

Held, following the dictum of Mr. Leith (see Leith & Smith's Blackstone, p. 420) that the covenant by the mortgagor to pay taxes applies only until default be made in payment of principal or interest.

Held, further, that as there is an express contract by the mortgagor to pay taxes until such default, the right, if any, which the mortgagees had to recover the money so paid as being money due by the mortgagor which they had been compelled to pay to protect their security, is, therefore, excluded.

R. L. Defries, for the plaintiffs.

J. B. O'Brian, for the defendant.

Province of Nova Scotia.

SUPREME COURT.

GRAHAM, Eq. J., }
At Chambers.

[June 30.

BANQUE D'HOCHELAGA v. MARITIME RAILWAY NEWS COMPANY.

Execution against partner—Ord. 40, Rule 10—Costs.

The writ of summons was served upon the following partners of defendant company, Frederick Dillon, F. W. Cunningham and James D. O'Connor. They appeared, and Dillon and Cunningham contested the claim, and costs were given against the firm. The plaintiff now applies under Order 40, Rule 10, for an execution against Burns, who was a partner but said that the partnership was dissolved on 1st November, 1895, before the issue of the writ—that he was not served, and was not aware of the nature of the action or of the contestation of it until after the termination of the proceedings. It was not proved that the dissolution was known to plaintiff: Order 16, rule 14 proviso. It was stated on affidavit that the reason given by plaintiff's counsel for not having served Burns with a copy of the writ of summons was that the plaintiffs were not aware that he was a partner of the defendant company until after action brought.

GRAHAM, Eq. J.—The plaintiffs are asking from Burns the costs incurred through the contestation of Cunningham and Dillon, that is the judgment and also the costs of a rule dismissing appeal from that judgment. I think the plaintiff is entitled to an execution against Burns, and moreover I think he is liable to the costs of the judgment and the rule and his remedy, if any, is against his co-defendants. It seems to me to be a hard case and it is giving effect to constructive service beyond what the plaintiffs had in their mind but still within the rules. I refuse the costs of this application.

C. H. Cahan, for plaintiff.

J. A. Chisholm, for defendant.