COMMON LAW CHAMBERS.

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*)

McKENZIE ET AL. v. McNAUGHTON ET AL.*

Application to set aside judgment—Delay—Misnomer—Amendment.

A summons was served on the 19th February, 1859, and final judgment signed for want of appearance on the 24th December, 1860, and execution issued Defendants, on the 21st January, 1861, moved to set aside the judgment on the ground that it had been signed more than a year after the summons was returnable, and without giving a term's notice. *Held*, that the application was too late.

One of the defendants, *Edmund* M. correctly styled in the summons, was by mistake named in the judgment roll and executions *Edward* M. *Held*, amendable.

This was a summons to shew cause why the final judgment in this cause should not be set aside with costs.

1st. Because the defendants were served with process (summons) on the 19th of February, 1859, and no proceedings taken till the 24th December, 1860, when final judgment was entered against all the defendants (one of the defendants, *Edmund* McNaughton, being deing designated therein as *Edward* McNaughton) for want of appearance, for £809 0s. 9d. and costs.

2nd. Because there was a variance between the judgment roll and execution and the writ of summons, the style of the cause in the summons being the same as in this summons, while the style of the cause in the roll and executions called defendant *Edmund* McNaughton *Edward*.

3rd. Because the plaintiffs did not give a term's notice, although more than a year had elapsed since the last proceeding.

In answer to the summons the plaintiff's attorney made an affidavit to the effect that the delay in entering judgment was agreed upon between him and the defendants: that the defendants undertook not to enter appearance, as they had no defence, and had engaged to pay off the debt within eighteen months, and had made small payments from time to time, but little more than sufficient to keep down the interest; and that in December last, finding that other people were pressing, he entered up the judgment. He swore also that he believed the application to set aside the judgment was made, not at the instance of the defendants, but of a creditor of theirs who took out an execution against them for a large debt, and placed it in the sheriff's hands a few minutes only after the execution in this case was delivered to him. In this affidavit it was alleged that the agreement with the plaintiff's attorney for delay was made between him and Andrew McNaughton, one of the defendants.

On the part of the defendants, Andrew McNaughton made an affidavit that after his first interview with the plaintiffs' attorney about this suit he always believed that the suit had been withdrawn: that this application was not made on behalf of any other of their creditors, but with the idea that if he could succeed in getting the judgment set aside he could then make arrangements to pay all the creditors equally: that he had often applied to the plaintiffs' attorney for an account of their debt, but had never received one.

It was not denied that the name of *Edward* was by mistake given as the christian name of one of the defendants in the judgment roll instead of *Edmund*, the name properly given in the summons.

ROBINSON, C. J.—By the Common Law Procedure Act, section 81, it is enacted that a plaintiff shall be deemed out of court unless he declare within one year after the writ of summons is returnable.

The judgment being entered on the 24th December, 1860, the defendants move against it for irregularity in being signed too late, that is, more than a year after the summons was returnable; but they come, as appears, not before the 21st of January, 1861, which is too late, according to the practice, and I think this is a case in which the application should not be favoured.

The same objection, of being too late in moving, applies to the other ground of not giving a term's notice, if indeed such an objection could be taken when the defendants have not appeared.

As to the mistake in the christian name of one of the defendants, Edward for Edmund, that can be cured by amendment, as the summons gives the true name.

I think that the name of the defendant, Edmund McNaughton, should be amended in the judgment roll and the writ or writs of execution that have issued under it, by making it conform with the name in the summons, and that this summons should be discharged, but not with costs.

COCHRANE v. SCOTT ET AL. AND COCHRANE v. CROSS ET AL.

Reference to arbitration—Costs.

Two actions for false imprisonment were referred to arbitration at the assizes, *no verdict being taken*, costs to abide the event. In one the arbitrator found £20, in the other £10. The plaintiff having proceeded by attachment on the award, *held*, that he was entitled to full costs without a certificate.

Such a case is not within the 155th rule of court, for the plaintiff cannot be considered as proceeding upon a final judgment.

Quære, whether under C. L. P. A., section 331, a judge's order is not necessary to have taxation revised by the principal clerk.

The plaintiff in this case applied to revise taxation, on grounds which sufficiently appear in the judgment.

BURNS, J.—Both of these cases were actions against the defendants for false imprisonment, in consequence of the writs to hold to bail being set aside for irregularity. When they came down for trial at the assizes at Stratford, in the spring of 1858, by consent of parties the causes were referred to an arbitrator, no verdicts being taken. The costs of the cause in each and the costs of the reference were ordered to abide the event. The arbitrator made his awards, and in the first case awarded £20 to the plaintiff, and in the second case £10. The plaintiff proceeded then to tax costs, and the deputy clerk of the Crown for the county of Perth taxed to the plaintiff full costs in each case. The plaintiff after that proceeded to demand the sums awarded and costs, and upon non-payment applied to the court to enforce the awards by attachment. The defendants resisted these applications, and the matter came on to be heard in Trinity Term last, before me in the Practice Court. The rules were made absolute for the attachment, but ordered to lie in the office a certain length of time, to afford an opportunity to have the costs taxed correctly and upon a proper scale, as a question was raised with respect to the costs as taxed by the deputy clerk of the Crown.

The order then made was special, directing an application to be made to a judge in Chambers, at least that was what I contemplated at the time. I had overlooked the provisions of the 331st section of the Common Law Procedure Act. Upon looking at that section now, I see I have made a note in the margin to that section in my copy, that some of the profession say, and have acted upon it, that they may as a matter of course have the costs re-taxed by the principal clerk: I doubt that being the true construction: the revision I think should be by a judge's order for the purpose. Be that as it may, however, the defendants in these cases avail themselves of the construction put upon the clause by the profession, and carried the taxation before the principal clerk. The plaintiff declined to attend this taxation, because he considered it a violation of the order made when directing the attachment to lie in the office till a taxation procured in accordance with it. The master in the first place taxed the plaintiff's costs on the scale of the county court, and then allowed the defendants their costs, that is, the difference of costs between the two courts to be deducted from those; and in the second case he allowed the plaintiff only division court costs, and taxed to the defendants their full costs.

The application now before me is made by the plaintiff, that the master shall review his taxation, and the question is simply this, whether he has taken a correct view of the matter. At the time of the argument I was under the impression that this very point had been before me in some shape sometime since, and I find it was in *Jones* v. *Reid* (1 U. C. P. R. 247). In some measure the same question was before Mr. Justice Richards in *Morse* v. *Teetzel* (Ib. 376). In this last case an order was made for full costs, but that case differs from *Jones* v. *Reid* and from this case, for no verdict was taken in either of them, and it is through the verdict the court deals with the question of costs, and under the rule of court by means of the final judgment.

I still adhere to my opinion expressed in *Jones* v. *Reid*, that where the parties refer a case to arbitration without taking any verdict, the different provisions of the statutes referred to do not apply. The provision in the rule of reference that costs shall abide the event, are not equivalent to saying that the plaintiff shall not have costs without a certificate, for the judge who tries