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Appeal Judgment In Accident Case

Judgment Concerned An Execution Issued In Connection With Damages Against Defendant Motorists In Case Tried At June Sitting Of Supreme Court.

In the Supreme Court recently in the appeal case of James F. Reid, plaintiff, vs. Benjamin G. Acorn and Daniel A. MacDonald, defendants, judgment was given by Justices Arsenault and Saunders granting the appeal and declaring void an execution issued in connection with the case. In the hearing before the appeal judges Mr. J. J. Johnston, K. C., appeared for the defendant Acorn, and Mr. Donald MacKinnon, K. C., for the defendant MacDonald. The facts and findings are fully set out in the judgments, given as follows:

MR. JUSTICE SAUNDERS

The action herein was brought by the above named plaintiff against the above named defendants for damage caused to the plaintiff through the joint negligence of the defendants in the operation of their respective motor cars on a public highway. The cause was tried before the learned Chief Justice and a jury at the last June sittings of this honourable Court when a verdict was found against both defendants jointly for the sum of $547.50 damages and upon this verdict judgment was entered against the defendants jointly for the sum of $1159.21 damages and costs.

On the 31st day of December 1931 Mr. J. O. C. Campbell, attorney for the plaintiff, caused a fieri facias execution to be issued upon the said judgment against both defendants directed to the Sheriff of Queens County and endorsed to levy for the sum of $1165.21 besides Sheriff's poundage fees, etc.

On the 2nd Day of January 1932 the defendant McDonald paid the Sheriff on account of the levy the sum of $611.18 and a few days later the Sheriff levied on both defendants for the balance of said levy.

On the 9th day of January 1932, the defendant McDonald and his attorney, Mr. Donald McKinnon went to the office of J. O. C. Campbell with a prepared assignment of said judgment from the plaintiff to one Malcolm McKinnon, an attorney in the office of Messrs. McLean and McKinnon. In the said office of Mr. Campbell Mr. Donald McKinnon filled out a cheque for $582.60 the balance due on the said levy and gave the said cheque to Mr. Campbell, the plaintiff's attorney, and immediately thereupon Reid the plaintiff signed and duly executed the said assignment of judgment.

On the 25th day of January, 1932, Mr. J. B. Johnston, attorney for the defendant Acorn, gave notice of motion to the defendant McDonald of his intention to apply to the Judge present at Judges' Chambers to have the fiere facias execution and the said assignment of judgment set aside or the judgment marked satisfied.

The motion came up at Chambers for hearing on the 27th day of January 1932, and the motion was refused on the 4th day of February, 1932; and immediately thereupon an appeal was taken therefrom to this Court. The chief grounds of this application or appeal are as follows:

(1) That the judgment obtained in this cause was recovered against the two defendants as joint tortfeasors and there is no contribution as between the said two defendants, and the assignment of said judgment to the said Malcolm McKinnon was made at the request of the said defendant McDonald to enable him to obtain contribution from his co-defendant Acorn as a joint tortfeasor.

(2) That no leave to enforce said execution by the said Malcolm McKinnon, the assignee of the said judgment, under Order 41 Rule 15 of the Orders and Rules of the Supreme Court or otherwise was taken out or granted.

Ground No. 1

It appears from the evidence of the defendant McDonald that he got a cheque from his wife on the 31st of December 1931 for $500.00 and placed it in the Bank to his own credit. His evidence is "I put it to my credit in general account. At that time I had to my credit in the bank no money." Regarding the $500.00 he obtained from his wife he says "I intended to pay this $500.00 back."

On the 3rd day of January 1932, the defendant McDonald gave Sheriff Bradley a cheque for $890.10, being $279.30 for his own costs and $610.80 for what he regarded as his share of the joint judgment and costs. He says the Sheriff made it up and "it was my equal share." The balance I understood he was going to take from Ben Acorn. That is the arrangement the Sheriff and I made. I understood I was clear of it if I paid $611.18."

