

C. L. Cham.]

DAVIS v. WELLER—IN RE APPEAL, &c.

[Mun. Case.]

action of *Smith v. Weller* should be paid, and until security for costs should be given on the ground that the plaintiff resided in Montreal.

W. Sydney Smith shewed cause.

Hector Cameron supported the summons.

HAGARTY, C. J., C. P.—I am of opinion that the suit of *Smith v. Weller* was carried down to the Lindsay Assizes in good faith, although clearly under a mistake. At these assizes the fact of plaintiff's death was discovered. Whether after such discovery William R. Smith acted in good faith or not does not affect my judgment. The learned judge declined to try the case, and it was struck out. There was no trial on the merits, and no legal determination of the suit. I think the security for costs in that suit must be practically unavailing to defendant. The subject is much discussed in *Hoare v. Dickson*, 7 C. P. 177. Wilde, C. J., says, "When a party has brought an action and has had an opportunity of trying that action on the merits, and has either failed upon the merits, or has withdrawn his case, and afterwards brings a second action for same cause, leaving the costs of the first action unpaid, the court will interpose its authority to prevent him from so harassing his opponent." Maule, J., says, "Can you find any case where a second action has been allowed to proceed after a decision upon the merits has been had and acquiesced in?" Counsel said, "There was no decision upon the merits here, the plaintiff was nonsuited." Maule, J., "Not upon a technical objection." In fact the nonsuit was upon the merits: *Melchart v. Halscy*, 3 Wils. 149; 2 W. Bl. 741, there cited is to same effect.

The late case of *Cobbett v. Warner*, L. R. 2 Q. B. 108, I think bears upon the same distinction as to whether the merits were tried in the first action; see the judgment delivered by Mellor, J., where he discusses the nature of the nonsuit in the first action.

As I am compelled to dispose of this motion to day, I have been unable to refer to some of the authorities cited. In a note to 2 Archbold's Pr. 1298, reference is made to *Dawson v. Sampson*, 2 Chit. 146, where the proceedings in the first action were set aside for irregularity, and the court refused to stay the proceedings in a second action; see also *Liversidge v. Goode*, 2 Dowl. P. C. 141.

In *Harrison's C. L. P. Act*, 448 (1st ed.), it is said in a note, "But a limitation of the practise is, that it is only exercised in cases where the previous ejectment has been tried, and not where the plaintiff in such previous ejectment abandoned his suit before trial, because in such cases there is little vexation and very little expense." Three of the cases cited seem hardly to support this distinction. I have not had time to refer to *Doe Blackburn v. Standish*, 2 Dowl. N. S. 26, and a manuscript case of our own Courts.

I decide the case on the general view of the law in *Hoare v. Dickson*, recognized in *Cobbett v. Warner*. I do not feel warranted on the state of the authorities, so far as I have had time to examine them, to stay proceedings, as asked, till the payment of the costs of a suit, never tried nor withdrawn by act of plaintiff, nor by his attorney, determined and instructed, as I believe, in

good faith, and only becoming unavailing in consequence of a mistake which destroyed (as it were) the whole proceeding as soon as discovered.

But I think the defendant is on other grounds entitled to security for the costs of this action, and proceedings must be stayed till such is given.

At plaintiff's suggestion I allow such security to be given by deposit of fifty pounds with the Master, to remain in court to abide the event of the suit, as a security to defendant, on the usual contingencies contained in the common order for security for costs.

Order accordingly.

MUNICIPAL CASE.

(Before His Honor JAMES R. GOWAN, Judge of the County Court of the County of Simcoe.)

IN THE MATTER OF APPEAL FROM THE COUNTY COUNCIL OF THE COUNTY OF SIMCOE IN EQUALIZING THE ASSESSMENT ROLLS.

Assessment Act of 1869, sec. 71—Equalization of Rolls—Procedure—Towns and Villages.

Held, in equalizing the rolls, although a difference is recognised by 32 Vic. cap. 26, sec. 71, between town and village property and country property, that as the valuation of the former is arbitrarily reduced by two-fifths, the duty of the County Council is to increase or decrease the aggregate valuations of townships, towns, and villages, as the rolls stand, as well as to make the statutory reduction with respect to the latter—town and village rolls being subject to equalization in the same way as townships.

Statement of the mode of procedure adopted in bringing the question for consideration in this case before the Judge of the County Court under sub-sec. 3 of sec. 71. Remarks upon the difficulty, under the present system of assessment, of arriving at a fair equalization of the Assessment Rolls in different townships.

[Barrie, July 31, 1869.]

This was an appeal to the judge of the County Court of the County of Simcoe from the decision of the County Council of that County, under sec. 71 of the Assessment Act, of 1869, in equalising the assessment rolls for the preceding financial year. The facts of the case fully appear in the judgment of

GOWAN, Co. J.—Finding no procedure laid down in the law by which the jurisdiction under sec. 71 of the Assessment Act of 1869 is given, I appointed a day to hear all parties interested and settle as to the course of procedure, having reference to the nature of the jurisdiction, and the time limited for hearing.

On the day appointed, the Reeves for the greater number of municipalities were present. The Warden also was present, but not as authorized for the purpose by the County Council. Upon the appeal being lodged I stated my desire to hear the several municipalities, and that I was prepared either to hear them by counsel or by some member of the corporation, authorized to act for the body entitled to be heard, but that I could not listen to unauthorized advocacy or permit it before me. The appellants alone were represented by counsel. The Reeves appeared in person on behalf of their several municipalities. I then required the appellants to hand in at once a full and specific declaration or statement of what was objected to in the equalization by the County Council, and what it was claimed ought to have been done; in fact, full particulars to