

Aylesworth for the sheriff and attaching creditors.

John Farley for the Division Court creditors.

Court of Appeal.]

[June 29.

BERTRAM v. MASSEY MANUFACTURING CO.

Costs—Jury Trial—Findings in favor of both parties—Substantial recovery by plaintiff—Depriving defendants of costs of issue found in their favor—"Event"—"Good cause"—Orders of trial Judge and Divisional Court.

The plaintiffs claimed more than \$13,000 upon a special contract for iron sold to the defendants and damages for refusal to accept a portion of the goods sold. The defendants denied their liability to pay for any part of the iron, setting up that it was not what they had contracted for, and counter-claimed for damages for breach of contract. The case was tried by a jury, who in answer to questions left to them found that the iron delivered was not up to contract, but that the defendants had accepted and used a portion of it, and judgment was entered for the plaintiffs by the trial judge for over \$5,000 for the portion of the iron used by the defendants at the contract price, less 15 per cent. for inferiority, as found by the jury, and also for the defendants for \$200 damages upon their counter-claim, as found by the jury. The trial judge gave the plaintiffs the costs of the action and the defendants the costs of the counter-claim, and the Divisional Court (15 O.R. 516) affirmed the judgment and this disposition of the costs.

The defendants appealed upon the question of costs only, contending that they had succeeded upon the issue as to the quality of the iron and were entitled to the costs of that issue.

The defendants had not asked at the trial to have judgment entered for them upon such issue, nor was it so entered.

Held, by the majority of the court, that there was upon the evidence good cause within the meaning of Rule 1170 for depriving the defendants of the costs of the issue found by the jury in their favor, and the order of the trial judge and the Divisional Court should not be interfered with.

Per HAGARTY, C.J.O.: If the trial judge did not intend by his order to deprive the defendants of such costs, then the costs were properly left to follow the event, which was in favor of the plaintiff to the extent of over \$5,000.

Per BURTON, J.A.: The defendants not having applied for judgment thereon, were not entitled to costs of the issue found by the jury in their favor.

Per OSLER and MACLENNAN, JJ.A.: Although there was no formal order specifically depriving the defendants of costs, the trial judge and the court below intended to deprive them of costs, for good cause.

Huxley v. West London Extension R.W. Co., 14 App. Cas. 26, specially referred to.

Osler, Q.C., and *Watson*, for the appellants.

Robinson, Q.C., and *Lash*, Q.C., for the respondents.

Law Students' Department.

The following papers were set at the Law Society Examination before Easter Term, 1889:

CALL.

REAL PROPERTY AND WILLS.

1. A. died before the law of primogeniture was repealed, leaving a son and two daughters, and leaving a will whereby he devised Black-acre "to my son." After the death the three children executed a deed, reciting an intention to partition their late father's estate, "devised and described to them," and they thereby partitioned and allotted [the lands] amongst them in the following portions, etc. Then followed a covenant by each with the others for themselves, their heirs, etc., for further assurance, according to the Short Forms Act. One of the daughters offers her share for sale. Can she make title? Why? How would you classify such a deed?

2. A. conveys to B. a piece of land upon the secret verbal agreement that B. is to pay all creditors of A. who apply to him for payment, but not to call for creditors or pay any who do not apply, and afterwards to re-convey to A. After payment of some creditors, A. demands a reconveyance, which B. refuses. Several years afterwards a creditor, whose debt accrued after the conveyance, brings an action to have his debt paid out of the land. Can he succeed? Why?