

DRAKE, J.]

[August 19.

LORING v. SONNEMAN ET AL.

*Appearance under protest—Renewing expired writ of summons—Laches.*

Plaintiff applied to renew a writ which expired in April last. After action brought, plaintiff discovering that both defendants were out of jurisdiction, obtained an order to issue concurrent writs, one of which was served in due course. The other was not served until after the twelve months for which the original writ was in force had expired.

The defendant who was served some months after the expiration of the twelve months, entered an appearance.

DRAKE, J. : A defendant improperly or irregularly served cannot treat the writ thus served as a nullity, *Hamp v. Warren*, 11 M. & W., 103. He must apply to set it aside, and this he can do without entering an appearance, (see Rule 70). Here the defendant has appeared and under the appearance is written a note stating that the defendant appears under protest.

In the case of *Fletcher v. McGillivray*, 3 B. C. Rep. 49, some remarks are made on the subject of appearance under protest being unknown under our rules. The case of *Frith v. DeLas Rivas*, 69 L.T. 383, was not brought to the attention of the Court when an appearance under protest was recognized as valid under a rule which is not in our code, but that case was decided on *Mayer v. Claretic*, 7 Times L.R. 40, where it was held that an appearance unqualified by protest did not take away the right to object to the jurisdiction if notice of the objection was given to the plaintiff at the time of entering the appearance, so it may be considered that this appearance conveys notice of an intention to raise the question of jurisdiction. The defendant has taken no step to set aside the service of the writ, and the plaintiff seeks to renew the writ in order that fresh service may be effected. The delay of four months, unaccounted for, shows too great laches. Application refused, with costs.

*Senkler*, for plaintiff.

*Godfrey*, for defendant.

BOLE, LOC. J.]

[June 24.

IN RE TRYTHALL.

*Setting aside award—Reference back.*

This was an action to set aside an award on the grounds that two of the arbitrators, while the arbitration was pending, and before the award was made, in the absence of their fellow-arbitrator and of the parties to the submission, obtained evidence having material bearing on a question of fact in the arbitration and on the question of construction of the agreement of submission.

*Held*, that under sec. 10 of the Arbitration Act, 1893, the matter of the award should be referred back to the arbitrators for their reconsideration and determination.