SIDNEY STOCKTON TAYLOR (DEFENDANT) ..... APPELLANT;

AND

WALTER SCOTT ROBERTSON (PLAINTIFF) ..... RESPONDENT.

1901
*Oct. 21.
*Nov. 16.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Solicitor and client—Negligence or misconduct—Breach of duty—Advising according to established jurisprudence—Territories Real Property Act —Unregistered transfers— Charging lands — Levy under execution— Indemnity to sheriff—Tort — Pleading — Interpleader — Counterclaim —Signed bill of costs.

In a suit against the sheriff and an execution creditor in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead but may be properly joined in a defence with the execution creditor.

A solicitor advising his client according to the established jurisprudence of the court in which procedings are taken is not guilty of actionable negligence although the decision upon which he relied in giving the advice may be subsequently overruled.

Neither a solicitor nor a sheriff is a tort-feasor, as against a transferree whose transfer is unregistered, by registering, in the discharge of their respective duties, an execution of a judgment against lands of the judgment debtor.

The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy, under the execution.

In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested because any such overcharges, if recoverable from the sheriff, do not belong to the solicitor but to the clients for whom he acted, but, in such

* PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard and Davies JJ.

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an action, the solicitor may set up by way of counterclaim h costs in a suit in which he had appeared for the sheriff notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim.

APPEAL from the judgment of the Supreme Court of the North-west Territories affirming that part of the judgment of Mr. Justice Rouleau at the trial which directed judgment in favour of the plaintiff and reversing that portion of the trial court judgment which directed a reduction of the plaintiff's claim by the amount of a portion of the counter-claim filed by the defendant, Taylor.

The appellant was the advocate of the deputy sheriff of the Northern Alberta Judicial District, and also the advocate of a judgment creditor for whom he had caused execution to issue which was duly filed in the sheriff's office. As advocate of the execution creditor, he delivered to the deputy sheriff a requisition to charge lands then registered in the name of the execution debtors in the Northern Alberta Land Registration District, as their interest might appear, and the lands were accordingly charged by the sheriff under the provisions of the Territories Real Property Act, as amended by 51 Vict. ch. 20, sec. 94, and advertised for sale under the execution. Subsequently, certain transferees of the lands so charged and advertised registered their deeds of conveyance, which were dated prior to the execution, and served notices upon the sheriff forbidding the sale. At the time the jurisprudence of the territorial courts was considered as settled by the decision *In re Rivers* (1), which had not then been reversed, and on being informed by the sheriff of the notices served, the appellant advised him to continue the sale proceedings, notwithstanding the notices, on the ground that the unregistered transfers

(1) 1 N. W. T Rep. pt. iv. 66.

were inoperative as against the execution lodged in the lands registration office. The transferees then brought actions against the execution creditor and the deputy sheriff to restrain the sale proceedings and to have the execution cancelled and removed from the register as a cloud upon their titles. The appellant appeared in these suits as advocate for both the execution creditor and the deputy sheriff and pleaded a joint defence, without interpleading for the sheriff, but alleging that the sheriff of the district, and not the deputy sheriff, had charged the lands and contending that the deputy sheriff had been improperly joined as a defendant in the actions. The appellant also moved in the trial court to have the name of the deputy sheriff struck out as a defendant, but the trial judge (Rouleau J.), dissolved the injunction and entered judgment for the defendants without making any order on the motion to strike out the deputy sheriff's name. On appeal to the full court, the trial court judgment was reversed, and a motion, renewed by the appellant before the court *en banc*, to have the deputy sheriff's name struck out was refused with costs.

The deputy sheriff did not appeal from the judgment *en banc* and brought the present action against his advocate to recover certain fees and charges for matters in which he had taken proceedings for clients in the sheriff's office and also to recover, as damages on the ground of negligence and misconduct, the costs incurred by him in the above mentioned suits, alleging also that the appellant had impliedly and expressly obliged himself to indemnify the plaintiff against any liability for costs or damages in consequence of the proceedings which had been taken.

In his defence, in addition to the general issue and other pleas, the defendant (present appellant), counter-claimed, first, for alleged overcharges made by the

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sheriff in bills previously paid to him for fees and charges in respect of matters in the sheriff's office in which his clients had been interested parties, and, secondly, for his costs in defending the deputy sheriff in the suits brought by the transferees, but of which no signed bill had been rendered before the filing of the defence.

