

Co. Ct.]

SOMERS V. KENNY.

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in which the full court held that if a mortgage is created by way of demise for a term of years, and the mortgagor attorns and becomes tenant to the mortgagee at a certain rent, the relation of a landlord and tenant is created, and upon failure to pay the rent the mortgagee is entitled to distrain the goods even of a stranger. "The decisive question in these cases," says Lindley, L. J., "is, whether there was a tenancy and not merely a personal contract on the part of the mortgagor."

The cases in the November number of the Probate Division all relate either to divorce or ecclesiastical law, and do not require notice here.

A. H. F. L.

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

COUNTY COURT OF THE COUNTY OF SIMCOE.

SOMERS V. KENNY.

Revival of judgment—R. S. O. chap. 116—*Dur-*
ation of judgment—R. S. O. chap. 108—*Imp-*
Act, 37 & 38 Vict., chap. 57.

A judgment having been entered against both plaintiff and defendant, as co-sureties upon a promissory note, and the plaintiff in the original suit having since died, the now plaintiff having satisfied the judgment, applied for leave to revive the same, in the name of the deceased's administrators, and for an order for contribution against his co-surety, the present defendant. An order was made for the trial of an issue between the parties, questions both of law and fact being involved.

Held, that the proceedings were regularly taken, and that the judgment, if not barred by the statute, might be revived, either in the name of the administrator to the plaintiff in the original suit, or in the name of the present plaintiff himself (under R. S. O. c. 116).

Held, also, that the judgment referred to having been entered up on the 23rd May, 1865,

was barred by R. S. O. chap. 108, and the present application came too late.

Held, also, that *Allan v. McTavish*, 2 App. R. 278, and *Boice v. O'Loane*, 3 App. R. 167, were over-ruled by *Sutton v. Sutton*, L. R. 22 Ch. D. 511.

[Barrie, September 8, 1883.]

The facts, so far as material to the real points in issue, are set out in the judgment.

Lount, Q.C., for plaintiff.

Pepler, for defendant.

ARDAGH, CO. J.—On the 19th March last, in an action in this Court, in which one William Holt was plaintiff, and Samuel Palk, Thomas Kenny and Joseph Somers, were defendants, (the two last being the defendant and plaintiff, respectively, in the present proceeding), an application was made by the said Somers, as assignee of the judgment in the said action, for an order for leave to revive the action in the name of James Hay Campbell, the administrator, with the will annexed of the said Wm. Holt, deceased, and to issue execution against his co-defendant, Kenny.

It was thereupon ordered that the said defendants, Somers and Kenny, should proceed to the trial of an issue before a Judge, without a jury, in which issue, the said Somers was to be the plaintiff and the said Kenny was to be the defendant, and that the question to be tried should be whether the said Somers was entitled to proceed on the said judgment, by way of execution against the said Kenny for contribution, either by reviving the judgment in the name of the said J. H. Campbell, as administrator, or in his own name, or otherwise.

This issue was tried before me, without a jury, at the sitting of this Court in June last, and judgment was reserved.

(After setting out the facts and history of the case in full, the judgment proceeds.)

On the argument, Mr. Pepler, for the defendant, contended :

1st. That under *The Real Property Limitation Act*, R. S. O. chap. 108, sec. 23, plaintiff's right to recover is barred.

2nd. That there is no provision for a proceeding of this nature, inasmuch as the plaintiff (Holt) in the original suit, is dead, and his administrator is his only representative.

3rd. That this is a wholly unnecessary proceeding, as plaintiff, (assuming his right to enforce his claim against the defendant) might