

Practice Notes

1. TAXATION OF COSTS

Under the rules of Court, a Plaintiff who is a necessary witness, may be allowed the reasonable and necessary expenses incurred by him in attending the trial of an action. **Fox v. Toronto & Nipissing Railway Co.**, 7 PR, and cases cited therein, **Widdifield on Costs** followed.

Routtu v. Routtu. Saint John County Court,
Ritchie, McKelvey & MacKay, Plaintiff's Solicitors.

2. NOLLE PROSEQUI

A **nolle prosequi** cannot be entered by the Attorney General after a verdict has been delivered in a Criminal Case.

Commonwealth v. Tulk, 20 Pick 356 (Mass.) disapproved.

Regina v. Swanton, per Keirstead Co. C. J.

3. CONDITIONS FOR SUMMARY APPEAL

Section 750 (c) of the Criminal Code provides, where the appeal is from a conviction or order whereby a penalty or sum of money is adjudged to be paid, the appellant shall deposit with the Justice making the conviction or order an amount sufficient to cover the amount so adjudged to be paid together with such further amount as such Justice deems sufficient to cover the cost of the appeal. Held, where the fine was paid but the Justice refused to set a sum for costs, the appellant had done all within its power to comply with the section and was entitled to proceed with his appeal.

Regina v. Boone, per Keirstead, Co. C. J.

4. SHERIFF'S FEES ON SERVICE

When a number of papers are served on a number of Defendants only one fee is allowed. Entry fee and return fee is allowed for each document. In this action a writ of Summons, an injunction order, a notice of motion, a notice of appointment and Ten affidavits were served on each of 22 Defendants. The Sheriff submitted a bill of \$333.50 for these services. It was based on entry 20c, service 50c, return 30c for each of 14 papers on each of the 22 defendants, plus mileage.

On taxation it was held that there was only one entry and one return of each document, and the Sheriff was entitled to only one of such fees for each document. A fee for service was allowed only with respect to each independent paper. These were the Writ, the Notice

of Motion and the injunction. The affidavits were to be considered as part of the Injunction Order. Accordingly the Sheriff's Bill was reduced from \$333.50 to \$59.80.

Lawson Motors Limited v. Automotive Lodge No. 1700 et al.

14 April—53, per Registrar Supreme Court.

Ritchie, McKelvey & Mackay, Plaintiff's Solicitor.

Teed & Teed, Defendant's Solicitor.

No one for the High Sheriff of Saint John.

5. EXTENSION OF TIME TO APPEAL

An application to enlarge time for giving notice of appeal should not be made *ex parte* but on Notice of Motion or by Summons. Judgment was delivered dismissing the plaintiff's action without costs. After the expiration of the time allowed for the service of a notice of appeal, as provided in Order 58, rule 3, the plaintiff made an *ex parte* application and was granted an order extending the time for serving the Notice of Appeal. On receipt of this order the defendant made application to set the order aside on the ground that an application to extend the time for service of a notice of appeal cannot be made *ex parte*. It was argued for the Defendant that once the time for appeal as of right, has expired the successful party has a vested right in the judgment, and should not be deprived of that right without being given an opportunity of showing cause why an application for extension of time for appeal should be refused. Order 52 rule 3; **Jackson v. McLellan**, 19 N.B.R., 494. **In Re Lawrence** L.R. 4 Ch. D. 139; **Commercial Bank of N.B. v. Price**, N.B.R. 97 and **Saint John-Quebec Ry. Co. v. Fraser** 43 N.B.R. 188 cited.

The order for extending time for service of the Notice of appeal was set aside.

Selby v. Selby. Per Richards, C.J. Jan. 1955.

J. F. H. Teed, For Defendant (Respondent)

R. V. Limerick, For Plaintiff, (Appellant)

6. WHAT IS NECESSARY FOR BRIEF FEE

It was held that under the County Court Scale of costs to entitle a party to a fee for brief on law under item 8, the solicitor should at least prepare some form of written memorandum on points of law, prior to judgment being rendered.

It was not necessary that the memorandum be extensive or served on the opposite party. However, in order to justify the fee there should be some written paper which could be used, on the application or trial.

Bustard v. Durley per Keirstead, Co. Ct. J.

Teed & Teed, for Plaintiff

Gibbon & Harrigan for Defendant.

7. TAXATION OF COSTS ON DIFFERENT SCALES.

The Plaintiff succeeded on his claim for \$87.00, and succeeded against the Defendant's counter-claim for \$387.00, in an action in tort.

On taxation it was held that the plaintiff's costs of his claim be allowed on the 1st. scale, that the plaintiff costs of opposing the counter-claim be allowed on the third scale and that items which were common to both defence and counter-claim should be divided where possible and such parts allowed on the appropriate scale.

Bustard v. Durley, per Keirstead, Co. Ct. J.

Teed & Teed, for Plaintiff

Gibbon & Harrigan for Defendant.

8. WHEN WRIT MAY BE FILED NUNC PRO TUNC.

Under Order 60, Rule 2, if a writ is not filed within thirty days of service double filing fees must be paid, unless an order is obtained dispensing with double payment. When the plaintiff by affidavit, showed the defendant, after being served with the writ, had arranged for payments on account, and later made default, permission was granted to file the writ without paying double fees.

John F. Rooney v. C. W. Myles, per Keirstead, Co. Ct. J.

H. E. Ryan, Plaintiff's Solicitor.

9. LEAVE TO SERVE WRIT OUTSIDE PROVINCE

Under Order 11, Rule 1 (g), application was made for leave to issue a Writ outside the jurisdiction of the Province. The Plaintiff showed (a) facts from which it appeared there was a good cause of action for debt, (b) the opinion of counsel that there was a good cause of action on the facts stated, (c) facts which indicated that there would be assets in New Brunswick which might be used to satisfy any judgment recovered against the intended defendant, (d) that the intended Defendant was a British subject, (e) that the intended Defendant was believed to be in Manitoba. Upon these facts the application for leave to issue a writ for service in Manitoba was granted. Costs of the application were ordered costs in the cause.

Regal Craft Company v. Albert Hall, per Keirstead Co. Ct. J.

Ritchie, McKelvy & Mackay, Plaintiff's Solicitor.

Eric L. Teed,
Saint John, N. B.