

Prac. Court.] PACAUD V. McEWAN—ESCOTT V. ESCOTT—MOFFATT V. EVANS. [C. L. Cham.]

CANADA REPORTS.

ONTARIO.

PRACTICE COURT.

PACAUD V. McEWAN.

Rescinding rule for new trial for nonpayment of costs.

The defendant had obtained a rule a year previously for a new trial on payment of costs. He neglected to pay the costs and the plaintiff obtained a rule *nisi* to rescind the rule for new trial. *Held*, that if the defendant should pay the costs of the trial, as provided by the original rule for new trial, and of this application within ten days, the rule *nisi* should be discharged, otherwise that the rule for new trial should be rescinded.

[Chambers, from Practice Court, 1872,—Galt, J.]

Burton, Q. C., obtained a rule calling upon the defendant to show cause why his rule for a new trial in this cause granted in Easter Term, 34 Vict., on payment of costs by the defendant, should not be rescinded on the ground that the defendant had made default in paying such costs. This rule was by consent of counsel enlarged to be argued in Chambers.

Oster shewed cause and called attention to the judgment of the Court of Queen's Bench, reported in 31 U. C. Q. B. 328, to show that the plaintiff was not under any circumstances entitled to recover more than nominal damages. The damages recovered were upwards of \$800. It was admitted that he had no valid excuse to offer why the costs had not been paid; it was simply an oversight on part of defendant's attorney.

W. S. Smith supported this rule, citing *Grant-ham v. Powell* 1 P. R. 256; *Rabidon v. Harkin* 2 P. R. 129; *Van Every v. Drake* 3 P. R. 84; *Lyman v. Snarr* 3 P. R. 86.

GALT, J.—I should have been surprised to find that the decisions had so settled the practice in cases like the present that I should have been under the necessity of rescinding the rule for a new trial in this case and to have permitted the plaintiff to retain a verdict for a considerable sum of money, when the Court of Queen's Bench has decided that at the most he is entitled to nominal damages only. But on looking at the cases referred to by the learned counsel for the plaintiff I see that in every one of them the Court refused to rescind the original rule. Under the circumstances of this case I think the defendant should pay the costs of this application. I therefore order that upon the defendant paying the costs of the former trial, as provided by the original order for a new trial, and also the costs of this application, within ten days, that this rule shall be discharged, otherwise, that the same shall be made absolute.

COMMON LAW CHAMBERS.

ESCOTT V. ESCOTT.

Judge in Chambers—Setting aside final judgment—Filing affidavits on return of summons.

A judge in chambers has power to set aside on the merits a final judgment signed on default of plea. Affidavits allowed to be read, though not filed when summons taken out; leave having been in fact given by the judge, but no notice thereof given to the opposite party.

[Chambers, 1872.—Mr. Dalton.]

Action against administrator on a note made by intestate. The plaintiff signed final judgment on default of plea. The defendant then applied to set aside this judgment on the merits, accounting for his laches.

O'Brien shewed cause. A judge in Chambers has no jurisdiction to set aside a final judgment, except when specially given him by statute, as in C. L. P. Act sec. 55: *Mearns v. G. T. R. Co.* 6 U. C. L. J. 62. See also *Ross v. Grange* 27 U. C. Q. B. 306 and C. S. U. C. c. 10, sec. 10. The application should be to stay proceedings: *Richmond v. Proctor* 3 U. C. L. J. 202. He also objected to certain affidavits being read as they were not filed when summons was taken out and no leave granted to file them on its return.

Keefer, contra.

MR. DALTON.—I shall allow the affidavits to be read as leave was substantially given to the defendant to file further affidavits on the return of the summons. The neglect to notice it in the summons is a mistake on the defendant's part, and if it rendered necessary an enlargement by the plaintiff, it would probably be at the defendant's expense, and on such other terms as would prevent injustice to the plaintiff; but, as no inconvenience has arisen in this case, I should disregard the omission, or allow an amendment if necessary.

I think a judge in chambers has power to set aside on the merits a final judgment signed on default of plea. As I think the defendant has shown grounds sufficient, I shall make the order, and provide that the plaintiff may go to trial at next assizes.

MOFFATT V. EVANS.

(Reported by Mr. C. C. ROBINSON, Student at Law.)

34 Vict. cap. 12 sec. 12 (Ont.)—Service on Toronto Agent—Notice to plead.

A notice to plead when served on the Toronto Agent of a country attorney must demand a plea within ten days. A notice to plead which does not truly set out the time within which defendant must plead, before plaintiff can take his next step, is irregular.

The obscurity of the above enactment remarked upon.

[Chambers, Oct. 24, 1872.—Mr. Dalton.]