From this evidence it appears the defendant McDonald thought he was clear of any further payments as far as he was personally concerned. Some few days later the Sheriff levied on both defendants for the balance due; and the defendant McDonald was then in a quandary as to what course he should pursue because he had thought the matter was ended, having, as he said, paid the Sheriff the money he borrowed from his wife for the purpose of settling. He also felt assured he had made definite arrangements with the Sheriff to look to Acorn for the balance due on the levy and now to his surprise he finds the matter has not been settled. McDonald doubtless felt that as the judgment was a joint one in all fairness and justice Acorn should pay his equal share, and when he discovered the Sheriff looking to himself for payment in full he naturally tried to protect himself. He then saw the Sheriff and was told by him to pay in full and get his share from Acorn. McDonald says he found out he could not recover his share from Acorn. He saw the Sheriff again and this time he was told by him to get a third party to take over the judgment. A third party was obtained in the person of Malcolm McKinnon and assignment to him of the judgment was duly taken.

Was or was not this assignment taken to enable the defendant McDonald to obtain contribution?

Clearly McDonald could not take an assignment to himself; the law is well settled that there is no contribution between joint tortfeasors.

As stated, on the 2nd of January, 1932, when McDonald paid the sheriff the $611.18 he considered he was relieved and the book closed. Seven days later when his goods and chattels are levied on by the Sheriff he tries as best he can to protect himself. But notwithstanding his unfortunate position I cannot see how this Court can assist him, especially in the face of his own honest declaration. He was asked the question "Was this assignment of judgment taken to Malcolm McKinnon to enable you to collect the balance from Ben Acorn?" and he answered "Yes." Does this not settle the matter in question? I think so.

This Court will not be a party to a subterfuge to enable McDonald to do indirectly what he could not do directly.

I am therefore of opinion that the assignment from Reid to McKinnon is void, the judgment obtained herein satisfied and the execution issued and renewed herein paid in full. I am unable to measure the degree of responsibility or negligence of the respective defendants in connection with the accident which gave rise to this suit. Each may have been equally at fault or either one wholly at fault. It seems to me however as the record stands the fair and reasonable thing to have done was for each to have paid one-half. Under the circumstances there will be no costs to either party.

It is not really necessary to consider point No. 2, but as it is on a question of practice I deem it advisable to do so.

Re Ground No. 2

Order 41 Rule 15 is as follows:

"15. Where the ten years have elapsed or any change has taken place by death or otherwise in the parties entitled or liable to execution the party alleging himself to be entitled to execution may apply for leave to issue execution accordingly, or to amend any execution already issued."

Rule 16 is as follows:

"16. Any person not being a party to a cause or matter who obtains any order, or in whose favour any order is made, may enforce obedience to such order by the same process as if he were a party to such cause or matter. . . . ."

Where there has been a change "by death or otherwise in the parties entitled or liable to execution" within the meaning of Imperial Order 42 Rule 23 of the Rules of the Supreme Court the leave of the Court is necessary as provided by that Rule before execution can issue. (Kaley V. Hothersall (1925) I K. B., p 607; L. J., Vol 94, p. 348).

Order 42 Rule 23 reads as follows:

"When six years have elapsed since the judgment or death of the order or any change has taken place by death or otherwise in the parties entitled or liable to execution. . . . the party alleging himself entitled to execution may apply to the Court or a judge for leave to issue execution accordingly; and such Court or a judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, etc, etc."

In the case of Kaley v Hothersall, Scrutton L. J. says:

"In this case co-sureties having satisfied a judgment have taken an assignment of it from the judgment creditor, under section 5 of the Mercantile Law Amendment Act, and desire to raise the question whether it is necessary to obtain the leave of the Court to issue execution. In my view, rule 23 of Order XLII prevents them from doing so without leave, because they are not the persons by whom judgment was originally obtained."

It is therefore clearly established that an assignee, not being the person by whom the judgment was originally obtained, must first obtain leave under the rule before issuing any execution.

In the case of an execution having been issued by the person who obtained judgment the question arises as to whether it is necessary for the assignee of the judgment to obtain leave under the rule before renewal of the execution. I must say I can see no real distinction between issuing and renewing an execution.

Assuming the defendant McDonald was indebted to the defendant Acorn in an amount in excess of the amount of the levy, should the defendant McDonald be permitted to levy and sell the defendant Acorn's goods and chattels? I certainly think that would be unfair and unjust. It seems to me the very spirit and intention of the rule is for the purpose of preventing this.

In Fast v Zarchekoff (20 Sask. 596) Lamont J. A. says:

"The question in this appeal is whether a surety who has paid the full amount of the creditor's claim is entitled without leave to enforce against a co-surety the execution obtained by the creditor against the principal debtor or must he obtain leave to issue execution in his own name under Rule 451."

