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OCTOBER 18TH, 1902.

DIVISIONAL COURT.

CHAMBERS v. McCOMBS.

Mortgage—Mortgagee in Possession—Statute of Limitations — Payment by Rents and Profits—Account—Reference.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., at the trial, in favour of plaintiff in ejectment. Plaintiff, as mortgagee, went into possession of certain land, chiefly pasture, but with a small house upon it, in 1871, and had the rents and profits of it. He removed the house, and, there being no one on the premises, the defendant, who acquired the interest of the mortgagor, in 1901, went into possession, and the plaintiff brought this action.

G. Lynch-Staunton, K.C., for defendant, contended that the plaintiff's claim had been paid off by the rents and profits and the removal of the house, and that that was such a payment as stopped the running of the Statute of Limitations, the plaintiff having then gone out of possession. He urged that an account should be taken to shew whether plaintiff's claim had been paid.

S. H. Bradford, for plaintiff, contra.

The judgment of the Court (BOYD, C., MOSS, J.A.) was delivered by

BOYD, C.:—The issues raised by the pleadings and which appear to be necessary to make a final determination of this case, have not been elucidated by evidence, nor are they dealt with in the judgment. The judgment is merely for possession, and, though that is in accord with the outstanding legal title, that legal title may not be of importance if the defendant can establish his defence as to the payment of the mortgage and the non-possession of plaintiff thereafter. The prosecution of the case at the hearing was intercepted by the hypothetical cases put by counsel, and we do not know what the real facts are. To save the expenses of a re-trial it is better to let the judgment stand for possession to plaintiff, subject to the report of the Master and judgment thereon

upon further directions. Let it be referred to the Master to investigate and report upon the truth of the defence and report specially as to taxes, etc. Further directions and costs reserved. The defendant should as a condition of this relief pay into Court or give security for $100, to be dealt with by the Court after the conclusion of the case. If this condition is complied with in 14 days, order as above. If not, appeal dismissed with costs.

OCTOBER 22ND, 1902.

DIVISIONAL COURT.

RE RITZ AND VILLAGE OF NEW HAMBURG.

Parties—Summary Application to Quash Municipal By-law—Countermand—Motion to Add or Substitute New Applicant.

Appeal by John F. Katzenmeier from order of MACMAHON, J., in Chambers (*ante* 574), dismissing application for an order allowing appellant to be added as an applicant for a summary order quashing by-law 259 of the village of New Hamburg, or substituting him for Charles Ritz, the original applicant, who had countermanded his notice of motion for the order. When the countermand was served, the time for applying to quash had expired.

New material was allowed to be used upon the appeal, which was heard by BOYD, C., STREET, J., MEREDITH, J.

E. E. A. DuVernet, for Katzenmeier.

A. B. Aylesworth, K.C., for the corporation.

BOYD, C.:—The analogy of proceedings in an action applies to these applications to quash by-laws: Re Sweetman and Townships of Gosfield, 13 P. R. 293, approved of by the Court of Appeal in Re Shaw and City of St. Thomas, 18 P. R. 454.

When the fact is that the motion to quash is taken on behalf of a number of interested ratepayers who have combined to make the necessary deposit to answer costs, it is as a matter of course to allow any amendment of the papers so as to place that fact on record: In re Tottenham, [1896] 1 Ch. 628. And if it be the fact that the motion is in truth on behalf of a number so interested, the failure of the individual put forward to give a title to the proceedings to prosecute, or his attempt to relinquish the proceedings, should not prejudice the others who seek to have the matter adjudicated. In such a case the practice of the Court is to substitute another, being one of those really interested: Hughes v. Pump House Co., [1902] 2 K. B. 485.

The persons interested who contributed the money relied upon their nominee, Ritz, duly prosecuting the motion intrusted to him, and if he betrays that trust, the Court seized of the motion is not helpless to do justice in the premises.

