Hood v. Cronkrite.

"Change of venue—Application for, before appearance on affidavit of a person describing himself as "attorney for defendant in this cause."

An application for a change of venue before appearance entered is irregular.

Before appearance entered, a defendant has no attorney *in the cause*, and an affidavit made by a person calling himself such was therefore *held* insufficient to support an application for a change of venue.

Semble, that the statement of addition as to the name of a deponent is only descriptive, and is not an allegation of a fact.

[Chambers, October 2, 1868.]

This was a summons to change the venue from the County of York to the County of Halton, on an affidavit made by R. S. A., "attorney for the above named defendant," who stated:—

That the declaration was filed on the 23rd September, 1868, laying the venue in the County of York:

That defendant had a good defence on the merits:

That the cause of action arose in the County of Halton and not in the County of York, or elsewhere, &c.

That it will be necessary to subpœna at least ten witnesses who are material and necessary, and that nearly all of them reside (nine out of ten) in the County of Halton.

The estimated difference of expense was $40.

In reply to this the plaintiff swore that no appearance was entered, and that declaration had to be served personally, and had been filed and served:

That he means to subpœna eleven witnesses, whose names he gives, and states they are material; almost all residing in the City of Toronto, and none in the County of Halton, and it was objected to the affidavit filed on the part of the defendant to support the application that the deponent described himself as defendant's attorney when no appearance had been entered.

Draper, C. J.—The C. L. P. Act provides for plaintiff proceeding and declaring, though no appearance be entered. See sec. 55 of Con. Stat. U. C. cap. 22, sec. 61 of original act.

Under the old practice it would seem that the affidavit to change might be made either by the defendant or his attorney. The case of *Biddell* v. *Smith*, 2 Dowl. 219, rather leads to the conclusion that if the defendant be in the Province he should make the affidavit. The affidavit of a defendant's wife was held sufficient, provided he was too unwell to make an affidavit, and she understood the nature and particulars of the action, but Parke B said "the defendant or his attorney" is the proper person: *Williams* v. *Higges*, 8 Dowl., 165. In the report in 6 M. & W. 133, Parke B. says: the proper person to make the affidavit, under the circumstances, (*i. e.*, defendant being unable from illness to make it) is the *plaintiff's* attorney. The application was to bring back—not to change the venue as stated in 8 Dowl.

In the present case no appearance whatever has been entered. By what right does defendant make this affidavit? There are things he may apply for before appearance, though, as a general rule, he must appear before he can take a step in the cause. *Ex. gr.* he may get an order for particulars of demand, or an order to stay proceedings on payment of debt and costs, or to compel plaintiff's attorney to disclose plaintiff's residence. But I find no case in which an application to change the venue has been entertained before appearance. It does not appear to me that he has a right to treat the plaintiff's declaration as an equivalent for his (defendant's) appearing because the plaintiff is authorized by a special provision in the act to take this course. Before the C. L. P. Act he might have entered common bail, or an appearance for defendant, if the latter made default. That, he cannot now do.

But, though an application to change the venue may be made on the common affidavit *before* issue joined, it cannot be made after plea, while on special grounds it should not, as a rule, be made until after issue joined. There is nothing shown to justify the special application before issue in this case.

There being no appearance, the defendant has no attorney *in this cause*, no one on whom service could be made to bind him, nor do I think that he has an attorney who can swear for him, especially when he has actual knowledge of the facts, or most of them, sworn to, while the affidavit produced is on instruction, information and belief. The statement of addition as to the name of the deponent is merely descriptive, it is not an allegation of a fact.

I discharge this summons with costs, on the ground that no sufficient affidavit is filed to sustain it, and I am inclined to think the application irregular because made before appearance entered.

Summons discharged with costs.

Corrigan v. Doyle.

Time to declare where long vacation intervenes—Time for taking next step after plaintiff's summons with stay of proceedings discharged.

Where the plaintiff obtains a summons with stay of proceedings, which is afterwards discharged, he has not the same time for taking the next step in the cause as he had when the stay arose, but must take it on the same day the summons is discharged, or obtain further time, and the practice in this respect is the same both as regards plaintiffs and defendants.

Where the defendant has given the plaintiff notice to declare, the latter has no further time to do so in consequence of some of the eight days falling in vacation, the rule of Court No. 9 and sec. 83 of C. L. P. Act, applying only to pleadings after declaration.

[Chambers, October 13, 1868.]

The facts of this case were as follows:—On the 13th June, 1868, the defendant served the plaintiff with notice to declare in eight days pursuant to C. L. P. Act sec. 82.

On the 18th June the plaintiff obtained a summons to extend the time for declaring until the 22nd August, which was enlarged from time to time, with stay of proceedings, until the 28th July, when it was discharged with costs. On the 29th July the defendant signed judgment of *non pros.*

W. Sidney Smith obtained a summons calling on the defendant to shew cause why the judgment and all proceedings should not be set aside for irregularity, with costs, on the grounds, that it was signed too soon, and before the plaintiff's time for declaring had expired: that the plaintiff had the same time to declare after his summons for further time was discharged, as he had when it was returnable, and as he could