Brunskill's affidavit shews that he himself—and while, it would seem, he was looking after the affairs of the garnishee, during the time the garnishee was confined to the house, and was too unwell to attend to his own business—was served with the attaching order, and, it may be assumed, some short time after its issue on the 16th of April; but he does not say whether he ever informed the garnishee of the fact, although, in the nature of things, it must be assumed he did do so, and more particularly as he does not deny that the garnishee had knowledge of the order and of its service as before stated, while he does say that, from statements made to him by the garnishee, and from his knowledge of the garnishee's affairs, he does believe the garnishee had no knowledge of the summons. And it can scarcely be assumed the deponent, while looking after the affairs of the garnishee, could or would have neglected so serious an affair as the one in question. At any rate he is the one who can the best explain whether he did communicate the receipt of the order or not, and as he does not allege to the contrary, the inference irresistibly is, that he did do what he ought to have done —inform his principal of the receipt of the important paper; or, if he had not done it that he would have disclosed the fact of such non-communication to the garnishee.

The knowledge by the garnishee of these proceedings having been initiated is of some consequence, for a less strict service or authority is required in the future proceedings or services, as would appear from the case of *Bayley* v. *Buckland*, 1 Exch. 6.

Here it is not at all certain but that the garnishee had full and actual knowledge of the fact of there having been a summons upon him to shew cause why he should not pay over, or that, at any rate, he should be presumed to have had such knowledge.

It is true that Brunskill says from his knowledge of the garnishee's affairs, and also from statements made by the garnishee, he believes the garnishee had no knowledge "of the summons having been issued," which is rather an equivocal expression. But it appears that Brunskill, from what he says, heard on the 22nd of June of the issuing of the summons. Now, from whom did he hear this? Was it from the garnishee? It is rather to be presumed it was, because Brunskill telegraphed on that day to Messrs. Paterson & Harrison, his own solicitors, to get them to have the service of the summons repudiated by Mr. Wilson's agent, and it can scarcely be assumed that he did this without the authority of the garnishee. In fact, the very act of Brunskill is made the foundation upon which the present application to set aside the service of the summons rests.

I am not inclined, therefore, to lay much stress upon the idea of there being new facts submitted in the new affidavits at all serviceable to the applicant. On the contrary, I rather think the service of the attaching order is strengthened by Mr. Brunskill's affidavit; for while before I thought the service of that order sustainable chiefly by the latter proceedings then had upon it, I now think it sustainable from the circumstances connected with the present proceedings. Nor have I altered my opinion as to the effect of the appearance of an attorney to except to a service claimed to have been made upon his client.

The first objection, therefore, I do not entertain, rather than overrule it.

The second objection is one which may, perhaps, be entitled to prevail, unless relief can be given; for the order being drawn up after the garnishee's death, can be of no efficacy in such a shape.

It is said the garnishee died after he had been called upon to shew cause why he should not pay the debt, and after the case had been argued and stood for judgment, and that the delay was the act of the judge and not of the party claiming the benefit of the order; that such delay should not prejudice the party but that such relation should be given to the order as it would have had if the delay in question had not occurred. It does seem reasonable that the order should be sustained, if it properly can be so, when the occasian of its not being earlier made was certainly the act of the judge, who required time for consideration as to the judgment to be pronounced, than that all that has been done towards it should be defeated by an objection which *per se* has no special merit in it.

The order of a judge is to be considered, while it stands, as the order of the court, and may be modified and dealt with by the judge precisely as a rule may be dealt with by the court. And I think it is quite clear that upon the particular day when an order is moved for, if the judge is not prepared to give his judgment, and takes time to consider it, if he afterwards grant the order, the order may be drawn up (and, perhaps, in strictness should always be drawn up) as of the day on which it was made (*Egan* v. *Rowley*, 8 Dowl. P. C. 145) This would be to make the order according to the actual fact, and is quite a different thing from giving it a special operation and relation as was sought to be done in *Wilkins* v. *Cauty*, 1 Dowl. N. S. 855.

I do not, therefore, think this order is erroneous or void as made after the death of the garnishee; but it is rather to be considered as wrongly dated, and so amendable according to the truth of the case.

Upon the third ground I have no hesitation in granting relief, and permitting the executors of the deceased garnishee to contest the alleged indebtedness to the judgment debtor, considering all the circumstances, and the very strong fact that it is the judgment debtor who is distinctly charged with carrying on these proceedings, and between whom and the plaintiff collusion is attributed, which neither of them has denied.

My opinion then is that I should amend the order as to its date, and that I should discharge the summons so far as relates to the first and second grounds, and that I should make it absolute, if the applicant desire it, upon the third ground upon payment of costs.*

COUNTY COURT.

(In the County Court of the County of Elgin, before His Honor Judge Hughes.)

Ellison v. Ellison.

Action in name of plaintiff without authority—Stay till indemnity given to him.

Where an attorney without the knowledge or consent of plaintiff brought an action in his name, relying upon an assignment of choses in actions from plaintiff to the person for whom the attorney really was acting and the right of the attorney under the assignment to use plaintiff's name for the purposes of the action was very doubtful, an order was made for the stay of the proceedings until the attorney or his client should give a proper indemnity to the plaintiff against any costs that he might be subjected to or become or be made liable for in consequence of the bringing of the action in case the plaintiff should become nonsuit, or the suit be discontinued, or a verdict be entered for defendant.

(Chambers, 3rd November, 1863.)

This was an action for money paid to defendant's use, as set forth in special endorsement on summons:

"To paid St. Thomas Building Society, for you at your request, £31; interest, £14 8s. 2d.; total, £45 8s. 2d."

Defendant appeared by attorney, and afterwards demanded security for costs from the plaintiffs attorney, which was not given, nor was the demand followed up by any application.

The plaintiff, however, made affidavit that the action was brought without his knowledge, consent or concurrence, and that he never authorised the plaintiff's attorney, nor any other person, to bring the action, nor had he ever been requested by any person to allow an action to be brought in his name against the defendant.

Upon that affidavit a summons was issued calling upon the plaintiff's attorney to shew cause why the writ of summons issued and served in this cause should not be set aside with costs to be paid by him, or why the beneficial plaintiff, whoever he might be, should not pay the costs of that application and give security to the plaintiff against all costs that might by possibility be recovered against or recoverable against the plaintiff, &c., or why further proceedings should not be stayed until the costs of the application be paid and the security given to the plaintiff; because,

1st. The plaintiff never authorised the bringing of the action.

2nd. That the plaintiff had no interest in the action.

Upon the return of that summons *Stanton* shewed cause, and produced a trust deed from plaintiff, and one S. H. Ellison to one Haight, Drake and Duncombe, executed upwards of ten years ago, conveying all the estate of T. & S. H. Ellison, together with their debts then existing, and containing a power of attorney authorising the trustees to collect the debts for the benefit of the estate; he also read the affidavit of B. Drake, one of the trustees, setting forth, 1st That he, Duncombe, and Haight, by a deed executed 28th May, 1852, were made trustees of the estate of the plaintiff and Samuel Hubbard Ellison. 2nd. That the trust deed had never been revoked. 3rd. That the debt sued for was for

* Applicant declined to take the order upon the terms of payment of costs, and so the summons was afterwards discharged with costs.—Eds. L. J.