True, in a creditor's suit the creditor who files a bill may before decree dismiss it and another creditor is not allowed to intervene, because he does not rely on the diligence of the acting creditor, and it is open for him to begin proceedings in his own name. But the points of difference here are plain: because it is too late to initiate another motion on account of the three months' limit; and because all the contributories relied upon Ritz acting promptly and uprightly (see Handford v. Storie, 2 Sim. & Stu. at p. 198, Canadian Bank of Commerce v. Tinning, 15 P. R. 401, Atlas Bank v. Mahat, 23 Pick. 492); and because those thus defrauded have made actual contribution to the expenses of the litigation.

[Macdonald v. City of Toronto, 18 P. R. 17, referred to.]

* * * * * * * * * *

The Court should grant the relief asked. . . . The terms will be as stated by my brother Meredith.

MEREDITH, J.:—The application was made at the instance and upon the behalf of nine ratepayers. Ritz was but one of them, and, with his concurrence, his name only was used in the proceedings. Some time afterwards he was bribed to discontinue them, and desired to do so, and has done all he was asked to do, by those who bribed him, to carry out his corrupt bargain; but the application was still pending when the order appealed against was made.

In these circumstances the Court is not powerless to prevent the bribed defeat of the ratepayers' right to apply to quash the by-law. Ritz, as their agent, could be restrained from such a breach of confidence and trust. A simple and ready injunction is the order proposed: see Payne v. Roger, Doug. 407; Leigh v. Hunt, 1 B. & P. 447; Doe v. Franklin, 7 Taunt. 9; Hicks v. Beith, 7 Taunt. 48; Morell v. Newman, 4 B. & Ad. 419. They may, and ought to be, empowered to continue the proceedings in Ritz's name, on the usual terms of indemnifying him against costs. They should also undertake to speed the hearing of the application, and should, at the end of the litigation, pay the respondents' costs of the motion below and of the appeal, which, by reason of the new material used, put it, for the purpose and in the circumstances of the case, in the same position as an original motion.

STREET, J.:—I concur.

OCTOBER 22ND, 1902.

DIVISIONAL COURT.

PEOPLE'S BUILDING AND LOAN ASSOCIATION v. STANLEY.

Execution—Judge's Order for Costs—Direction for Set-off—Service of Allocatur—Issue of Execution—Production of Original Order or Office Copy.

Appeal by defendant from order of LOUNT, J., dismissing defendant's application to set aside a writ of *fi. fa.* against defendant's goods for interloctutory costs under a Judge's order, upon grounds of irregularity appearing below.

The appeal was heard by BOYD, C., STREET, J., MEREDITH, J.

W. H. Bartram, London, for defendant.

D. W. Saunders, for plaintiffs.

BOYD, C.:—Strict practice requires that when execution is issued upon a Judge's order, the order itself or an office copy thereof should be produced to the officer, unless that officer has official custody of the books of the Court wherein the order has been entered. In such case he may act upon the copy of the order served, after verifying its correctness by reference to the record in his custody. Where the officers are distant, *i.e.*, one officer issues the order and another issues the execution, then proper evidence of the existence and contents of the order should be laid before the officer who issues process. It is customary in the central office at Osgoode Hall, where all the officers are together, that one should refer to the other, and a copy of an order served may be acted upon when the officer has the means at hand of verifying its correctness. So in the Weekly Court at London, where an order is issued and entered by the clerk at the weekly sittings, it is competent for the auxiliary officer who issues execution thereon, *i.e.*, the deputy registrar, who is in easy touch with the other officer, to satisfy himself that the copy served is accurate. In the absence of evidence and in face of the fact that it is not disputed that the copy is right, the Court on this motion will infer that *omnia rita esse acta*.

I think that the appellant has a right to complain in strictness that deduction was not made from the costs last taxed against him, if the company's solicitor intended to issue execution therefor, and for this reason I would agree with the result arrived at by my brother Meredith.

STREET, J.:—I concur.

MEREDITH, J.:—The appellant seeks to set aside the *fi. fa.* on these grounds: 1, because costs directed to be set off were not deducted before the writ issued; 2, because the certificate of taxation was not served; and 3, because, as to part of the costs included in the writ, it was issued without production of the original order for payment of such costs.

