

SECOND DIVISIONAL COURT.

JANUARY 21ST, 1918.

*McDONALD v. PEUCHEN.

Indemnity — Action upon Covenant for — Judgment Recovered against Plaintiff—Interest—Costs—Defence to Action—Reformation of Deed — Independent Collateral Agreement — Special Endorsement—Defence Set up by Affidavit Filed with Appearance—Rule 56—Trial upon Record Consisting of Endorsement and Affidavit—Cross-claim for Damages for Deceit—Unassignable Claim—Indemnity against Payment of Money not actually Paid—Application of Money—Amount for which Judgment to be Entered.

An appeal by the defendant from the judgment of CLUTE, J., at the trial at Ottawa, in favour of the plaintiff, in an action upon a covenant for indemnity.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. W. Bain, K.C., for the appellant.

J. R. Osborne, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that McDonald, the plaintiff in this action, owed Levesconte, a solicitor, \$5,450; Peuchen, the defendant in this action, covenanted with McDonald that he would "indemnify and save harmless" McDonald from the Levesconte debt, except as to \$1,450 of it. The deed in which this covenant was contained did not fix the amount of the Levesconte debt, but it was ascertained and settled with Levesconte at \$5,450 by Peuchen's solicitor just before the deed was made, and was put in writing by the solicitor, over his own signature. McDonald paid to Levesconte \$1,450, but no more; and Levesconte thereupon sued McDonald for the rest of the debt, \$4,000, with interest upon that sum, \$133.37, and costs of that action, \$34.70; and that judgment stood in full force and effect against McDonald, who was ready to pay it, and from whom it could be recovered by execution.

Then this action was brought by McDonald against Peuchen to recover the amount of the judgment in the other action, with interest; the action being based upon Peuchen's indemnity covenant.

The only defence set up was, that Peuchen agreed that, if any action was brought by Levesconte, he (Peuchen) would take