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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 17TH, 1918.

*MALDEN PUBLIC SCHOOL BOARD (SECTION 5) v. SELLERS.

Trial—Adjournment to Next Sittings—Necessity for New Notice of Trial—Rule 252—Notice of Trial Given by Plaintiffs for Later Sittings—Subsequent Notice of Trial for Next Sittings—Attempted Countermand—First Notice Accepted by Defendant—No Application to Set aside First Notice of Trial—Entry for Trial at Next Sittings—Defendant not Appearing—Plaintiffs Insisting on Going on—Judgment for Plaintiffs Set aside on Appeal—Costs.

Appeal by the defendant from the judgment of the County Court of the County of Essex, in favour of the plaintiffs, in an action to recover $126.30, moneys of the school section alleged to have been wrongfully paid to the defendant.

The action came on for trial in October, 1916; but the trial was then postponed, at the instance of the defendant. The County Court Judge endorsed on the record: "Adjourned peremptorily till the June sittings, 1917."

The plaintiffs (by mistake, it was said) served notice of trial for the October sittings of 1917, and entered the action for that sittings; but subsequently served a notice of trial for the June sittings of 1917; and caused the entry for trial to be changed, but did not formally countermand the previous notice of trial; nor did either party make any motion.

* This case and all others so marked to be reported in the Ontario Law Reports.

The defendant notified the plaintiffs that he would not attend at the June sittings—that he relied upon the notice of trial for the October sittings.

The plaintiffs appeared at the June sittings and insisted on the trial going on; the defendant did not appear; the County Court Judge proceeded with the trial, in the absence of the defendant, and gave judgment for the plaintiffs.

The defendant's appeal was from that judgment.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

D. L. McCarthy, K.C., for the appellant.

A. W. Langmuir, for the plaintiffs, respondents.

THE COURT, at the conclusion of the hearing, gave judgment allowing the appeal, holding:—

(1) That, notwithstanding the peremptory adjournment to the June sittings, notice of trial was necessary: Rule 252.

(2) That, in the event which happened, the defendant accepted the plaintiffs' first notice of trial; and, without an order setting it aside, the plaintiffs were bound by it.

(3) That the plaintiffs' second notice of trial was in effect an attempted countermand of their first; and a countermand of a notice of trial is not regular.

Friendly v. Carter (1881), 9 P.R. 41, approved.

The judgment was set aside with costs of trial and appeal payable by the plaintiffs forthwith after taxation.

SECOND DIVISIONAL COURT. JANUARY 21ST, 1918.

*APPELBE v. WINDSOR SECURITY CO. OF CANADA LIMITED.

Mortgage—Action to Enforce—Summary Dismissal as Contravention of Mortgagors and Purchasers Relief Act, 1915—Order Dismissing Set aside by Appellate Court—Application by Defendants to Add to Order of Appellate Court an Order for Judgment for Plaintiff—Proposed Appeal to Supreme Court of Canada—Application Opposed by Plaintiff—Unnecessary Application—Dismissal.

In this mortgage action, the defendants, soon after it was begun, obtained an order dismissing it, on the ground that it was

brought in contravention of the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, and the amending Act, 6 Geo. V. ch. 27: ante 139; but, upon an appeal against that order, it was set aside: ante 239.

The defendants now applied, to the Court in which that appeal was brought, to add to its order discharging the order dismissing the action, an order that judgment be entered in the action in favour of the plaintiff.

The application was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

W. E. Raney, K.C., for the defendants.

A. W. Langmuir, for the plaintiff.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the reason of this peculiar application was, that the defendants desired to appeal to the Supreme Court of Canada against the judgment of this Court directing that the order dismissing the action be set aside, and they feared that they might not have a right to do so unless the action was also determined against them; and that they were willing should be done, as they had no defence, upon the merits, to it.

On two grounds at least, it seemed to the learned Chief Justice that the application should not be granted, assuming that the Court had power to grant it without the consent of the plaintiff: (1) Because it seemed to be unnecessary; for, if the defendants had the right to have the action dismissed as it was, and this Court had wrongfully deprived them of that right, why should there not be a right of appeal, even without the aid of the legislation of 1913 (see the Dominion Act to Amend the Supreme Court Act, 3 & 4 Geo. V. ch. 51, sec. 1), extending the right of appeal. And (2), however that might be, the Court ought not thus to give to the defendants the conduct of the plaintiff's case against his will.

The application should be refused, so long as it is opposed by the plaintiff.

SECOND DIVISIONAL COURT. JANUARY 21ST, 1918.

*McDONALD v. PEUCHEN.

