Lucus v. Taylor.

Venue—Change of, by plaintiff—Fear of losing debt.

Where the record did not reach the place of holding the assizes in time to be entered on the commission day, the plaintiff, on showing that due diligence had been used, and that if he did not get down to trial before the fall assizes he would be in danger of losing his debt, was allowed to change the venue, so as to go to trial at the spring assizes, on payment of costs of the day, costs of the application, and any extra expense occasioned to defendant by the change.

[Chambers, 20th April, 1867.]

In this case the venue was laid in the county of Wellington, and the writ issued in the county of Middlesex. The defendant was under terms to go down to trial at Guelph. The pleas were served on the 13th March, at Guelph, and reached the plaintiff's attorney at Fergus on the following day.

The plaintiffs' attorney filed and served issue and had record passed in London on the 16th March, on which day it was mailed to Guelph, but did not reach that place in time to be entered for that assizes.

On the 18th March plaintiff obtained a summons to change the venue to the county of Kent, where the assizes were to be holden on the 30th April. The affidavits filed, in addition to the above facts, showed that the defendant was making away with his property, and that unless plaintiff got down to trial before autumn, he would be in danger of losing the debt.

In support of the summons were cited *McDonald* v. *Provincial Ins. Co.*, 5 U. C. L. J. 186; *Mercer* v. *Voght*, 4 U.C. L.J. 47.

A. Wilson, J.—I think that application should have been made to the judge who held the assizes at Guelph, as soon as the record reached there, for leave to enter it. This would have been the proper course. But the affidavits do not show that any such application was made. As the delay is accounted for, and plaintiff's affidavit not contradicted, I will make the order to change the venue; but the plaintiff must pay the costs of the day, for not going down to trial at Guelph, as well as the costs of this application, and any extra expense that may be occasioned to the defendant by having the trial at Chatham instead of at Guelph.

Order accordingly.

CHANCERY.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law.*)

The City Bank v. McConkey.

A. obtained a judgment against B. and registered same, and issued *fi fas* against lands, kept them in force, and filed bill on judgment before act abolishing registration of judgments. C. had obtained judgment against B and registered it, but subsequent to A. C. filed his bill to set aside a prior sale made by B. to D. not making A. a party. A decree was pronounced in his favor, sustaining the sale, but giving him a lien on the purchase money. A. applied by petition to be made a party and have his priority declared in such suit.

Held, that he could not by petition make himself a party to that suit, and that his remedy, if at all, was by bill.

Quære, had he any remedy at all.

This was a petition presented in this suit by Charles Fitch Kemp (as assignee in bankruptcy of John Gladstone and Thomas Hall Gladstone) and Alexander Morrison, not parties thereto. The City Bank had obtained judgments at law against the defendant Burnett, and Gladstone and Morrison had also obtained a judgment against Burnett. The latter had registered their judgment before the City Bank in the County of Simcoe, in which county the lands in question in this cause were situated, and had kept their judgment alive by writs of *fi. fa.* against lands, and by filing a bill in this court on their judgment within the period limited by the act abolishing registration of judgments. The City Bank prosecuted this suit to set aside a sale of lands made by Burnett to McConkey before either the Bank or Gladstone & Morrison had registered the certificates on their respective judgments. The court upheld the sale as good, but gave the City Bank a vendor's lien on the purchase money. To this suit Gladstone & Morrison had not been made parties, and this petition was filed at their instance, setting forth in detail the facts hereinbefore stated, and claiming that they were entitled to a priority over the City Bank by virtue of their prior registration, and of their having kept that priority alive by continuous writs of *fi. fa.* lands, and by filing a bill on their judgment (but which had not been served), and they prayed that further proceedings by the plaintiffs to enforce the payment of the said purchase money might be stayed; that the petitioners might be made parties to this suit, and might have the benefit thereof in the same manner and to the same extent as they would have had if the decree in this cause had directed the accountant to enquire as to other incumbrancers upon the said purchase money and lien therefor, and to make such incumbrancers, if any, parties in his office, and had so made the petitioners parties accordingly.

Blake, Q. C., and *Snelling*, in support of the petition. As to objections to the form of the application, they referred to the following authorities: *Foster* v. *Deacon*, 6 Madd. 59; *Brandon* v. *Brandon*, 3 N. R. 287; *Baner* v. *Mitford*, 9 W. R. 135; *Scale* v. *Butler*, 6 Jur. N. S. *Hall*, 989; *Gifford* v. *Hort*, 1 S. & L. 409; *White* v. 1 R. & M. 332; Calvert on parties, 2nd edit., 65; *Cook* v. *Collingridge*, C. P. Cooper (1837), 255; *Paine* v. *Edwards*, 10 W. R. 709.

Crooks, Q. C., for the City Bank, submitted that the rights of Gladstone & Morrison could not be enforced by petition, but must be the subject of a new bill, and he referred to *Slater* v. *Young*, 11 Grant, 269.

Strong, Q. C., and *D'Alton McCarthy* for McConkey and Burnett (but who took no part in the argument).

The petition was, however, argued on the merits, and as to the effect of the filing of the Bill by Gladstone & Morrison on their judgment the same not having been served or any further proceedings in the suit having been taken. On this point the following authorities were referred to: *Tylee* v. *Strachan*, Grant's Cham. R. 319; *Coppin* v. *Gray*, 1 Y. & C. C. C. 205; *Boyd* v. *Higginson*, 5 Ir. Eq. R. 97; *Foster* v. *Thompson*, 4 Dru. & War. 303; *Purcell* v. *Blennerhasset*, 3 Jones & L. 24; *Carroll* v. *D'Arcy*, 10 Ir. Eq. R. 321; *Dixon* v. *Gayfere*, 17 Bea. 421; *Hill* v. *Lord*