## CASE v. BENSON AND RAYMOND, AND CASE ET AL v. BENSON AND RAYMOND.

*Practice—Cognovit—Attorney—Attestation.*

Neglect to explain the nature of a Cognovit to the defendants by an attorney clearly and expressly chosen by them, will not vitiate the confession, properly attested. Defendants sending for an attorney, named by the plaintiff or his attorney, will be deemed to have adopted his as their attorney within the meaning of our rule of Court No. 26.

(July 1, 1857.)

HAGARTY, J.—These are applications almost identical in their nature made last Term to Practice Court, and enlarged to Chambers by consent.

The motion in each was to set aside a Cognovit judgment, and all proceedings thereon, with costs, on the grounds that the Cognovit was not executed before an attorney named by or attending at the request of defendants or for them, and that defendants were not before executing this Cognovit informed of its nature and effect, of which they were ignorant; that they were induced to sign it by misrepresentations of the plaintiff; that *Mr. Merrill*, the attorney who attested it, acted at the request of and in collusion with the plaintiff, and not at the defendants' request; or why they should not be set aside as to defendant Raymond. The applications rest on the affidavits of defendant Raymond and Mr. Merrill.

Many affidavits are filed in reply, including two made by Mr. Merrill for the plaintiff, and affidavits made by defendant Benson strongly supporting the plaintiff's case.

Without entering into the details of the numerous affidavits filed, I will say that I am quite satisfied that no fraud or imposition whatever was practised on defendant Raymond or the other defendant; that they both knew perfectly well what they were doing, and that no case is made out to impeach the confessions on the ground of amount, even had such an objection been urged in the rule to show cause.

The case rests entirely on one rule of Court No. 26, requiring the presence of an attorney expressly named on behalf of the defendant, and attending at his request.

No objection is urged to the form of the attestations here; our rule follows the English practice, and I wish to decide it as if the imperial statute 1 and 2 Vic., cap. 110, sec. 9, were re-enacted here.

The facts in these cases are, that *Mr. Fitzgerald*, as attorney for plaintiff's, proposed chattel mortgages from these defendants to the plaintiffs, and also the two confessions in question for the same debts respectively; that when defendants were after executing the mortgages, Mr. Fitzgerald informed them that they usually have an attorney present to act for them, and named Mr. Merrill as the only attorney in Picton who could then be obtained, and that after several attempts to get him he was at last obtained, one of the Messrs. Case at defendants' request going for him. Mr. Merrill says that he did not explain the nature or effect of the Cognovits to defendants, supposing that all the parties fully understood the transaction; that he did not read them over to defendants, nor did any one else; that he did not know the amount; that from the conduct and appearance of the parties, and from other facts he believes there was collusion between all or some of the parties for the purpose of wronging defendants' creditors. In subsequent affidavits filed against the motion, Mr. Merrill states that Mr. Fitzgerald stated to him in presence of all the parties that defendants wished him to witness their signature to those Cognovits; that he has no particular recollection of what took place; that he did not act in collusion with the plaintiff or any one else, and observed nothing different from the usual manner of executing Cognovits; that both defendants knew perfectly well what they were signing; that he acted as their attorney and for no one else; that when signed Mr. Fitzgerald told defendants his (Merrill's) charges for attending to witness was 10s. in each case, defendant Benson said he had no money with him, and asked other defendant for it; Raymond said he had not so much with him. The defendants promised to leave the money with Fitzgerald for Merrill, and afterwards Fitzgerald paid the amounts to him as coming from defendants—(this is clearly proved in Fitzgerald's affidavits); and that Raymond has since told him (Merrill) that he never had stated or sworn that Merrill colluded with plaintiff. Mr. Fitzgerald's affidavits are very full as to Merrill being sent for by defendants, he having first named him. As to the nature of the confession being fully explained by him to defendants and strongly leading to the clear belief that both defendants adopted Merrill as their attorney, and undertook to pay him as such—defendant Benson fully proves the same facts. Both the Cases file affidavits as to the good faith of the transaction; as to Raymond's perfect knowledge of what he was doing, F. H. Case proves going for Merrill at defendant's request. Other persons, from conversations had with Raymond, show that he knew that he had executed a confession. Mr. Fitzgerald swears distinctly that he in Merrill's presence told defendants the amount of the Cognovits and when they became due: other affidavits state the same facts.

It is stated in Arch. Practice, vol. 2, page 892, edit'n 1856: "The attorney should inform the person of the nature and effect of the Warrant or Cognovit before the same is executed. If however there be no collusion with the plaintiff a neglect of the attorney's duty in this respect will not vitiate the instrument. If there be collusion then it would be void on the ground of fraud, and not for non-compliance with the act. It is not necessary that it should be read over to the defendants, except perhaps he is a marksman; nor is it necessary for the attorney to consult with his client in private before he signs, or that the attorney be cognizant of the facts under which the warrant is given." I have examined the cases cited to support these views. Haigh v. Frost, 7 Dowl. 743, (cited in next case); Taylor v. Nichols, 6 M. & W., 96; Jael v. Dickie, 5 D. & L., 1; Hibbert v. Barton, 10; M. & W. 678.

In Walton v. Chandler, 1 C. & B. 306, Findal, C. J., says, "the later cases lay it down that if there be a clear and express adoption by the defendant of the party for his attorney that will suffice, though such party may have been originally suggested by the plaintiffs' attorney." Gupper v. Bristow, 6 M. & W., 807, cited in the last case, is also to the point.

Mr. Justice Coleridge, in Haigh v. Frost, says, "It appears to me not to be absolutely necessary that the attorney should do his duty towards his client when he has been appointed as required by the statute, but that there may be a failure of his duty without rendering the warrant of attorney void—and as a