As to the first ground, the direction was a verbal one, made by the learned Judge who made the order now in appeal, so that it must have been considered by him that his verbal direction had been substantially carried out, and so it now appears. The costs have been set off against an earlier bill of the plaintiffs, upon which execution had issued. The only possible loss the defendant could sustain by setting his costs off against the plaintiffs' earlier instead of his later bill is the sheriff's poundage on $12, that is, 72 cents, and in the disposition to be made of this motion that will be prevented.

As to the second ground, there is no practice requiring service of the allocatur in such case as this. The defendant's solicitor had notice of the taxation, and his agents were present when it was completed, so that the defendant had notice of the amount payable, and the writ was not issued until five days afterwards: see Con. Rule 843. It would have been more courteous and commendable to have asked for payment before issuing the writ; the amount was small, for interlocutory costs only, and the solicitors resided in the same town, and after the previous like taxation a copy of the allocatur had been served; though, to the contrary, it is right to add that such service had no effect, the costs were not paid, the Court had to be moved to recover them.

The last ground seems more important as a matter of general practice. It can hardly be good practice to issue execution upon what at most merely purports to be a copy of an order; and, in this case, there was no reason why the original or an office copy could not readily have been obtained. Our Rules seem to contain no provision touching the question; they are quite bald as to the *modus operandi* in obtaining the writ; they indicate from which office such writs shall issue, and provide for the filing of a præcipe, but that seems to be all. The English Rules expressly require the production of the original order or of an office copy of it: O. 42, r. 11: and such has long been the practice there, a rule of 1853 providing that no writ of execution should be issued until the judgment paper, postea, or inquisition, as the case might be, had been seen by the proper officer: R. 71, H. T. 1853. This is a reasonable and convenient practice which ought to be followed—as I think it has been—in this Court. It might be different if the order were entered in a book accessible to,

and examined by, the officer issuing the writ, before issuing it. But the defendant has not suffered from the irregularity; the order existed, and an office copy of it could have been had.

In these circumstances, the proper order to be now made, is that, upon the defendant paying to the plaintiffs or the sheriff, within five days, the amount due upon the two later bills of costs, that is, the balance now payable for interlocutory costs, all proceedings upon the writ be stayed. No costs of this appeal or the motion below; in default, the appeal to be dismissed with costs.

WINCHESTER, MASTER. OCTOBER 23RD, 1902.

CHAMBERS.

RE PINKNEY.

Security for Costs—Petition by Parents for Custody of Infant—Petitioners out of Jurisdiction—Respondents Admitting Rights of Petitioners.

An application by the respondents to a petition for the custody of an infant for an order requiring the petitioners to give security for the respondents' costs of the petition.

Shirley Denison, for respondents.

W. E. Middleton, for petitioners.

THE MASTER.—The parents of Leland Pinkney have filed and served a petition seeking the delivery up by Mr. and Mrs. Corbett of Leland Pinkney, a boy about 14 years of age. The petitioners reside outside of the jurisdiction of this Court, and an application is now made by the respondents for an order for security for costs.

On the argument counsel for the respondents admitted that they were quite willing to deliver up the boy, but alleged that he refused to leave them. If this be so, then they have no objection to the Court awarding the custody of the child to his parents. The only difficulty apparently in the way is that the petitioners are asking to be paid the costs of the petition by the respondents. That is a matter that the Court has jurisdiction over, and is no reason why an order for security for costs should be granted when the subject matter of the petition must be handed over to the petitioners, as admitted by the respondents. In my opinion no order for security for costs should be granted. Costs in the petition to the petitioners.

WINCHESTER, MASTER. OCTOBER 23RD, 1902.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v. HICKEY.

Third Parties—Action to Set aside Tax Sale—Claim by Purchaser to Relief over against Municipality.

Motion by the corporation of the town of Toronto Junction to set aside an order making them third parties herein.

