

of the money which defendant had received by mortgaging the property. The statement of claim also charged misconduct in various ways. The statement of defence offered to reconvey the property and account for all moneys received, but defendant claimed a sum of \$100, which he alleged that the plaintiff had agreed to allow him for his services as trustee. The trial judge found that plaintiff had agreed to pay the \$100, but in ordering the reconveyance and taking of accounts, he directed that no remuneration be allowed to the defendant, and declined to make any order for costs. The defendant appealed on both grounds.

Held, (1) that defendant should be allowed the \$100 remuneration agreed on. (2) Following *Hill on Trustees*, 566, and cases there cited, no misconduct having been proved, that the defendant was entitled to his costs as between solicitor and client. (3) That an appeal as to costs may be heard and decided when, as here, the appellant succeeds on another substantial ground of appeal. *Hurpham v Shacklock*, 19 Ch. D. 215.

Semble, that an appeal as to costs may sometimes be entertained when the appellant raises another ground of appeal, not merely colourable, although he does not succeed in it; or where the giving or withholding of costs is not wholly discretionary, as in the case of a trustee guilty of no misconduct: *Farrow v. Austin*, 19 Ch. D. 58; *Turner v. Hancock*, 20 Ch. D. 303; *Re Knight's will*, 26 Ch. D. 82.

Howell, Q.C., for plaintiff. *Ewart*, Q.C., for defendant

Killam, J.]

ALLEN & CLOUGHER,

[Aug. 18.

Costs—Scale of costs—Practice.

The plaintiff recovered a verdict in the Queen's Bench for \$101.09 in a suit on two promissory notes amounting with interest to \$532.47. No certificate for costs was granted, but the plaintiff contended that the evidence showed that the action was really one for the balance of an unsettled account, exceeding in the whole \$400; and on that account not of the proper competence of a County Court, and that no certificate was necessary. On an application to a Judge for a direction to the taxing officer as to the scale on which the costs should be taxed,

Held, that in the absence of a certificate from the Judge before whom the action had been tried, the record alone and not the evidence should be looked at.

So far as the record showed the action to be within the proper competence of a County Court, and, following the statute, only County Court costs should be allowed to the plaintiff, and the defendant was entitled to tax his costs of the action as between attorney and client, and to set off against the plaintiff's costs and verdict so much of such costs of defence as exceed the taxable costs of defence which would have been incurred in the County Court. Costs of the application allowed to the defendant.

Phippen, for plaintiff. *Allen and Cameron*, for defendant.