The trial court declared that the plaintiff was entitled to be indemnified for the amount of the costs awarded against him in the actions by the transferees, less $147.42 which sum was allowed the defendant for a portion of his counterclaim for overcharges.

On appeal to the full court by the defendant against the trial court judgment in so far as it favoured the plaintiff, and cross-appeal by the plaintiff from that part of the judgment which allowed a portion of the counterclaim, the Supreme Court of the North-west Territories, *en banc*, dismissed the appeal by the defendant and allowed the cross-appeal of the plaintiff with costs.

J. Travers Lewis and *Smellie* for the appellant. Throughout all the transactions in question in the case the appellant acted solely as the advocate of the execution creditor; he was an agent and his principal was known, consequently he incurred no personal liability. He carefully limited his requisition to the sheriff as to charging the lands only so far as the debtor's interest might appear and incurred no liability on account of the sheriff exceeding his authority and attempting to charge and levy on the fee. No express contract by appellant to indemnify the sheriff has been proved and certainly no such indemnity can be implied from anything appellant may have done in discharging his duty towards his client and by his special authorisation seeking to secure for him the fruits of his judg-

ment. See *Smith* v. *Keal* (1) *per* Lindley L. J. at page 354; *Levi* v. *Abbott* (2); *Hallett* v. *Mears* (3); *Jarmain* v. *Hooper* (4); *Childers* v. *Wooler* (5); *Robbins* v. *Bridge* (6).

There is no evidence of any misconduct on the part of appellant nor of anything which might constitute actionable negligence. The plaintiff, respondent, knew and approved of every step taken by the appellant in the suits against him. When appellant advised as to the unregistered transfers being inoperative as against the registered execution he was justified and bound by the decision *In re Rivers* (7) which was then the established jurisprudence of the North-west Territories on that question. In any event, *crassa negligentia* has not been proved. *Blair* v. *The Assets Company* (8); *Purves* v. *Handell* (9); *Hart* v. *Frame* (10); *Kemp* v. *Burt* (11); *Swinfen* v. *Chelmsford* (12).

There could be no objection to appellant acting for both the sheriff and the execution creditor in the actions brought against them and it was so found by the trial judge. The sheriff could not withdraw the notification by which he had charged the lands in the Lands Registration Office and he was properly joined in all the defences pleaded.

The appellant insists that his counterclaim is well founded and that he should recover on both heads. The rule requiring an advocate to render a signed bill of costs one month before suit does not prevent the amount of his costs being set up by way of counterclaim although this formality may have been omitted.

(1) 9 Q. B. D. 340.
(2) 4 Ex. 588.
(3) 13 East 15.
(4) 6 M. & G. 827.
(5) 29 L. J. Q. B. 129.
(6) 3 M. & W. 114.
(7) 1 N. W. T. Rep. pt. iv, 66.
(8) [1896] A. C. 409.
(9) 12 C. & F. 91.
(10) 6 C. & F. 193.
(11) 4 B. & Ad. 424.
(12) 5 H. & N. 890.

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Brown v. *Tibbits* (1); *Lester* v. *Logarus* (2); *Irving* v. *Wilson* (3); *Umphelby* v. *McLean* (4). The practice followed was in conformity with the best precedents of pleading; see Bullen & Leake, (4 ed.) page 944.

We also refer generally to *Hebb* v. *Pun Pong* (5); *Lee* v. *Everest* (6); *Boyle* v. *Busby* (7); *Smith* v. *Broadbent & Co.* (8); *Ford* v. *Williams* (9); *Rascorlla* v. *Thomas* (10); *Lampleigh* v. *Braithwait* (11); *Snow* v. *Hix* (12).