The action was brought, to set aside a tax sale, against a person who had obtained a conveyance from the mayor and treasurer of the applicants under such sale.

The defendant claimed that she was entitled to some relief over against the corporation by virtue of the deed of conveyance.

W. E. Raney, for the third parties.

H. F. Gooderham, for defendant.

F. J. Dunbar, for plaintiff.

THE MASTER.—The deed does not purport to bind the corporation, and, besides, the statute provides for the relief to which a tax purchaser is entitled. I am, therefore, of opinion that the third party notice must be set aside.

The plaintiff was unnecessarily served with notice of this application. There will be no costs to the plaintiff. The third party will be entitled to the costs of this application, to be paid by the defendant forthwith.

BOYD, C. OCTOBER 23RD, 1902.

TRIAL.

GRAND TRUNK R. W. CO. v. VALLIEAR.

Way—Private Way—Easement—Prescription—Railway Lands — User not Incompatible with Requirements of Railway.

Action for damages for forcible removal and destruction of plaintiffs' fence by defendant, and for destruction of other property of plaintiffs, and for an injunction. Counterclaim for damages for removal of defendant's gate and interference with right of way.

Wallace Nesbitt, K.C., for plaintiffs.

S. W. McKeown, for defendant.

BOYD, C.:—The facts in this care are all one way. The defendant has used openly, continuously, and without interruption, for over 30 years, a foot-path, well defined, from the rear of his lot to the common, public roadway opening on the station grounds. The entrance to the station yard is protected by a gate which is frequently kept locked at night, and

the user of the defendant has been subject to this restriction. The defendant made the entrance from his land wider some eight or ten years ago, but, as against the company, the length of user of that additional width of way cannot be upheld.

The company's contention was of law, and was placed on the footing that a railway company have not power to dedicate part of their property, as that would be repugnant to the title by which they hold their lands. And, by parity of reason, that no presumption of grant could arise from length of user to support an easement, and therefore no right of way has been established as a matter of law. That doctrine, though it has some colour from expressions in Guthrie v. Canadian Pacific R. W. Co., 27 A. R. 64, 31 S. C. R. 155, is not regarded as law by many great authorities by which I am bound. There is a line of cases beginning with Regina v. Leake, 5 B. & Ad. 478, down to the present time, which establish that railway lands may be dedicated for public or other user so long as that user is not incompatible with the present and actual requirements of the railway. Such is indubitably the case here, inasmuch as for over 30 years the defendant's use of the path has in no way harmed the company, and has not called forth the slightest complaint until this action is brought. . . . This path is a matter of no small importance to defendant, as it is in fact his only means of outlet. I think he is entitled to be undisturbed in his use of the path as aforetime, *i.e.*, of its original width as a footpath for pedestrians, subject to the right of the company to keep their gates closed and locked as before and so long as the station is in its present condition.

[Grand Junction Canal Co. v. Petty, 21 Q. B. D. 273, 276, Re Gonty and Manchester, etc., R. W. Co., [1896] 2 Q. B. 439, Foster v. London, Chatham, and Dover R. W. Co., [1895] 1 Q. B. 711, Wells v. Northern R. W. Co., 14 O. R. 594, Mulliner v. Midland R. W. Co., 11 Ch. D. 611, Rangeley v. Midland R. W. Co., L. R. 3 Ch. 306, 310, Elliott on Railroads, sec. 1140, Lehigh Valley R. R. Co. v. McFarlane, 43 N. J. L. 605, and Turner v. Fitchley, 145 Mass. 438, referred to.]

The company interfered with and caused injury to defendant's gate, and should pay $10 damages on the counterclaim. Action dismissed with costs and costs of counterclaim to be paid to defendant.

Moss, J.A. OCTOBER 23RD, 1902.

C. A.—CHAMBERS.

OTTAWA GAS CO. v. CITY OF OTTAWA.

