Practice Notes

1. REMOVAL OF SOLICITOR FROM RECORD

A matter of practical importance to solicitors has presented itself to the writer's knowledge three times recently. The problem is how a solicitor, once engaged by a client and who appears on the record, may have his name removed from the record after his services have been dispensed with.

At first sight this appears to be an unimportant question but on study it presents several difficulties.

To the opposite party all papers and proceedings are sufficiently served by leaving with the solicitor who appears on the record even though in fact he may no longer be acting for the client. How does this come about?

Mr. "A" employees solictor "X" to defend an action brought against him by Mr. "B" through solicitor "Y". After "X" enters an appearance Mr. "A" decides that he will not bother to defend and tells "X" that he no longer represents him and his services are dispensed with.

Neither our Judicature Act nor the rules thereto make any provision to enable "X" to take his name from the record. There is provision for Mr. "A" to remove "X's" name by substituting himself or another solicitor, but "X" himself is unable to do anything. Surely this is a rather anomalous state of affairs, where once a solicitor formally acts as such for his client in any action, he remains in that capacity until the client files the necessary papers to relieve him. Possibly if the client neglects or refuses to formally change his solicitor on the record, the solicitor is entitled to charge his client for any work he might have to do because of papers being served upon him, after his employment has been terminated.

This, however, would seem to be stretching the matter somewhat. However, be that it may, at present a solicitor appears to be powerless to remove his own name from the record.

2. ORDER 32 RULE 6 – JUDGEMENT ON ADMISSIONS

A recent action commenced in the King's Bench Division of the Supreme Court contained a number of interesting points of practice, two of which are briefly presented for the information of the practitioner.

SUMMARY JUDGEMENT ON ADMISSIONS WILL NOT BE GRANTED WHERE SUBSTANTIAL GROUNDS OF DEFENCE, OR A COUNTERCLAIM ARE RAISED, K.C. GRASS (ENTERPRISES) LIMITED v. MacDONALD & McKIM

S.C. K.B.D. 1951 – unreported.
W. A. Gibbon, Solicitor for Plaintiff
H. O. McLellan, Solicitor for Defendant, MacDonald
K. A. Wilson, Solicitor for Defendant, McKim

This action arose out of a covenent in a lease prohibiting assignment or subletting without the consent of the lessor. The defendant MacDonald made an assignment to the defendant McKim without first obtaining the consent of the Plaintiff company as lessor. The plaintiff then commenced an action for possession, damages for breach of covenant and mesne profits from the date of the writ till the date of possession.

In the course of certain applications in the action, admissions were made by the defendants that the assignments had been made without the required consent, although it was not admitted that there had been a forfeiture. Because of such fact the plaintiff applied for summary judgement for possession under Order 32 rule 6 which reads:–

> "Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court or Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may upon such application make such order, or give such judgment, as the Court or Judge may think just."

Before the application was heard, the pleadings consisted of an amended Statement of Claim, Statement of Defence and Counterclaim of MacDonald and Statement of Defence and amended Counterclaim of McKim. The counterclaims were for relief from forfeiture and for damages for breach of covenant.

At the hearing the defendants raised several points which included the waiver of the right of forfeiture by the plaintiff; the right of the plaintiff to maintain the action, based on the question whether the covenant not to assign ran with the land, and bound unnamed successors in title; the right of the defendants to seek relief under the Landlord and Tenant Act; the claim for equitable relief, which it was claimed the Court had authority to grant under the Judicature Act, Sec. 28 (b), and the matter of facts not being fully developed before the Court.

It was argued further that where the defendant puts forward a matter of fact or law which may constitute a good defence, the Court should not order summary judgment and in particular that where there is a counterclaim, the whole matter should be dealt with at the trial.

Harrison J. before whom the application was made, held that under the circumstances where the defendants had raised the various points of defence and where there was a counterclaim, that summary judgment should not be given, but the whole matter should be developed at the trial.

3. SEC. II JUDICATURE ACT – TRANSFER FROM KING'S BENCH DIVISION TO CHANCERY DIVISION CANNOT BE ORDERED BY CHANCERY COURT JUDGE WITHOUT CONSENT OF PARTIES

In the same action of Grass (Enterprises) Ltd. v. MacDonald et al an application was made by the plaintiff to transfer the action from the King's Bench Division to the Chancery Division.

The action being for ejectment, was properly commenced in the King's Bench Division but the defendants counterclaimed for equitable relief. Accordingly, the plaintiffs believing such could be better dealt with in the Chancery Division, applied for a transfer under the authority of Sec. II of the Judicature Act (1950) Chapter 160 which is as follows:–

> "If a plaintiff assigns his cause to a Division to which according to the rules of Court, or to the Act, the same ought not to to be assigned, the Court or a Judge of that division may direct the cause or matter to be transferred."

Without any argument on the merits of the application, Harrison J., held that as a Judge of the Chancery Division he did not have any authority under the Section to transfer an action commenced in the King's Bench Division to the Chancery Division, without the consent of all parties. Accordingly, he dismissed the application.

4. In an application for attachment for breach of an injunction, the Court will require particulars of the breach to be delivered to the Defendants. Further, where the breach was not wilful, the payment of the costs of the application will be sufficient punishment and attachment will not issue against the offenders.

MALONEY et al x. GALBRAITH et al. Hughes J.
William G. Power Plaintiffs' Solicitor
J. Paul Barry Defendants' Solicitor

5. Where the Defendants applied to have the action struck out for want of a Statement of Claim, but a Statement of Claim was served before the application was heard, the action was allowed to continue, but on the terms it be entered for trial at the next regular sitting of the Court.

MALONEY et al v. GALBRAITH et al. Hughes J.
William G. Power Plaintiffs' Solicitor
J. Paul Barry Defendants' Solicitor

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