Chrysler K.C. for the respondent. There is an implied indemnity under the circumstances of this case which makes the appellant liable to the sheriff. *Heugh* v. *Abergavenny* (13); *Bennett* v. *Bayes* (14); *Ontario Industrial Loan & Investment Co.* v. *Lindsey* (15); *Jellett* v. *Wilkie et al.* (16). As the sheriff acted by direction of the appellant and by his act occasioned injury to the rights of a third party, not evidently illegally but honestly and *bonâ fide* in compliance with the direction, the party giving the direction is under an implied agreement to indemnify the party acting upon it. Addison on Contracts (9 ed.) 423; Evans, Principal and Agent, 416 *et seq.*; 12 Campbell's Ruling Cases, "Indemnity," 838. There is no evidence that appellant acted as agent for Jellett in directing the sheriff. As solicitor for Jellett he had no implied authority to give such a direction. *Re McPhillips* (17); *Keal* v. *Smith* (18) affirmed *sub. nom. Smith* v. *Keal* (19); *Burrell* v. *Jones* (20); *Wallbridge*

(1) 11 C. B. N. S. 855.
(2) 2 C. M. & R. 665.
(3) 4 T. R. 485.
(4) 1 B. & Ald. 42.
(5) 18 Can. S. C. R. 290.
(6) 26 L. J. Ex. 334.
(7) 6 Q. B. D. 171.
(8) [1892] 1 Q. B. 551.
(9) 3 Kernan N. Y. 577.
(10) 3 Q. B. 234.
(11) Sm. L. C. (10 ed.) 136.
(12) 54 Vt. 478.
(13) 23 W. R. 40.
(14) 29 L. J. Ex. 224; 5 H. & N. 391.
(15) 3 O. R. 66; 4 O. R. 473.
(16) 26 Can. S. C. R. 282.
(17) 6 Man. L. R. 108.
(18) 51 L. J. Q. B. 487.
(19) 9 Q. B. D. 340.
(20) 3 B. & Ald. 47.

v. *Hall* (1); *Muirhead* v. *Shirreff* (2). There is no evidence of express authority. The direction given was personal the words "Advocate for the Plaintiff" being merely descriptive. *Hall* v. *Ashhurst* (3); *Lennard* v. *Robinson* (4); *Scrace* v. *Whittington* (5); *Parker* v. *Winlo* (6); *Watson* v. *Murrell* (7); *Hutcheson* v. *Eaton* (8); Story on Agency, secs. 269, 270, 278; Evans Prin. & Agent, 245; 359. There appears to be a stronger inference in favor of personal liability in the case of an attorney or professional agent than in the case of others. The ratification by Jellett claimed in argument, but not established by the evidence would not relieve appellant from liability; see *Woolen* v. *Wright* (9); *Kenedy* v. *Patterson* (10); The general statement, that ratification transfers both rights and liabilities to the ratifying principal, is subject to the limitation that the agent is released only if he is not liable *ex directo* on the contract, but only on his implied warranty of authority; he is not released if he is liable *ex directo* on the contract by virtue of the terms thereof as, it has already been submitted, is the case here. Am. & Eng Ency. Law (2 ed.) p. 214, note 9. Story on Agency, s. 251. *Collen* v. *Wright* (11); Ruling cases, Vol. II, Agency 484.

But in truth, the law of principal and agent has no application at all to the present action, which is not based on contract but on general principles of equity. See DeColyar on Guarantees, pp. 305 *et seq.*, and 7 Am. & Eng. Ency. of Law (2 ed.) tit. "Contribution and Exoneration," pp. 326, *et seq.* The cases from *Pasley*

(1) 4 Man. L. R. 341.
(2) 14 Can. S. C. R. 735.
(3) 1 Cr. & M. 714.
(4) 5 El. & B. 125.
(5) 2 B. & C. 11.
(6) 27 L. J. Q. B. 49.
(7) 1 C. & P. 307.
(8) 13 Q. B. D. 861.
(9) 1 H. & C. 554.
(10) 22 U. C. Q. B. 556.
(11) 26 L. J. Q. B. 147; 27 L. J. Q. B. 215.

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v. *Freeman* (1); *Derry* v. *Peek* (2); both annotated in 12 Campbell's Ruling Cases, tit. "Fraud" settles the law that wilful falsehood, or reckless disregard of truth is an essential element in an action for deceit, and the rule deducible is that where A. asserts the ownership of property to be in a particular person, and where if such assertion be true, he may lawfully give a direction to B. (either as being his special mandatary or as holding a public office) to do an act regarding such property, B. if he does the act by the direction of A. or at his request, and it turns out that A.'s assertion was in fact false and the real owner recovers damages against B., is entitled in an action in the case alleging the direction or request and the falsity of A.'s assertion to recover damages by way of indemnity against A., whether A. be acting on his own behalf or not. *Adamson* v. *Jarvis* (3); *Palmer* v. *Wick S. S. Co.* (4); *Burrows* v. *Rhodes* (5); *Humphreys* v. *Pratt* (6); *Betts* v. *Gibbins* (7); *Collins* v. *Evans* (8); *Childers* v. *Wooler* (9); *Dugdale* v. *Lovering* (10); *Moodie* v. *Dougall* (11).

