ONTARIO REPORTS.

PRACTICE COURT.

Lutz v. Beadle.

Ejectment—Order for costs—Purchaser after action brought.

In an action of ejectment, the defendant appeared and claimed title as tenant of one R. Two days before appearance, R. had disposed of his interest in the lands to S., who, after notice of trial, applied on affidavits setting out the conveyance and the subsequent attornment to him of defendant (now his lessee) to be admitted, as landlord, to defend the action; but the application, being opposed by the plaintiff, was refused.

Plaintiff having succeeded, applied for a rule ordering S. to pay the costs of the action, on the ground that the defendant was insolvent, and the conduct of S. in making the above application, as well as at the trial and subsequently thereto, proved him to be the real defendant.

Held, that plaintiff was not estopped from making such an application, by having opposed the prior application of S., and the rule was made absolute.

[Practice Court, E. T., 34 Vic.—*Gwynne, J.*]

This was an action of ejectment in which judgment was obtained by the plaintiff.

Freeman, Q. C., during last term, obtained a rule upon one Simeon Cline, to shew cause why he should not be ordered to pay the costs of the plaintiff in the suit, upon the ground that the defendant was only nominally interested as tenant of Simeon Cline, and that the suit was defended in the interest of, and for the benefit of the said Cline.

F. A. Read shewed cause.

The facts sufficiently appear in the judgment.

June 24.—Judgment was now delivered by

Gwynne, J.—The cases of *Hutchinson* v. *Greenwood*, 4 E. & B. 324, 24 L. J. Q. B. 2; *Anstey* v. *Edwards*, 16 C. B. 212, and *Mobbs* v. *Vandenbrande*, 33 L. J. Q. B. 177, sufficiently establish that the court has jurisdiction to make the order asked for, under the 77th section of the Consolidated Statutes of U. C., ch. 27, notwithstanding that the action of ejectment is no longer a fictitious one. The only question, therefore, appears to be, whether it is or is not proper, that under the circumstances appearing, I should exercise that jurisdiction. By the affidavits filed on the part of the plaintiff, it appears that the action was commenced on the 23rd day of April, 1869, and was entered for trial at Hamilton in the fall of that year. An appearance was entered for the defendant on the 10th day of May, 1869. With this appearance was filed a notice to the effect that, besides denying the plaintiff's title, the defendant claimed to be entitled to the possession of the said lands as tenant of Ransom Cline. In the month of October, 1869, and just before the cause was entered for trial, Simeon Cline applied to be made a defendant in the cause jointly with the defendant Beadle In an affidavit made by him upon that application, a copy of which was filed in support of the present application, after setting out the service of the writ upon Beadle, his appearance, and notice of claim as above, he swore that on the 8th day of May, 1869, he, Simeon, purchased the interest of Ransom Cline in the said lands, and that, on the 17th day of June following, the said Beadle attorned to, and became tenant of the said lands under Simeon, and accepted a lease thereof from him for the term of one year, at the yearly rent of one dollar; that Ransom Cline had not appeared to the said action; that he, Simeon, was then in the possession of the land by his tenant, the defendant, Beadle; and that notice of trial had been served on the 29th September, for the then next assizes, to be held in the County of Wentworth, on the 11th of October then instant.

This application, being opposed by the plaintiff's attorney upon the ground that Simeon had purchased after action brought, was refused.

In the plaintiff's affidavit, filed upon the present motion, he swore that Simeon Cline attended at the trial, which took place in the month of April, 1870, and that he appeared to be the only person interested in the defence; that he was instructing the attorney and counsel for the defendant, and looking after the witnesses, and taking on himself the entire management of the cause; and that plaintiff believes that throughout the whole progress of the suit, or, at all events, since he purchased the alleged interest of Ransom Cline, in May, 1869, as stated in his own affidavit, he has been the only person who has given instructions for the defence of the suit, and who has been really interested in the result thereof. The plaintiff further swore that at the trial, neither the defendant, nor Ransom Cline, who is a brother of Simeon, appeared to have anything to do with the suit, except as witnesses; that the defendant, Beadle, is hopelessly insolvent, and has no property whatever out of which the plaintiff can recover his costs of suit; and that several times since the commencement of the suit, Simeon Cline has told the plaintiff that he, Simeon, claimed the property as his own; and that since the trial, he has said to the plaintiff that he would yet have the property, and that he would not submit to the verdict rendered.

Simeon Cline filed no affidavit of his own in answer to this application, but an affidavit of the attorney of the defendant on the record was filed, and he swore that, on the 7th day of May, 1869, he was retained and employed by the defendant, Beadle, and by Ransom Cline, who then claimed to be the owner of the property in question in the cause, and from whom the defendant, Beadle, leased the same,—as attorney to defend the suit. That he entered an appearance for the defendant on the 10th May, 1869, and at the same time served a notice of claim of title under Ransom, which he set out at large, and which is to the effect stated by plaintiff in his affidavit. The attorney further swore, that he never knew Simeon Cline in any way in the matter of the suit *up to the 21st day of May*, 1869; nor did he ever receive instructions of any kind from him in the above suit, *previous to the said 21st day of May*, 1869. This is the only affidavit used in answer to the notice.

I was asked by Mr. Freeman also to notice judicially the evidence taken at the trial, and which was before the Court of Common Pleas on a motion to set aside the verdict, (upon which motion judgment has been given sustaining the verdict,) with a view to seeing that the defendant was put forward solely for the purpose of asserting the title which Simeon Cline claimed at the trial, and that the whole defence was in his interest. On the other hand, Mr. Read ob-