JAMES J. RUTLEDGE (DEFENDANT) . . APPELLANT;

1906
*Nov. 29
*Dec. 5.

AND

THE UNITED STATES SAVINGS AND LOAN COMPANY (PLAINTIFFS) . . . . RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Practice—Revising minutes of judgment—Mistake—Costs of abandoned defences—Reference to trial judge.

The plaintiffs' action was maintained with costs in the courts below, but on appeal, it was dismissed with costs by the Supreme Court of Canada (37 Can. S.C.R. 546), no reference being made to certain costs incurred by the plaintiffs in respect of several defences which the defendant had abandoned in the trial court. On motion to vary the minutes, the matter was referred to the judge of the trial court to dispose of the question of the costs on the abandoned defences.

MOTION to vary minutes of judgment as settled by the Registrar.

The appeal to the Supreme Court of Canada in this case was allowed with costs(1), and the form of the minutes was settled accordingly by the Registrar in Chambers. It appeared by the record that several defences had been pleaded, on some of which the plaintiffs were obliged to issue commissions for the examination of witnesses abroad which had been duly executed. On the trial these defences were abandoned and the sole issue raised was as to the application of

*PRESENT:—Fitzpatrick C.J., and Girouard, Davies, Idington, and Maclennan JJ.

(1) 37 Can. S.C.R. 546.

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the statute of limitations. The plaintiffs were successful in the courts below, but the Supreme Court of Canada reversed their judgments with costs and held that the action was barred by the Yukon Ordinance, ch. 31, of 1890; that being the only question argued on the appeal.

The motion was to have the direction as to costs varied, as having been made inadvertently, and that the plaintiffs should be allowed to set-off their costs *pro tanto* upon the abandoned defences, or, alternatively, to have the matter remitted to be dealt with in the courts below.

Chrysler K.C. for the motion.

Ewart K.C. contra.

The judgment of the court was delivered by

MACLENNAN J.—After judgment in this case, allowing defendant's appeal with costs in this court and in the courts of the Yukon Territory, the respondent moved to vary the judgment by directing that the respondent should be allowed to set off, *pro tanto,* against the costs of the appellant, his costs of the issues raised by the 2nd, 3rd, 4th, 5th and 6th paragraphs of the statement of defence, and that the respondent should recover the costs properly incurred by him in the Yukon Territorial Court after the entering of the appeal to this court.

The action was upon a judgment recovered in the State of Washington, and the defences referred to are: No. 2, that the defendant was at no time subject to the jurisdiction of the courts of that state; No. 3, that he had never been summoned in the action; No. 4,

payment; No. 5, that the Washington Court had no jurisdiction over him; and No. 6, that he was only one of several debtors under the said judgment, and so only liable for a proportion of the debt.

At the trial the defence was rested upon the Statute of Limitations of the Territory, and that is the defence upon which the defendant has ultimately succeeded.

No witnesses were examined at the trial, but the defendant had been examined for discovery, and evidence appears to have been taken on two commissions, one in the State of Washington, and the other in the State of Minnesota, both at the instance of the plaintiffs.

We have no means of knowing what if any evidence or other proceedings were taken by reason of the several defences referred to, nor how far the taking of such evidence or proceedings was reasonable or necessary.

We therefore refer it to the learned trial judge to direct what disposition should be made of the costs of such evidence and proceedings.

There will be no costs on this motion.

Motion allowed without costs.

Solicitor for the appellant: *C. W. C. Tabor.*

Solicitor for the respondents: *J. K. Sparling.*