The evidence establishes an express agreement to indemnify Robertson. There is undoubtedly a direct conflict of evidence upon this point, but the conclusion should, it is submitted, be in respondent's favour. See Pollock on Contracts (5 ed.) pp. 233, 439, 440; *Smith* v. *Hughes* (12); *Birrell* v. *Dryer* (13); *Knox* v. *Munro* (14). Appellant ought to have declined to act for the sheriff while acting for Jellett, their interests being in conflict, inasmuch as the sheriff was entitled

(1) 3 T. R. 51.
(2) 14 App. Cas. 337.
(3) 4 Bing. 66.
(4) [1894] A. C. 318.
(5) 68 L. J. Q. B. 545.
(6) 5 Bligh N. S. 154.
(7) 2 Ad. & E. 57.
(8) 13 L. J. Q. B. 180.
(9) 29 L. J. Q. B. 129.
(10) 44 L. J. C. P. 197.
(11) 12 U. C. C. P. 555.
(12) L. R. 6 Q. B. 597.
(13) 9 Ap. Cas. 345.
(14) 13 Man. L. R. 16.

to be indemnified by Jellett, if Jellett authorized the direction on which he acted, and, in any case, by the appellant himself. Under the circumstances appellant was guilty of breach of duty and misconduct for the consequences of which he is liable. 3 Am. and Eng. Ency. Law (2 ed.) pp. 295, 299, 300, 379, 380, 387. *Taylor* v. *Blacklow* (1); *Barber* v. *Stone* (2); *Donaldson* v. *Haldane* (3); *Lanphier* v. *Phipos* (4); *Hart* v. *Frame* (5); *Parker* v. *Rolls* (6); *Cox* v. *Leech* (7); *Godefroy* v. *Dalton* at page 468, (8); *Leslie* v. *Ball* (9); *O'Connor* v. *Gemmill* (10); *Armour* v. *Kilmer* (11); *Armour* v. *Dinner* (12).

The court has inherent power to protect its own officers, independently of the Interpleader Acts, which extend to goods only, and on application to that effect proceedings have been stayed till indemnity was given, and a withdrawal of the execution directed, if indemnity were not given. 22 Am. & Eng. Ency. Law, (1 ed.) "Sheriffs," p. 537; Ib. Vol. x, "Indemnity," p. 420; 2 Freeman on Executions (2 ed.) pp. 254, 275; *King* v. *Bridges* (13); *Burr* v. *Freethy* (14); *Bernasconi* v. *Fairbrother* (15); *Probinia* v. *Roberts* (16); *Beaven* v. *Dawson* (17); *Holmes* v. *Mentze* (18).

A sheriff is entitled to file a Bill of Interpleader. Snell's Eq. (5 ed.) 584; Mitford on Pleading, 48-49; Story's Eq. Jur. 820 (b.); *Dutton* v. *Furniss* (19); *Tufton* v. *Harding* (20); *Child* v. *Mann* (21). The deputy sheriff would have been protected had he refrained

(1) 3 Bing. N. C. 235.
(2) 50 L. J. Q. B. 297.
(3) 7 Cl. & F. 762.
(4) 8 C. & P. 475.
(5) 6 Cl. & F. 193.
(6) 14 C. B. 691.
(7) 1 C. B. N. S. 617.
(8) 6 Bing. 460.
(9) 22 U. C. Q. B. 512.
(10) 29 O. R. 47.
(11) 28 O. R. 618.
(12) 4 N. W. T. Rep. 30.
(13) 7 Taunt, 294.
(14) 1 Bing. 71.
(15) 7 B. & C. 379.
(16) 1 Chit. 577.
(17) 6 Bing. 566.
(18) 4 A. & E. 127.
(19) 35 L. J. Ch. 463.
(20) 29 L. J. Ch. 225.
(21) L. R. 3 Eq. 806.

