Practice Notes

1. Extending time for Notice of Appeal under 0.58, r. 3.

Plaintiff obtained an ex parte order extending time for the service of a notice of appeal from a judgment in the Queen's Bench Division. Defendant applied on summons for the plaintiff to show cause why the order so granted should not be set aside for irregularity in that no notice of the application had been given. It was held that the order was irregular for want of notice and must be set aside.

Selby v. Selby, per Richards, C. J. (January 1955).

Teed & Teed for defendant.

Limerick & Limerick for plaintiff.

2. Extending time for perfecting security in appeal to Supreme Court of Canada.

Defendant applied ex parte to extend the time for perfecting security on an appeal to the Supreme Court of Canada. The order was granted. Plaintiff moved to set aside the order for irregularity in that notice of motion had not been given nor had a summons been obtained to secure the order. Defendant argued that the Judge had no jurisdiction to reconsider the order once given: the jurisdiction to make the order is found in s. 65 of the Supreme Court Act and when exercised could not be revoked or changed.

Plaintiff argued that until such time as the Supreme Court of Canada made rules under s. 103 of the Act the rules of practice of the court in which the application was made were applicable.

Reference was made to **Jackson v. McLellan,** 19 N.B.R. 494. It was held that the ex parte order was irregular and must be set aside with costs to the plaintiff.

Debly v. M. Gordon & Son Ltd., per Richards C.J. (Sept. 1955).

Teed & Teed for plaintiff.

Ian P. Mackin for defendant.

3. Application in Chambers in New Brunswick Supreme Court in Supreme Court of Canada Appeals.

Defendant served notice of motion for a hearing in chambers on an application to extend time for perfecting security in an appeal to the Supreme Court of Canada. Before the day set in the notice of

motion, he secured a summons returnable the same day, calling upon plaintiff to show cause why the application by notice of motion should not be granted.

Plaintiff objected that under the Rules of Court six days notice had not been given; that all applications in chambers must be by summons; and that all notices of motion must be heard in Court. Reference was made to **Romaine Saulnier v. McCormick,** 1 M.P.R. 495 (N.B.C.A.).

Defendant argued that no practice had been established to cover applications under s. 65 of the Supreme Court of Canada Act and the Judge was free to deal with the matter as he saw fit.

McNair J. said:

"It would seem to me that in such applications where a procedure has not been set under s. 103 of the Supreme Court Act, a Judge should follow the practice and procedure in his own Court."

The applications were dismissed with costs to the plaintiff.

Debly v. M. Gordon & Son Ltd. (Sept. 1955).

Teed & Teed for plaintiff.

Ian P. Mackin for defendant.

4. Leave to issue execution under 0. 42, r. 23.

Plaintiff obtained judgment in the Supreme Court. The judgment was assigned in writing and notice of the assignment given to defendant. The assignee applied for examination of the judgment debtor under the provisions of section 33 of the Arrest and Examinations Act. Defendant objected on the ground that the examination was in effect a type of execution and leave had not been obtained to issue execution under Order 42, rule 23 of the Supreme Court. It was held:

"I am of the opinion that proceedings under section 33 of the Arrest and Examinations Act are in the nature of an execution. The purposes of an application for examination under section 33 are twofold.

"Firstly, as discovery in aid of execution, i.e., to find out what assets the debtor may have or have had that may be eligible to satisfy the judgment; secondly, where other forms of execution have failed or proved inadequate, to provide for instalment payments. Both purposes are directed to enforcement of the judgment. No one would make an application under this section but one who sought to enforce his judgment. If the creditor makes use of the application for the second purpose above (as he may rely upon this entirely and never issue execution at all) he is enforcing his judgment just as surely as if he levied by fieri facias.

"I conclude that the applicant must obtain leave under Order 42, Rule 23 before he is entitled to an order for examination under section 33 of the Arrest and Examinations Act."

Travis v. Maxwell, per Keirstead, Co. Ct. J., Saint John County (Jan. 1956).

Gilbert, McGloan & Gillis for judgment creditor.

Gibbon & Harrigan for defendant.

5. Cases entered but not tried

If a case has been entered on the docket of a Circuit Court and is not tried it automatically is placed on the docket of the next circuit as a remanet. If it is not then tried before the following circuit, it automatically is removed and must be re-entered. A case remains on the docket for two circuits.

Per Michaud, C.J.Q.B. at Saint John Circuit Jan. 1956.

6. Trial out of term: County Court Act, R.S.N.B. 1952, c. 45, s. 55

In an action for contribution for the support of a child and an order for weekly payments for maintenance, plaintiff applied for a trial out of term. Pleadings were closed, and two months would transpire before the regular sitting of the Court. Plaintiff alleged the matter was ready for trial and delay would mean the possible loss of weekly payments for the maintenance of a child. It was ordered that the trial be held out of term and a date was fixed before the regular sitting of the Court.

Lord v. Fudge, Kierstead Co. Ct. J. Saint John County (Dec. 1955).

Teed & Teed for plaintiff.

Henry E. Ryan for defendant.

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