And he says it is necessary in the case simply of an assignee of a judgment debt.

Again in the case of Condon v Gassall & Drinkle (23 Sask. 275) an execution was outstanding at the time the assignment of judgment was given (similar to the case under consideration) and Martin J. says:

"The assignment did not give the defendant Drinkle the right to enforce the execution, for, although it was expressly mentioned, the contents of the assignment cannot override the provisions of Rule 451, and, until the rule is complied with, the assignee of a judgment debt cannot issue execution . . . . ."

Rule 451 is exactly the same as Imperial Order 42 Rule 23 previously read.

I therefore hold in this case it was necessary for Malcolm McKinnon to have obtained leave under Order 41 Rule 15 before he renewed the execution issued herein.

MR. JUSTICE ARSENAULT

In this matter the facts are fully set out in the judgment of Mr. Justice Saunders.

The first question to be considered is whether as a matter of practice under Order 41, Rule 15, it is necessary for an assignee of a judgment to apply for leave to issue execution or to amend an execution already issued. Order 41, Rule 14 is as follows:

"14. As between the original parties to a judgment, execution may, without leave, issue at any time within ten years from the date of same."

Rule 15 reads as follows:

"15. Where the ten years have elapsed or any change has taken place by death or otherwise in the parties entitled or liable to execution the party alleging himself to be entitled to execution may apply for leave to issue execution accordingly, or to amend any execution already issued."

The above Rule 15 is the same as the Ontario Rule 566. It differs from the Imperial Rule in as much as the Imperial Rule omits the provision for amending an execution already issued, nor is this provision in the Saskatchewan Rule to which I will make reference. There seems to be no doubt that, where there has been a change of parties, leave is necessary before an execution can be issued. This is undoubtedly the practice in England. It has also been so decided in Saskatchewan by the Court of Appeal in Fast v. Zarchekoff (20 Sask. 596), where at page 597 Haultain C. J. says: "There can be no doubt that the assignee of a judgment creditor can only issue execution by leave under Rule 451."

Other Authorities

In Condon v. Garsall & ano. (23 Sask. 272) at page 275 Martin J. says: "It does not appear that the defendant Drinkle took any proceedings as prescribed for in Rule 451 to obtain leave to issue an execution; the assignment did not give the defendant Drinkle the right to enforce the execution, for although it was expressly mentioned, the contents of the assignment cannot override the provisions of Rule 451, and, until the Rule is complied with, the assignee of a judgment debt cannot issue execution." Then he refers to the Fast v. Zarchekoff case above. It may be noted that in this case, as in the Zarchekoff case, an execution had already been issued before assignment and that the assignment purported to assign the execution as well.

In recognition of the practice that leave is necessary, even in the case where an execution is issued, I quote from Lamont J. in the Zarchekoff case at page 599, where he says: "If this were the case simply of an assignee of a judgment debt I would agree with the conclusion reached by the learned Judge in Chambers," that is, that it was necessary to obtain leave under Rule 451.

Some cases were cited on the argument to show that under the old practice it was not necessary to obtain leave where there had been a change by the death of either the judgment creditor or the judgment debtor after execution issued and a levy made and this seems to be still the practice. In such cases the principle seems to be that there is really no change as the levy is against the same goods and for the benefit of the same party.

If we look at the assignment of the judgment in this case we see that the grant is of "all that the said mentioned judgment and all and every sum or sums of money now due and hereafter to grow due by virtue thereof for principal, interest and costs and all benefit to be derived therefrom either at law or in equity or otherwise howsoever"; and the Power of Attorney appoints the assignee "to be the lawful attorney in the . . . . of the assignor but at the proper costs of the assignee to ask, demand and receive from the said Benjamin G. Acorn and Daniel A. McDonald the said judgment debt and premises assigned and on non-payment of same or any part thereof to obtain any execution or execution."

Power of Attorney

This assignment does not purport to assign the execution that had been issued thereon but merely the amount due or to grow due; on the contrary the Power of Attorney appoints the assignee the attorney of the assignor to ask, demand and receive, etc., and on non-payment . . . . to obtain any execution or executions, etc.

Rule 15 of Order 41 seems to me very explicit in as much as it provides that where any change has taken place by death or otherwise in the parties entitled or liable to execution the party entitled may apply for leave to issue execution accordingly "or to amend any execution already issued."