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from contesting and set up his true position in a separate Statement of Defence. The course actually pursued by attempting to have his name struck out was clearly wrong on principle and authority, apart even from the claim of injunction, it being clear on the authorities already cited that, notwithstanding his official capacity, he was liable. Had he either by interpleader action, or by motion or by separate defence made his claim for protection merely, he would undoubtedly have been protected and escaped being charged with costs. *Neuman* v. *Godfrey* (1); *Jones* v. *Wiggins* (2); Bullen & Leake (1 ed.) p. 457; Odger on Pleading, (2 ed.) p. 201; Seton on Decrees pp. 213; *Clark* v. *Wilmott* (3). It is not necessary, in order that these principles should apply, that there should be a formal disclaimer. *Wansley* v. *Smallwood* (4).

So far as the counterclaim relates to the bill of costs in the actions, the grounds on which the plaintiff is entitled to judgment on his claim at the same time disentitle the appellant to his costs. As to the rest of the counterclaim the Judicature Ordinance No. 6 of 1893, sec. 538, (now rule 536, C. O. 1898,) affords an answer in law. There is no pretence that any of its provisions have been complied with. The form of action is immaterial; notice is necessary, though the form of action is for money had and received. *Greenway* v. *Hurd* (5); *Selmes* v. *Judge* (6); *Waterhouse* v. *Keen* (7); *Midland Railway Co.* v. *Withington Local Board* (8). A further answer is that the sums were all paid voluntarily under a mistake of law.

(1) 2 Bro. C. C. 332.
(2) 2 Y. & J. 385.
(3) 11 L. J. Ch. 16.
(4) 11 Ont. App. R. 439.
(5) 4 T. R. 553.
(6) L. R. 6 Q. B. 724.
(7) 4 B. & C. 200.
(8) 11 Q. B. D. 788.

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The judgment of the court was delivered by:

DAVIES J.—This was an action brought by the respondent Robertson, Deputy Sheriff at Edmonton, against his solicitor or advocate, the appellant Taylor, in which it was claimed that Taylor was bound to indemnify Robertson for costs incurred by him in the defence of certain actions brought against him and one Jellatt by Wilkie and others, on the grounds of an alleged express or of an implied indemnity from Taylor, or alternatively, against such parts thereof as were incurred by the breach of duty, misconduct or negligence of Taylor.

The appellant, Taylor, denied, as a matter of fact, having given any express indemnity or that, under the facts, any implied indemnity from him arose. He also denied all charges of breach of duty or negligence and counter-claimed: First, for the amount of his costs in defending Deputy Sheriff Robertson in the actions brought against him, and; Secondly, for certain alleged overcharges made by Robertson as sheriff's fees, in cases which the appellant, Taylor, had placed in his hands and in which Taylor was advocate or solicitor.

The facts out of which the proceedings arose are not disputed. One Jellatt had obtained a judgment against The Edmonton and Saskatchewan Land Company and, on the twenty-ninth May, 1893, Taylor, as his advocate, placed an execution on this judgment in the hands of Robertson, as Deputy Sheriff of the Northern Alberta Judicial District, and at the same time in writing, directed the sheriff to charge the interest of the company in certain lands with the said judgment and execution. The direction or requisition was entitled in the suit, was signed by Taylor, as advocate of Jellatt, the plaintiff, and was as follows:

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REQUISITION TO CHARGE LANDS.

MR. SHERIFF,—Required the following lands to be charged, under the Territories Real Property Act, as to the defendant's interest, as the same may appear. (Here follows the description of the several parcels of land required to be charged.)

There was another requisition delivered by Taylor, as Jellatt's advocate, to Robertson, at the same time affecting other lands, but as these other lands were not the lands of any of the plaintiffs in the consolidated suits against Jellatt and Robertson, out of which the present proceedings arose, it has no bearing upon the case.

Copies of this execution and requisition were, on being received by the deputy sheriff, duly delivered by him to the registrar of the district within which the lands were situate, pursuant to the 94th section of the Territories Real Property Act, as amended by 51 Vict. ch. 20, and the registrar entered a memorandum thereof in the register.

At this date all these lands were registered in the name of The Edmonton and Saskatchewan Land Company.

In April, 1894, the deputy sheriff advertised the lands for sale and, on the 27th of June, 1894, the deeds to Wilkie and others of these lands, which had been delivered before the registration of the execution, were registered and notices served upon the deputy sheriff forbidding him to sell.

