

was dismissed with costs, and as the trial was not proceeded with by plaintiffs, defendants' solicitor obtained an order "that the action be for want of prosecution dismissed with costs to be taxed against plaintiffs, and that judgment be entered for defendants with costs unless plaintiffs paid the costs of their motion to set aside the notice of trial to be taxed, and unless plaintiffs gave to defendants security in the sum of \$200 by a bond to respond defendants costs to be incurred, said bond to be approved of by defendants counsel, etc."

Per RITCHIE, J., GRAHAM, E. J., concurring.

1. The proceeding being one of an equitable nature, to have a grant declared void, as well as for partition, plaintiffs were not entitled under any practice of the Court prevailing immediately prior to October 1st, 1884 (the date at which the Judicature Act, 1884, came into force) to obtain a judgment by default against the defendants as at common law.

2. The suit must be governed by the same practice as any other equitable action not provided for in O. 13, rr. 11 and 13.

3. The defendants could appear at any time before judgment, although the time limited in the writ for their appearance had elapsed.

4. So far as the defendant against whom judgment by default had not been entered was concerned, the appearance and defence were unobjectionable, and that he could appear at any time although not served.

5. The appearance and defence being good, the notice of trial and entry on the docket were regular, and the trial Judge was right in dismissing the motion to set them aside, and that the appeal on this point must be dismissed with costs.

And *semble*, that even if the appearance and defence were irregular, the motion should have been to set them aside, and not the notice of trial and entry on the docket which followed them.

6. The notice of trial given by defendants' counsel was regularly given under O. 34, rule 11, and that the defendants having appeared when the cause was called for trial and plaintiffs having failed to appear, the action was properly dismissed under Rule 23 of the same Order.

7. The conditions of the order by compliance with which plaintiffs were entitled to retain their suit, although unusual, were such as it was within the province of the trial Judge to impose.

8. The order should be amended by adding recitals shewing that the cause had been called for trial and that defendants had appeared and that plaintiffs had not appeared, and that the appeal from the order should be dismissed, but without costs, the difficulty having been created by want of care on the part of the plaintiff's solicitor in drawing up the order.

9. The action should be dismissed with costs in case the conditions imposed were not complied with.

Per GRAHAM, E. J., and WEATHERBE, J.: The trial Judge was wrong in requiring the bond to be given for costs to be approved of by defendants' solicitor, and that the order should be varied in that respect.