Leave to Appeal—Question of Costs—Right to Costs against Opposite Party—No Liability to Solicitor—Corporation Solicitor Paid by Salary—Change in By-law—Statute—Conflict of Decisions.

Motion by defendants for leave to appeal to the Court of Appeal from the order of a Divisional Court (ante 647) reversing an order in Chambers upon a question of taxation of costs.

J. H. Moss, for defendants.

H. T. Beck, for plaintiffs.

MOSS, J.A.—As the case stands at present, the defendants have been held not entitled to include in the costs taxable against the plaintiffs, any profit costs. The action was finally dismissed with costs on the 14th September, 1901. On that date the solicitor who conducted the defence, and acted throughout the action for the defendants, was under engagement by them at a yearly salary of $2,500, in consideration of which he was to perform the duties specified in the by-laws regulating and defining the duties of city solicitor. One term of the by-law was, that all costs awarded to the coporation in any suit should be paid to the city treasurer, and a detailed statement thereof rendered in May and December of each year.

On the 10th July, 1902, the by-law was amended so as to provide that all costs payable to the corporation in any suit should be paid to the city solicitor as part of his remuneration in addition to his salary.

On the 23rd July, 1902, the defendants brought in their bill of costs in this action for taxation by the deputy registrar, who, on the production by the plaintiffs of the before mentioned by-laws, ruled that the defendants were not entitled to tax profit costs. Upon appeal from this ruling Street, J., held that the defendants were entitled to the benefit of the amendment of the by-law, which brought the case within the provisions of sec. 320 (3) of the Municipal Act.

The Divisional Court was of the contrary opinion, and also held that upon the terms of the by-law prior to the amendment the case was governed by Jarvis v. Great Western R. W. Co., 8 C. P. 280, and Stevenson v. City of Kingston, 31 C. P. 333.

The defendants relied upon Galloway v. Corporation of London, L. R. 4 Eq. 90, and Henderson v. Merthyr Tydfil, [1900] 1 Q. B. 434.

On this motion it was submitted that these cases laid down a rule not in conflict with our own cases, which might be adopted without impinging upon them. It was said that, conceding the correctness of the doctrine that inasmuch as the salary covered all claims of the solicitor against the clients for the costs of conducting the defences, the clients incurred no liability against which they were entitled to be indemnified, it had no application where, as in this case, it was a term of the employment that the costs awarded to the corporation should be received by the city treasurer for its benefit. It was further submitted that if it appeared that Jarvis v. Great Western R. W. Co. and Stevenson v. City of Kingston applied, they should be reconsidered in the light of the English cases; and that in any case the question of the effect of the amendment to the by-law was of sufficient importance to justify further discussion in this Court.

Jarvis v. Great Western R. W. Co. was decided over 40 years ago. It was fully considered in Stevenson v. City of Kingston over 20 years ago, and was then affirmed, though the opinion of Sir A. Wilson, C.J., was opposed to it. At the next session of the Legislature held after the rendering of the latter decision, the Municipal Act was amended (44 Vict. ch. 24, sec. 5) so as to enable a municipal corporation to collect costs of suits and proceedings, notwithstanding the employment of the solicitor at a salary, when by the terms of the employment such costs are payable to the solicitor as part of his remuneration in addition to his salary. From that time to the present it has been within the power of the defendants in this action to do as they have lately done, viz., make it a term of the employment of their solicitor that costs payable to them by other parties should be received by the solicitor as part of his remuneration in addition to his salary.

Without saying that a case could not yet arise in which it might be proper to review these cases, I think that, having regard to the legislation, and to the prior decisions and the clear recognition of their authority in subsequent cases, I ought not to give leave to open a discussion of them with a view to the adoption of the rule of the English cases, at the instance of a municipal corporation. The amount involved is not large, and the defendants have provided for all future cases. I am inclined to agree with the Divisional Court that the date of the judgment governs the plaintiffs' liability to the defendants for costs, but I express no decided opinion. I only say that I think no sufficient reasons have been shewn for treating the case as exceptional and allowing a further appeal.

The motion must be dismissed.