There is a dispute as to whether the appellant Taylor, who was the execution creditor's advocate, actually directed the lands to be advertised by the sheriff, or whether the latter did it without express orders in the ordinary discharge of his duties. But, in the view I take of the appellant's position, and duty, it does not matter which contention is correct.

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There is also some difference of opinion as to what was said by Taylor at the time the deputy sheriff came to him with the notices of the deeds having been registered and forbidding further proceedings upon the sale. It may be assumed from the evidence that Taylor made light of them and told Robertson to pay no attention to them. His client Jellatt, the plaintiff in the action, had determined to go on with the sale and not withdraw his execution, relying upon a previous decision of the Supreme Court of the Territories, *In re Rivers* (1). Taylor would be fully justified in telling the deputy sheriff of this determination and it would be his duty to do so.

On the fourth of July following, Messrs. Wilkie and others, the grantees of the Edmonton and Saskatchewan Land Company, whose several deeds had now been registered, commenced their actions against Jellatt, the execution creditor, and Robertson, the deputy sheriff, to restrain them from proceeding with the sale under the execution which had been issued and registered against The Edmonton and Saskatchewan Land Company on the ground that the execution was a cloud on their titles and asked that the entry of the execution should be cancelled and removed from the register and that an injunction should be issued restraining the sale of the lands and for damages.

Taylor, the appellant, appeared as solicitor for both defendants, Jellatt and Robertson, being expressly retained by them and defended the suit on the ground that the deeds of the plaintiffs, being unregistered at the time of the registration of the execution against the grantors, they were inoperative as against the execution.

In pleading, he joined both parties in the same defence and, it is now contended, on the part of Robert-

(1) 1 N. W. T. Rep. pt. iv, p. 66.

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son, the deputy sheriff, that in doing so, he was guilty of such negligence as made him liable in this action for the damages sustained by Robertson.

In pleading as he did, he followed the usual forms prescribed by the best pleaders, and it is difficult to see how he could have put in any other defence, or wherein his negligence lay.

He certainly could not have interpleaded for the sheriff and, if he had severed in his defence, his plea could not be materially different from the one he put in for the execution plaintiff and the sheriff jointly. But he did not stop there. Shortly after the actions were begun he applied to one of the judges of the North-West Territories court to have the name of the deputy sheriff Robertson struck out of the writ and the subsequent proceedings. The learned judge who heard the application, unfortunately died before giving his judgment thereon, and Taylor, at the trial of the action before Judge Rouleau, renewed his application, but, as the action was dismissed by Mr. Justice Rouleau and the injunction dissolved, he does not appear to have thought it necessary to accede to the motion and strike out Robertson's name. At any rate, his name was not struck out and the case went up by appeal to the Supreme Court of the North-west Territories, when Taylor appears again to have renewed his argument to have Robertson's name struck out. The application was not successful and the Supreme Court of the Territories reversed the judgment of the trial judge, declared the execution to be clouds upon the plaintiff's titles, ordered the registrar to remove from the register of the lands in question the entries made by him of the execution and enjoined the deputy sheriff from selling the lands. The Deputy Sheriff Robertson was thus made liable for costs of the trial and of the appeal. He accepted the judgment and declined joining in the

appeal to this court. Such an appeal was, however, taken by Jellatt his co-defendant, the execution creditor, and was dismissed, the judgment of the Supreme Court of the North-west Territories being sustained. It is for the costs incurred by Robertson on the trial before Judge Rouleau and on the appeal to the Supreme Court of the North-west Territories, that he now brings this action against Taylor, his advocate and solicitor.

I have already said that I do not see on what possible ground Taylor can be condemned for negligence. So far as his pleading was concerned, I think, with every respect to the learned judges of the Supreme Court of the Territories, that he was right and he certainly shewed zeal and persistence in endeavouring to get his client's name struck out of the action. At the time the actions against Jellatt and Robertson were brought and up to the delivery of the judgment therein by the Supreme Court of the Territories, the case of *Re Rivers* (1) was supposed to have correctly declared what the law was as to the effect of registered executions upon unregistered deeds. Mr. Justice Rouleau, who was himself a party to the judgment in *re Rivers*, in giving judgment on the trial of the case now before us in appeal says:

> In *re Rivers*, the language of the court as expressed by Wetmore and McGuire JJ., is unequivocal. It was held that an unregistered transfer did not pass or affect land and that an execution registered against the registered owner had priority and that such transfer could not be registered afterwards, except subject to such execution.