It has been held in Saskatchewan (Fast v. Zarchekoff), even in the absence of the latter words in the Saskatchewan Rule 451, that where a change has taken place and although execution may have been issued that leave is still necessary.

I am unable to find anything to the contrary and I am therefore of the opinion that the practice here where there has been a change of parties should be to apply for leave to issue execution or to amend in cases where execution has already been issued.

In the present case, even if the assignee of the judgment were entitled to enforce it, the assignee must first apply for leave under Rule 14, Order 41 before the execution can be executed.

The second part of this application is the substantial one and shortly is that the enforcement of the execution issued by the original plaintiff herein by the assignee of the judgment against the defendant Acorn, a joint tortfeasor with the defendant McDonald, is an abuse of the process of the Court and that the defendants being joint tortfeasors there is no contribution between them and that the assignment to McKinnon as a bare trustee was made at the request of McDonald, one of the joint defendants, to enable him to get contribution from his co-defendant Acorn.

Evidence on Record

In order to get the true picture it is necessary to examine the record. The record shows that the judgment herein was entered on the 21st December, 1931. Execution thereon was issued by J. O. C. Campbell, attorney for the plaintiff, on the 21st day of December, 1931, with directions to the sheriff to levy for the sum of $1,165.21 and was returnable on the 31st day of January, 1932, and placed in the sheriff's hands on the day of issue—21st December, 1931.

On December 21st, 1931, the defendant McDonald got a cheque from his wife payable to himself for the sum of $500.00, which he cashed and deposited to his account in the bank the same day. He says that at that time he had no money in the Bank but that he was obliged to raise more money by giving a note. On the same day—December 31st, 1931—he issued a cheque on the Bank for the sum of $890.19 payable to the Sheriff of Queens County.

He had evidently interviewed the Sheriff before making out the cheque for he says the Sheriff made up the amount as being the sum of $610.99 for his half of the amount of the levy together with sheriff's fees and a further sum of $279.30 for some costs which he was personally liable to pay. In paying this amount he says he thought the sheriff would get the other half of the levy from his co-defendant Acorn. McDonald further says that his first intention had been to pay the whole judgment and take an assignment of it but that he found out that he could not do this. The sheriff after this proceeded with his levy on both the defendants.

Assignment of Judgment

On the 8th or 9th of January the defendant McDonald came to see the sheriff about the levy and there met Mr. J. O. C. Campbell, the plaintiff's attorney, and asked him if he would assign the judgment. Campbell replied that he would have to consult his client. On the ensuing day Campbell telephoned the office of McLean & McKinnon, attorneys for McDonald, and there spoke to Mr. Malcolm McKinnon, an attorney employed in the said office, and told him that his client was willing to assign and Malcolm McKinnon said that he would inform Mr. Donald McKinnon, the defendant McDonald's attorney.

On the same day an assignment was prepared to defendant McDonald's wife and Mr. Donald McKinnon and the defendant McDonald attended on Mr. Campbell with it. Mr. Campbell objected to the form of the assignment. Some discussion took place as to the advisability of taking an assignment to McDonald's wife and a new assignment was prepared and this was executed assigning the judgment to Malcolm McKinnon who says that he took it as trustee for defendant McDonald's wife.

The consideration for the assignment was paid by cheque issued by Mr. Donald McKinnon, attorney for McDonald. The negotiations with the sheriff and with Campbell up to this point were carried on by the defendant McDonald and by Mr. Donald McKinnon his attorney, and there is no evidence whatsoever that defendant McDonald's wife took any part nor does she appear in such negotiation. She has filed no affidavit nor has she given any evidence. There cannot be any doubt that she gave her husband a cheque for $500.00 on the 31st December, 1931, but at that time and for eight or nine days after that there was no intention of taking any assignment to her.

It is also significant that McDonald on being cross examined before the Chief Justice in answer to the question "Was the assignment of the judgment taken to Malcolm McKinnon to enable you to collect the balance from Benjamin Acorn?" says "Yes". Again on page 4 of his evidence the defendant McDonald says "I intend to pay this $500.00 back". This refers to the $500.00 given him by his wife on the 21st December, 1931.

McDonald's manifest intention in getting the $500.00 from his wife was to pay his share of the judgment at a time when he had no intention of taking an assignment to his wife.