Indemnity — Action upon Covenant for — Judgment Recovered against Plaintiff—Interest—Costs—Defence to Action—Reformation of Deed — Independent Collateral Agreement — Special Endorsement—Defence Set up by Affidavit Filed with Appearance—Rule 56—Trial upon Record Consisting of Endorsement and Affidavit—Cross-claim for Damages for Deceit—Unassignable Claim—Indemnity against Payment of Money not actually Paid—Application of Money—Amount for which Judgment to be Entered.

An appeal by the defendant from the judgment of CLUTE, J., at the trial at Ottawa, in favour of the plaintiff, in an action upon a covenant for indemnity.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. W. Bain, K.C., for the appellant.

J. R. Osborne, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that McDonald, the plaintiff in this action, owed Levesconte, a solicitor, $5,450; Peuchen, the defendant in this action, covenanted with McDonald that he would "indemnify and save harmless" McDonald from the Levesconte debt, except as to $1,450 of it. The deed in which this covenant was contained did not fix the amount of the Levesconte debt, but it was ascertained and settled with Levesconte at $5,450 by Peuchen's solicitor just before the deed was made, and was put in writing by the solicitor, over his own signature. McDonald paid to Levesconte $1,450, but no more; and Levesconte thereupon sued McDonald for the rest of the debt, $4,000, with interest upon that sum, $133.37, and costs of that action, $34.70; and that judgment stood in full force and effect against McDonald, who was ready to pay it, and from whom it could be recovered by execution.

Then this action was brought by McDonald against Peuchen to recover the amount of the judgment in the other action, with interest; the action being based upon Peuchen's indemnity covenant.

The only defence set up was, that Peuchen agreed that, if any action was brought by Levesconte, he (Peuchen) would take

over the defence and defend that action in the name of McDonald, and would set up his (Peuchen's) claim against Levesconte as a defence to Levesconte's claim against McDonald, but McDonald refused to allow him (Peuchen) to defend the action and refused to accept an assignment of Peuchen's claim against Levesconte, and allowed judgment to go by default.

Upon this defence, Peuchen failed at the trial, the trial Judge finding the facts against him, and properly so, upon the evidence, the Chief Justice said. In addition, Peuchen could succeed only upon a reformation of the deed, for nothing like an independent collateral agreement based upon a good consideration was proved, and no claim for reformation was made.

The only other point raised at the trial was whether the plaintiff was entitled to interest upon the amount of the judgment against him in the other action. The trial Judge gave him interest, very properly, because the plaintiff was liable for interest upon that judgment, and liable because the defendant had hitherto broken his covenant to save the plaintiff harmless from the claim in that action.

Upon this appeal, it was argued that the plaintiff's claim was one which could not be the subject of a special endorsement on the writ of summons. The writ was specially endorsed, the defence was set up in an affidavit filed with the appearance, and the endorsement and the affidavit made up the record upon which the action was tried (Rule 56). The learned Chief Justice was of opinion that the claim was properly the subject of a special endorsement; and, if it were not, it was so treated by both plaintiff and defendant, and the action tried accordingly, and so the trial could not be treated as a nullity.

The plaintiff was entitled not only to interest, but to costs of the former action as between solicitor and client.

Peuchen's claim against Levesconte was for damages for deceit, and was not assignable.

In an action for indemnity, when law and equity are administered in the one Court, a plaintiff may have judgment for the full amount against which he is indemnified, though he has yet paid no part of it, and may never pay any part of it—that is, in cases in which the defendant is not concerned in the application of the money; and that is this case: whether McDonald pays Levesconte or not, does not affect Levesconte—McDonald alone is answerable to him for this debt: see Liverpool Mortgage Insurance Co.'s case, [1914] 2 Ch. 617; British Union and National Insurance Co. v. Rawson, [1916] 2 Ch. 476.

The appeal should be dismissed.

RIDDELL, J., also read a judgment. In the main he agreed with the Chief Justice, and was in favour of affirming the judgment, but not necessarily for the full amount allowed by the judgment at the trial. If the defendant did not object to the amount, the appeal should be dismissed with costs; if he did object, the amount should be fixed by the Registrar at the cost of the defendant, and judgment should be entered for that sum, with costs here and below.

LENNOX, J., agreed that the appeal should be dismissed.

ROSE, J., agreed with RIDDELL, J.

Appeal dismissed with costs.

HIGH COURT DIVISION.

SUTHERLAND, J., IN CHAMBERS. JANUARY 23RD, 1918.

GREISMAN v. ROSENBERG.

Mortgage—Final Order of Foreclosure—Opening up on Application of Assignee of Execution Creditor, not Made a Party and not Served with Notice—Rules 469, 470—Doubt as to whether Execution Satisfied—New Account and New Day for Redemption—Improvements Made by Mortgagee—Lien for—Conveyancing and Law of Property Act, sec. 37.

Appeal by the plaintiff from an order of the Master in Chambers setting aside a final order of foreclosure obtained by the plaintiff, and directing a reference to the Master in Ordinary to take an account and fix a new day for redemption.