Feeling himself bound by that judgment and having been himself a party to it, he dismissed the action.

And yet it is contended Taylor should be liable for actionable negligence because, as was said by Lord Davey, in the case of *Blair* v. *Assets Company* (2) he gave advice to his client

(1) 1 N. W. T. Rep. (pt. iv,) 66. (2) [1896] A. C. 409.

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which involved the assumption that a recent and unanimous decision of the very judges before whom the question would come was correct.

As to the question of indemnity, the learned judges in the court below assume Taylor and Robertson to be joint wrongdoers in registering execution against the lands of The Edmonton and Saskatchewan Land Company and hold that Taylor was liable upon an implied indemnity to Robertson, arising out of the written requisition or instructions he had given him to register that execution.

I am of opinion that neither position is sound. I do not think that either the advocate Taylor or the deputy sheriff Robertson was a tort feasor in causing that execution to be registered against the lands of the company, nor do I think that any implied indemnity from the solicitor to the sheriff arose out of it. Each one was, in my opinion, only discharging his duty. It was the clear duty of the solicitor to do everything in his power to gather for his client Jellatt the fruits of his judgment. No question arises as to his authority to act. What he did was with the full authority and consent of Jellatt. He appears to have acted with great caution, for he carefully required the sheriff to charge the lands specified under the "Territories Real Property Act" *as to the defendant's interest therein as the same may appear.* What was the defendant's interest in the land? At that time as far as Taylor or Robertson knew or had notice and as far as the register shewed their interest was that of owner.

How could Taylor justify himself if, being charged by Jellatt his client to reap for him the fruits of his judgment, he had neglected to notify the sheriff of these lands which, as far as he knew or had means of knowledge, belonged to the defendant land company, and if as a consequence the lands were subsequently conveyed away by the land company? The cases cited in

the judgment below, and at the bar, of solicitors going beyond and outside of their duty and officiously pointing out to the sheriff specific personal property as that of the defendant and requiring him to sell are not in point. Taylor here was acting strictly within and in discharge of his duty to his client and the lands which he directed the deputy sheriff to register his execution against, were lands registered in the name of the defendant company and which, being so registered and without notice to the contrary, he had every reason to assume they were the owners of.

It was not until the end of June in the following year, 1894, that he received any notice to the contrary. He was not therefore an officious solicitor going outside of his duty and taking upon himself personal responsibilities which did not properly belong to his position as solicitor, but one discharging a duty which, under the circumstances, was incumbent on him and directing the sheriff to do that which was apparently his duty.

Section ninety-four of the "Territories Real Property Act," as amended by 51 Vict. ch. 20, directs the sheriff to deliver a copy of every writ or process affecting lands which he may have had delivered to him, together with a memorandum in writing of the lands intended to be charged to the registrar within whose district the lands are situate and declares that no land shall be bound by any such writ unless such copy or memorandum has been so delivered. It became clearly his statutory duty after receiving the requisition designating the lands intended to be bound to see if they were registered in the name of the execution defendant and if they were to deliver a copy of both writ and memorandum to the registrar. In the present case he found the lands designated were registered in the name of the execution debtor and in giving

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the registrar the copy of the writ and memorandum he was only discharging his statutory duty. In the like manner when, in April following, eleven months afterwards, he advertised the land, he was only doing his duty and was in no sense a tort-feasor.

The holders of the unregistered deeds had them in their pockets and only produced and registered them on the twenty-seventh of June, 1894, nearly two months after the lands were advertised. Jellatt, the execution creditor, being then notified of these deeds and their registration refused to withdraw the execution, claiming that it took precedence, whereupon the proceedings were taken which rightly determined that the Territories Real Property Act does not give the execution creditor any superiority of title over prior unregistered transferees, but merely protects lands from intermediate sales and dispositions by the execution debtor. See judgment of Chief Justice Strong in *Jellatt* v. *Wilkie, et al* (1). But in that very case the Chief Justice says, at p. 292:

> No doubt, if the sheriff had sold and the purchaser had registered his transfer, the Act would apply, and would in that case, invalidate prior unregistered transfers made by the execution debtor before the registration of the execution.

