Practice Notes

1. MODE OF ENTERING CASES ON THE DOCKET

Michaud C.J.Q.B. at the June sitting of the Saint John Circuit Court drew the attention of the solicitors then present to a long established rule of practice as to the mode of entering cases on the Docket, which rule has been lost sight of in the last few years. His Lordship stated that the correct practice was for the senior solicitor to enter one case of his own choosing for which notice of trial had been given. He would be followed by the next senior solicitor who would enter one case followed by the remaining solicitors in the order of seniority, until all present had entered a case. Then the senior solicitor entered his second case if he had one, followed again by the remaining solicitors in order of seniority entering their second case. This procedure is to be repeated until all cases have been entered.

The junior solicitors will doubtless be pleased to hear this rule re-iterated again for it has sometimes happened of late that senior solicitors by entering all their cases at the one time, have taken all available trial days, leaving the junior solicitor with the consolation of having a remanet for the next sitting of the Court.

It is also of interest to know that the case is entered by the solicitor, not by the counsel or barrister. This being the case, it follows that it is not necessary to move the case be entered as has been attempted in some circuits.

2. PERSONAL SERVICE

The requisites for service under the provisions of the Arrest and Examinations Act were dealt with by Harrison J., in an application for Habeas Corpus arising out of an action in the Magistrate's Court at Hampton, entitled **Pierce v Hopkins.**

Pierce recovered judgment by default against Hopkins and applied under the Arrest and Examinations Act for examination of the judgment debtor. A summons was issued. This was served on the defendant by leaving a copy with his landlady, she being an adult at his usual place of abode.

Subsequently on the return of the summons, when the defendant failed to appear, an execution was issued against him and he was lodged in jail. He applied for a habeas corpus on the ground that the execution and hearing on which it was based were nullities, as there had been no service of the summons. The statute provides that the summons be served as follows: if the defendant can be found, by delivering to him a copy thereof, or if he cannot be found by leaving the same at his place of abode, with some adult member of his household.

Harrison J. held that service upon an adult member of the household could only be effected if the defendant could not be found. As the affidavit showed no grounds for not serving the defendant personally, there was no service. Further, service upon a landlady was not service upon an adult member of the defendant's household and the service was bad on this account also. Accordingly the defendant was discharged from jail.

J. D. Harper for discharge of the defendant.

Henry E. Ryan, contra.

3. ORDER 56 RULE 10–ACCESS TO CHILD BY FATHER

A father and a mother were living separate and apart. The mother had taken custody of the children. The father wished to have access to the children but did not desire to have custody. The proper procedure was for the father to apply as a next friend under the provision of Order 56 Rule 10 of the Judicature Act for access.

BONNY v BONNY Harrison J.

W. A. Gibbon for the applicant.

4. CONTEMPT OF COURT

Where there has been a contempt of court but the parties did not do so deliberately they will be sufficiently punished by paying the costs of the application for attachment, where such is made.

MALONEY et al v GALBRAITH Hughes J.

W. G. Power for attachment.

J. F. H. Teed, contra.

5. COSTS OF ORIGINATING SUMMONS

Where there are proper grounds for an originating summons to determine the construction or meaning of a will, the costs of all parties properly represented will be paid out of the estate on a solicitor and client basis but the Court may order that such costs do not exceed 5% of the Probate value of the estate.

Re IDA A. NORTHRUP Harrison J.

D. G. Willett for executrix

6. COUNTERCLAIM IN EXCESS OF COUNTY COURT JURISDICTION

Where the defendant conterclaimed for damages in excess of the jurisdiction of the County Court in an action commenced in the County Court the action will be transferred to the Supreme Court with costs of the application in the cause, unless the parties consent to the Jurisdiction of the County Court.

ROURKE v TEED-McCARTHY CONSTRUCTION LTD

Kierstead Co. Ct. J.

Teed & Teed for application.

Whelly & Whelly contra.

7. WITHDRAWL OF COUNTERCLAIM AND DISMISSAL OF ACTION

Where an action in which there is a counterclaim is called for trial and the plaintiff does not appear, the defendant is entitled to withdraw its counterclaim without prejudice to again raising the issues and to have the action dismissed under Order 36 Rule 32. Where the original action was commenced in the County Court the action will be dismissed with costs on the County Court scale.

ROURKE v TEED – McCARTHY CONSTRUCTION LTD.

Anglin J.

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

COMPLIMENTS OF

Lockhart & Ritchie Limited

General Insurance

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