Shirley Denison, K.C., for the plaintiff.
J. J. Gray, for Hyman Gross.

SUTHERLAND, J., in a written judgment, said that, at the time the writ of summons was issued, there was a writ of execution apparently in force in the hands of the sheriff, of which Hyman Gross became the assignee. The plaintiff did not follow the practice provided by Rule 469 with reference to bringing into the Master's office a certificate of the sheriff, and Gross was not

made a party in the Master's office and did not receive notice of the proceedings (Rule 470).

It was contended that Gross in reality had, at the time the writ of summons was issued, no interest in the property in question exigible under the execution of which he had become assignee, and that in consequence he was not required to be made a party or entitled to notice.

The Master in Chambers thought otherwise. After this appeal had been argued, special application was made, on the part of the plaintiff, to be allowed to read, in addition to the material originally filed, the affidavit of Samuel Rosenberg. Some doubt was cast during the argument upon the accuracy of the statements made by him therein, and it was suggested that he had made contradictory statements at other times.

Upon the whole material, it was difficult, if not impossible, to determine whether the execution in question had been satisfied in full, or whether the holder thereof was entitled to notice under Rule 470. In the circumstances, the order of the Master was rightly made and should be affirmed.

The further point was raised upon the appeal that the plaintiff, believing a good title had been acquired by him, had proceeded, in reliance thereon, to make costly improvements, and that in any event, on the reference back, leave should be given to him to adduce evidence with a view to shew that he was entitled to a lien on the property in question for such improvements, pursuant to sec. 37 of the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109. If necessary, such leave should be given.

The appeal otherwise should be dismissed, with costs in the cause to Gross, the respondent.

SUTHERLAND, J., IN CHAMBERS. JANUARY 23RD, 1918.

RE JONES AND TOWNSHIP OF TUCKERSMITH.

Costs—Taxation—Appeal—Counsel Fees—Discretion of Taxing Officer—Separate Bills of Costs of two Concurrent Proceedings—Taxation of one—Regard had to Fees Allowed in the other—Costs Incident to Motion for Leave to Appeal to Supreme Court of Canada.

An appeal by Jones and others, the applicants upon a motion to quash a municipal by-law, from the taxation of their costs by the Senior Taxing Officer at Toronto.

The judgment of the First Divisional Court of the Appellate Division, Jones v. Township of Tuckersmith and Re Jones and Township of Tuckersmith (1915), 33 O.L.R. 634, was reversed by the Supreme Court of Canada, and the applicants, under the judgment of that Court, were entitled to the costs both of the action (in which they were plaintiffs) and the application to quash (twice heard) and appeals in relation thereto.

The applicants' costs of the action, in the Supreme Court of Ontario, were taxed at $420.29; and their costs of the motion to quash in the High Court Division and the Appellate Division were taxed at $197.20.

The present appeal was taken with a view to increase the latter amount.

William Proudfoot, K.C., for the appellants.

W. Lawr, for the township corporation, the respondents.

SUTHERLAND, J., in a written judgment, after setting out the facts, took up the items involved one by one:—

(1) Counsel fee on the original argument of the motion to quash the by-law, charged at $75, allowed at $50. The Taxing Officer had, in his discretion, considered $50 sufficient, and there was no sufficient reason for interference.

(2) Counsel fee on argument of appeal from the order quashing the by-law, charged at $120, and allowed at $50. For the same reason, there should be no interference.

(3) Counsel fee for attendance of counsel before the appellate Court to settle the terms of the order which had been made, charged at $50, and disallowed in toto. In the absence of a special direction from the Court, the counsel fee on the argument of the appeal must be held to include this attendance.

(4) Fee at trial of action on argument there (the second argument) of the motion to quash, charged at $150, and disallowed in toto. The fee ($100) allowed to counsel at the trial of the action was sufficient to cover the argument of the motion, and adequate for all purposes.

(5) and (6) "Judgment $10, correspondence $5," disallowed in toto. The same amounts were allowed in the taxation of the costs of the action; and the motion and the action were so interwoven that it would not be proper to allow double fees. The Taxing Officer exercised a proper discretion in taxing these items off the bill.

(7) Preliminary proceedings on the second appeal to the Appellate Division, charged at $15, disallowed in toto, and properly so for the same reason as under (5) and (6).

(8) and (9) Counsel fees on the argument before the appellate Court on appeal from the order made at the trial, first counsel $200, second counsel $50. This appeal was of course argued with the appeal from the judgment of the trial Judge in the action; and on that appeal only one counsel fee of $80 was allowed. In view of the two notices of appeal and the two orders taken out, an additional fee of $25 should be allowed.