And so it seems to me that the execution creditor was perfectly right in registering his execution against the lands standing in the name of the judgment debtor and in advertising such lands and continued in the right until at least the unregistered deeds were registered. His refusal to recognize these deeds after registration as taking precedence of his judgment and insisting upon going on to sale compelled the grantees to take the proceedings they did and made him liable for their costs. It may have also created a relationship between him and the sheriff from

(1) 26 Can. S.C.R. 282.

which an implied indemnity to the latter might be assumed. But how could such an indemnity be assumed against the solicitor? His action throughout was taken as solicitor. His notice or requisition to the sheriff was so signed. His principal was known from beginning to end and, unless therefore some express indemnity was given by him, he is not liable. See *Lewis* v *Nicholson* (1); *Collen* v. *Wright* (2); *Cherry* v. *The Colonial Bank of Australasia* (3). See also *Ford* v. *Williams* (4).

As regards the alleged "express indemnity", the court below say that the evidence is conflicting and that in view of the conclusion they have reached upon the implied indemnity

it was unnecessary to inquire whether there was, in fact, any express promise to indemnify.

Neither the trial judge nor the court in banc found that any express indemnity was given.

It is true that Judge McGuire says he

thinks, if it was necessary to connect the defendant with the advertisement, he was aware of it and approved of it.

That may well be so, but such knowledge or approval falls very far short of an express indemnity. There certainly never was any written indemnity, and the existence of any verbal contract was hardly urged upon us at the argument. From a careful perusal of the evidence, I have come to the conclusion that there is not sufficient evidence to justify this court in finding that an express binding promise was made. The deputy sheriff (respondent), does no doubt say that Taylor, more than once, promised him

that he would guarantee him from all damage and harm.

He says that these promises were made at or about the time he was being sued and after the suit was

(1) 21 L J. Q.B. 311.
(2) 7 E. & B. 301; 8 E. & B. 647.
(3) L.R 3 P.C. 24.
(4) 3 Kernan N.Y. 577, 584.

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begun. The appellant Taylor, on the other hand, emphatically denies that anything was said about indemnity, or that the idea of indemnity was ever brought up, except in the summer of 1895, presumably after the judgment of the Supreme Court of the Territories which was delivered 13th June, 1895, and when an appeal to this court was being considered. He further states that he never indemnified or guaranteed any one for their costs in the whole course of his profession, and that Robertson approved of the application being made to have his name struck out as a defendant, and that it was impossible that anything could have been said about indemnity. Mr. H. C. Taylor, the appellant's law partner, says that he was in constant attendance at the office during the years when these proceedings were going on; that he knew nothing of any indemnity to be given Robertson and never heard Robertson mention it. He further says:

> I can't recall any specific conversation with Robertson but have no doubt I was present when there was any conversation between S. S. Taylor (the appellant), and Robertson.

The evidence is conflicting, but I do not entertain any reasonable doubt that no express indemnity was ever given by Taylor or intended to be given. I think a good deal of the confusion or misunderstanding on the part of the respondent, Robertson, arose out of the conversations with respect to the proceedings having for their object the striking out of his name from the action, and the subsequent negotiations to induce him to join in the appeal to this court which he declined doing.

There remains only to be considered the counterclaim. With respect to the second part, to recover back certain alleged overcharges for work done by respondent as sheriff, that clearly cannot be allowed as the moneys, if recoverable at all, do not belong to

Taylor, but to his clients. With respect to the first part of the counter-claim, viz., the costs of defending Robertson in the suit, it was objected that no signed bill had been delivered by Taylor pursuant to the statute. But it is clear from the authorities that such an objection does not apply to a set-off or counter-claim. The court below dismissed this part of the case with the statement that as they found against Taylor on the implied indemnity, if the counter-claim was allowed it would simply go to increase the amount which they held Taylor was bound to indemnify Robertson against. In my view of the case however, there was no such indemnity express or implied and Taylor is entitled on his counter-claim to judgment for what are reasonable charges.

The appeal should, in my judgment, be allowed with costs in all courts, and judgment entered for the defendant on his first counter-claim for such an amount as the proper officer may tax the costs.

Appeal allowed with costs.

Solicitor for the appellant: *H. C. Taylor.*

Solicitors for the respondent: *Beck & Emery.*