

C. L. Ch.]

PATTERSON V. MCCOLLUM ET AL.—IN RE DAVY.

[C. L. Ch.]

The learned judge, who in-chambers ordered the *certiorari*, probably thought, under the facts, that the case would be more satisfactorily disposed of in the superior court; but inasmuch as there was delay in not delivering the writ in due time, we think, as already stated, the case is not properly before us.

On an application to the court below the defendant may shew circumstances to satisfy the judge why the delivery of the writ was delayed, and may account for any other seeming laches. In that event, the judge, I have no doubt, can set aside the judgment and all subsequent proceedings thereto, and let the party in to defend on such terms as he may consider just.

Rule accordingly.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

PATTERSON V. MCCOLLUM ET AL.

Irregularity—Moving against declaration filed or served—Practice—Delay.

On an application to set aside the service of a declaration on the ground that no copy of the writ of summons had been served on defendant, it was held that the application was wrong, as it should have been to set aside the declaration *filed*, for this is the first proceeding, and that being set aside the service falls with it.

Quære, as to delay in making the application.

[Chambers, Oct. 23rd, 1865.]

This was an application to set aside the service of a declaration on Robert Mercer, one of the defendants, because no copy of the writ of summons or any process in the cause had been served on him or had come to his knowledge.

J. B. Read shewed cause, and said if even the facts were so, the irregularity was not in the service of the declaration, but in the filing of it, and that the first proceeding in such a case should be attacked, but as it had not been, the summons should be discharged.

Carroll supported the summons.

ADAM WILSON, J.—By the Common Law Procedure Act, s. 56, the plaintiff must file a declaration with a notice to plead in eight days. By s. 61 the service of all papers and proceedings subsequent to the writ must be made upon the defendant or his attorney according to the established practice.

The established practice by our Rules of Court (and see also s. 91 of the Common Law Procedure Act) is that a copy of every declaration shall be served upon the opposite party.

The really objectionable proceeding taken here is that the plaintiff has filed a declaration without having first served the defendant with a copy of the writ of summons upon which the declaration is founded.

The defendant should therefore have applied to set aside the declaration *filed*, and not merely the service of it, for whilst the original one which is filed remains, another copy of it may be served, whereas if the one served be set aside, the service falls with it. It is very likely also that when the declaration was served on this defendant on the 12th of October, and the judge's summons to set aside the proceedings was sued out on the 17th of this month, but not served until the 20th, that the delay has been rather too long. The summons was granted in

Toronto, and was served here, why then should the delay before the service was made have been taken place? Was it made within a reasonable time? The time for pleading had expired on the 19th, the day before the summons was served.

Summons discharged, with costs.

IN THE MATTER OF B. C. DAVY, GENT., ONE, &c.

Taxation of attorney's bill—One-sixth of amount struck partly composed of sheriff's and witness fees which have been paid by the client—Costs of taxation.

In a bill rendered by an attorney and referred to the Master for taxation, he is not to take into consideration—in determining whether one-sixth has been taxed off the bill—so as to make the attorney pay the costs of the reference—items which are not properly taxable items, such as the sheriff's fees and witness fees, &c., not actually to be repaid to the attorney nor a part of his claim.

[Chambers, Oct. 4th, 1865.]

A summons was obtained by Mr. Davy, an attorney of the Court, on the 24th of August last, calling on John Foulds and Jonathan Hodgson to shew cause why the taxation of the bills of costs in this matter should not be revised, and the Master directed not to take into consideration the sheriff's fees and witnesses' fees in the said bills charged in calculating whether or not one-sixth has been taken off the bills, on the grounds—

1. That the amount of the sheriff's fees and witnesses fees are not taxable items, and should have been struck out of the bills instead of being taxed off.

2. That if the items are taxable they should have been allowed in the bills, and credit should have been given for them instead of taxing them off.

3. That if the items were taxable and were properly taxed off they should not have been taken into consideration in ascertaining whether or not one-sixth was taken off.

And why the sum of \$75, the amount of the bill of costs filed by the said Davy, being the amount paid by him to Mr. Draper as Commissioner's fees, should not be set off and deducted from the amount found due to Foulds and Hodgson by the Master in his report.

There were several suits, and a bill of costs in each suit was made up and taxed. The total amount made up by the attorney on all the bills and claimed apparently by him was... \$1069 80

The amount allowed on taxation by

the Master was..... 778 90

Making a deduction of \$290 90

Or more than one-sixth of the apparent amount claimed.

J. B. Read shewed cause.

John Patterson contra.

ADAM WILSON, J.—Mr. Davy represented, and it is not disputed, that in making up these bills he included in each one the total of the gross costs, which was payable by the defendant or debtor—that is, witnesses fees, sheriff's charges, and his own personal claim as attorney—and that his intention was to shew to his clients how the matter actually stood, and not to make the amount of these items any portion of his demand.

The witnesses' fees so included amounted to \$56 34, the sheriff's fees on executions to \$62 35, and the sheriff's fees on attachments to \$57