(10) The remaining items had reference to a motion made to the Appellate Division for leave to appeal to the Supreme Court of Canada. The learned Judge agreed with the view of the Taxing Officer that these items, if allowable at all under the order made, should have been included in the costs taxed in the Supreme Court of Canada.

The appeal from the taxation was, therefore, allowed to the extent of $25 under items 8 and 9, and dismissed as to the other items. No costs of the appeal.

MIDDLETON, J. JANUARY 26th, 1918.

BAILEY v. BAILEY.

Partnership—Dissolution—Reference for Accounting and Sale—Sale of Land of Partnership Deferred until after Accounts Taken—Possession—Occupation-rent.

Appeal by the defendant from a direction of the Master in Ordinary for an immediate sale of the land forming part of the partnership assets.

The appeal was heard in the Weekly Court, Toronto.

F. Arnoldi, K.C., for the defendant.

M. L. Gordon, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the action was for dissolution of a partnership, and the ordinary judgment had been pronounced for an accounting and a sale.

There were no creditors, and the brick-plant, which constituted the sole asset, could not now be sold to advantage. The judgment was pronounced on the 27th May, 1917, but the accounts had not yet been taken.

The defendant asserted that, on the accounting, the great portion of the assets would be found to be due to him—this was denied.

The Master had ordered the land to be sold before the taking of the accounts, and had given the parties leave to bid, giving the conduct of the sale to the Official Guardian.

The defendant contended that the accounts should first be taken, so that the amount of money he must put up, in the event of his purchasing, might be ascertained. If the land should sell for $15,000, and the balance due the defendant before division should be $7,000, he would have to put up only $4,000—half the balance—and so could buy; but, if required to put up the whole price, he would be at a disadvantage, as his whole capital was in the business.

This contention should prevail, and the accounts between the parties should be taken, so that the interests of the respective parties might be known before the sale.

The appeal should be allowed. The defendant must undertake to expedite the accounting; there was no reason why it should not be completed in a few weeks.

The defendant was in possession, and there was no reason why he should not so remain pending the sale, but he must be charged with an occupation-rent, to be fixed by the Master.

Costs in the reference.

THOMPSON v. THOMPSON—KELLY, J.—JAN. 24.

Contract—Maintenance of Brother upon Homestead—Breach—Damages—Costs.]—The plaintiff sued the defendant, his brother, for breach of an agreement to support and maintain the plaintiff upon the lands referred to in the agreement. The action was tried without a jury at Lindsay. KELLY, J., in a written judgment, finds that which the defendant contracted to do, after the death of the mother of the parties, was, to support and maintain the plaintiff in a fit and proper manner on the lands and premises referred to in the agreement; but there was no provision for an alternative in case of his neglect or refusal to do so. Any remedy to which the plaintiff was entitled was, therefore, in damages. There was no suggestion that, while the plaintiff remained at the defendant's house, he was not supported and maintained in a fit and proper manner, as concerned food, lodging, and clothing. But the defendant suggested the advisability of the plaintiff's procuring another boarding-house; and, in May, 1914, the plaintiff left the defendant's house, and had not since returned to it. In his statement of claim he offered to return, and renewed the

offer at the trial; when, after more than one suggestion that the parties should come to an understanding, the plaintiff again expressed his willingness to return and the defendant his willingness to receive the plaintiff back. This left nothing to be considered except the claim in respect of the period from May, 1914, to the time of the trial. The sum of $300 fairly represented the amount of the plaintiff's damages for that period; but that was not to be taken as the measure of damages in any other than the unusual circumstances of the present case. The same circumstances warranted a refusal of costs, for the plaintiff was not wholly free from blame for the dissatisfaction which was an element in bringing about his departure from the defendant's house. Judgment for the plaintiff for $300 without costs. A. M. Fulton, for the plaintiff. J. T. Mulcahy, for the defendant.

RE BREAULT AND GRIMSHAW—MIDDLETON, J.—JAN. 24.

Will—Devise of Land—Condition in Codicil—"Die before Having Children"—Absolute Devise, Subject to Devise over in Event which could not Happen—Good Title to Land.]—Motion by a purchaser of land, under an agreement for sale and purchase, for an order, under the Vendors and Purchasers Act, declaring that an objection to the title was valid and that a good title could not be made. The motion was heard in the Weekly Court, Toronto. MIDDLETON, J., in a written judgment, said that the only objection to the title seemed to be based upon a mistranslation of the codicil to a will under which the vendors derived their title. This read: "If one of my three sons David Henry and Alex should die before having children," &c. They all had children, and so this could not now come to pass, and the clause could not in any way be read as meaning "die without leaving issue surviving." The gift was absolute, subject only to a gift over in an event which could not now happen, and so a good title could be made. So declare. No costs. W. Lawr, for the purchaser. A. B. Drake, for the vendors.