Whether the sheriff had instructions to collect the whole of the judgment from the defendant McDonald and whether such was his intention there is nothing to show, nor am I concerned with the sheriff's instructions or intentions.

Assignment a Subterfuge

At no time did the defendant McDonald's wife appear to have carried on negotiations for an assignment or to have requested same or to have been represented by an attorney or to have paid the consideration mentioned for that purpose. Even at the hearing the substantial part of the argument was in opposition to the application made by Mr. Donald McKinnon, attorney for the defendant McDonald. In the circumstances disclosed by the record I cannot but look at this assignment as a subterfuge and an attempt on the part of one joint tortfeasor to do indirectly what he could not do directly,—that is, to get contribution from his co-defendant by having the judgment assigned to a third party on the pretense that it had been purchased by his wife.

It has been argued that the defendant McDonald has paid half of the judgment and that the defendant Acorn should be made to pay the other half and that the effect of refusing contribution would be a great injustice.

This was also urged in an old case—Lingard v. Bromly (1 Vesey & Beames, 114) but the Master of the Rolls in giving judgment said that "where entire damages are recovered against several defendants guilty of a tort a Court of Justice will not interfere to enforce contribution among the wrong doers."

I cannot here do better than quote the words of Middleton J. in the case of Eaten v. Rosen (30 L. R., p. 212) which are most applicable to this case.

"It is admitted that Rosen cannot claim indemnity or contribution from Wedd or any right against him. There is no contractual relation between them and until the accident they were strangers. There is nothing to show the respective degree of negligence on the part of each which resulted in the accident and there is no statute which indicate that in the absence of any such finding they are to be presumed to be equally at fault. It was enough for the plaintiff to show that the negligence of each defendant was a contributory cause to the accident no matter how slight the fault of either might be. Without knowing more it might be regarded as unjust that one defendant should pay all the damages awarded, but that merely from the point of view of abstract justice; one defendant might be much more to blame than the other, then he should bear substantially the whole burden and it might be a great injustice in some cases to require an equal contribution. In the absence of a finding as to the degree of fault it is idle to speculate as to the justice or injustice."

After a careful examination of the record and of the evidence it is with great deference and reluctance that I find myself unable to agree with the Judgment of the learned Chief Justice delivered at Chambers. I am of opinion that the appeal should be granted and that the execution should be declared void and that the judgment recorded in the suit should be declared paid and of no further effect but, because the defendant Acorn has no merits otherwise, there will be no costs to him of the application.

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CENTRAL GUARDIAN

DON'T MISS Mrs. Nash and Mr. Douglas as the practical jokers, St. Paul's Parish Hall, Friday evening. 2849-5-5-1i.

UNITED BAPTIST SERVICE for May 8, Dundas 3 p. m. St. Peters 7 p. m. Annandale 11 a. m. H. C. Morgan, Pastor.

NEW LONDON GROUP, Presbyterian Church in Canada, services on Sunday, May 8, will be as follows: 11 a. m. Long River; 2.30 p. m. Clifton; 7 p. m. Granville.

POLICE COURT — Five drunks appeared before the Stipendiary Magistrate yesterday morning. Two were remanded until Friday. One had his ten dollar another his twenty dollar bail bond estreated. And the fifth was fined $5 and costs or ten days. An autoist charged with not stopping confessed and paid $2.

VISITS ORPHANAGES — Mr. Theodore Georges accompanied by a Guardian representative visited the St. Vincents and Prince Edward Island Protestant Orphanages yesterday morning. Mr. Georges was making arrangements to treat the children of these institutions to fruit and candy next Saturday. This kindly act will no doubt be much appreciated.

PERSONALS

Little Miss Marjorie Hamilton left Wednesday by the Hochelaga enroute to Pictou to join her family.

Mr. Andrew MacDonald, Sr., who has been spending the winter in the city at the Sacred Heart Home, left yesterday on return to his home in Vernon River. Mr. MacDonald, although 90 years of age, is quite active and enjoyed his winter in the city.

Efficiency

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In she came,
Down she sat;
Laid an egg,
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Kill the moths now before they start on their path of destruction eating away at your clothing and furnishings. The safe and sure way to kill moths is to spray FLY-TOX. Spray directly on clothing, furs, chesterfield and rugs. FLY-TOX will not stain and is guaranteed to kill moths. 318-M
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