referred to the master to be taxed as between attorney or solicitor and client, and as on a taxation between said attorney and his clients the said company. The said attorneys' amended bills then produced to be those referred in lieu of those formerly given.

IN RE SPRINGER.

Vankoughnet obtained a rule *nisi* in Trinity Term last to set aside so much of an order made by *Richards*, C. J., dated 26th May, 1863, as directed that the said John A. Macdonald should refund to Daniel Springer, his attorney or agent, what should appear on the taxation of the said Macdonald's bill of costs to have been over-paid, and so much of said order as directed the master to pay the costs of the said reference, and to certify what upon said reference should be found due to or from either party in respect of the bills so referred, and the costs of such reference should be paid according to the event of such taxation, and to rescind so much of the master's allocatur under the reference as certifies the cost of such reference "that there is due from the said Macdonald to the said Springer the sum of £13 6s," or so much thereof as the court sees fit, on the ground that the taxation being one under the third parties clauses of the Attorneys' Act, ch. 35, of Consol. Stats. of U. C., the judge had no power to order the said attorney to refer, there being no privity between him and the said Springer, said Springer being merely entitled to tax the said bills, and being left to his remedy against the mortgagees for anything overpaid, and also on the ground that the said attorney is not liable to Springer for costs of said reference under the said act; there being no privity between them.

The order of Richards, C. J., making the reference, is dated 26th May, 1863, and is to the effect that he ordered that the bill of costs in the causes and matters delivered by the said the Honourable John A. Macdonald to Daniel Springer be referred to the master to be taxed, and that the said Macdonald should give credit for all sums of money by him received from or on account of the said Springer; and he further ordered Macdonald to refund to Springer, his attorney or agent, what, if any, might appear on such taxation to have been overpaid, and he further ordered the master to tax the costs of the reference and certify what, upon such reference, shall be found due to or from either party in respect of such bill and demand, and the costs of such reference to be paid according to the event of such taxation pursuant to the statute.

W. H. Burns and *Robt. A. Harrison* showed cause.

RICHARDS, C. J.—In this case and on a similar motion made *In Re Glass and the Hon. John A. Macdonald*, we shall be obliged to discharge the rule, inasmuch as the materials on which the judges' orders moved against were obtained, are not before us. The order in this case was made before the end of Easter Term, and was not moved against until the sixth day of Trinity Term. I do not find any decided cases that the motion is too late; yet the general rule is, that a motion to rescind a judge's order must be made within a reasonable time, and certainly before the end of the next term after the order is made. Though not deciding against the motion on that ground, I am by no means certain the application is not too late, and merely mention the matter that it may not be understood that we decide the application to be in time.

On the main question, however, we have no doubt that an attorney may be ordered to return moneys which he has retained beyond the amount of his bill as taxed to the person at whose instance the taxation has taken place under the statute, though such person be a third party who is liable to pay and has paid the bill to the attorney or principal party entitled thereto.

In Re Baker, 8 L. T. Rep., N. S. 566, is an express authority that where the state of facts is such that as between the mortgagee and his solicitor, the bill though paid may be taxed, the excess beyond the amount taxed may be ordered to be re-paid to the mortgagor by the solicitor when the application to tax has been made by him. But where the mortgagee has paid his solicitor under such circumstances as would preclude him from having the bill taxed, then whatever amount the mortgagee has received beyond the taxable sum, there the order may go to direct the mortgagee to refund if he is before the court. The facts before the judge in Chambers no doubt warranted fully the order to pay over by the attorney who now seeks to set them aside.

It is probable the parties having heard our view of the statute will have obtained the object of the motions.

Rule discharged in both cases with costs.

Per cur.—Rules discharged.

SMITH V. ROBLIN ET AL.

Promissory note—Appearance—Defence—Laches.

One of several defendants served with a summons instructs an attorney to defend his suit, who enters an appearance, but no notice is taken of it by the plaintiff's attorney, because the attorney defending for the other defendants has entered and filed an appearance and pleaded for all.

The defendants' attorney having ascertained the error notified the plaintiff's attorney that he had a defence, but took no measures to set aside his proceedings. Upon motion to set aside the verdict,

Held, that the defendant having neglected to set aside the proceedings, knowing the plaintiff was going on, and his affidavits not showing substantial merits of defence, a new trial was refused. [T. T., 27 Vic.]

This was an action on a promissory note made by D. Roblin, endorsed by D. Roblin and J. Chamberlain, for $887 25, due on the 8th of November, 1862, at the Bank of Upper Canada, in Kingston. The writ was sued out on the 12th of November, 1862, and all the defendants were served before the 21st of the same month. That in due time appearance was entered for all the defendants by Peter O'Reily, one, &c., of Kingston; upon whom all the subsequent papers were served, and who appeared for Chamberlain without his authority and pleaded that he had no notice of the non-payment of the note.

The defendant Chamberlain, on the 1st of November, retained Mr. Wilkinson to appear and defend for him, and on the 26th he caused an appearance to be entered for him, in the office of the Crown at Cornwall, from which the writ had issued.

The plaintiff's attorney took no notice of the appearance for the defendant Chamberlain, which Mr. Wilkinson had entered, but proceeded, and in the end of December served notice of trial on O'Reilly for all the defendants for the assizes at Toronto, for the 8th of January last.

On the 31st of December it came to the knowledge of Mr. Wilkinson, by information from O'Reilly, that he, O'Reilly, had through mistake entered an appearance for Chamberlain, and that notice of trial had been served on him; and he then wrote to Messrs. Macdonald & McLellan, plaintiff's attorneys, telling them of the mistake of O'Reilly, and that he had appeared for Chamberlain in due course; that Chamberlain had a good defence, that if they persisted in going to trial without giving him an opportunity of defending, he should be obliged to move to set aside any verdict they might obtain. He further stated that he should insist upon being placed in a position to plead and prepare for trial, as he had several witnesses to establish his defence. That he heard nothing further until, in March, the defendant told him there was an execution against his goods and chattels on a judgment in this action. The defendant Chamberlain in his affidavit stated that he had retained Mr. Wilkinson, not O'Reilly; that he had heard nothing of the matter from the time of his retaining his attorney till about the 10th of March, when the execution issued was then in the sheriff's hands. That his defence was, that he never had received any notice of the non-payment of the note.

Mr. Jones, a clerk of Mr. Wilkinson, stated in his affidavit that Chamberlain resides in North Fredericksburgh, about three miles north of Napanee, which is his post-office. That Fredericksburgh post-office is in the township of South Fredericksburgh, about twenty miles from Napanee.

For the plaintiff—Whilman R. Smith, in his affidavit, stated that he was present when Chamberlain endorsed the note. That Chamberlain at the time told him that he lived in Fredericksburgh, and that was his address. That attached to his affidavit is a true copy of the protest, which shows that the notice of dishonour and protest was addressed, "John Chamberlain, Fredericksburgh."

On this showing, a rule was granted last term calling upon the plaintiff to shew cause why the proceedings from the service of the writ as against this defendant should not be set aside with costs, or set aside on payment of costs by Chamberlain, or why a new trial should not be granted without costs or on payment of costs, on the grounds above appearing, and that Chamberlain has a good defence to the action.