UNREPORTED PRACTICE CASES*

EXAMINATION IN AID OF EXECUTION DEBTOR — RULES 372 and 374 — DATE WHEN LIABILITY IN TORT ACTION INCURRED

A Judgment Creditor who recovered judgment as a consequence of a fire which occurred in May of 1967 was given judgment in December of 1969, and execution issued accordingly, The wife of the Judgment Debtor was examined under Order issued pursuant to Rule 374(1), with respect to assets transferred to her "since the date when the liability or debt, which was the subject of the action, was incurred".

The wife of the Judgment Debtor refused to answer any questions concerning any transfers prior to the date when judgment was entered, which was December 31st, 1969, and an application was made for an Order directing her to answer questions relating to property transferred to her since the date of the injury.

The question was, therefore, what was the date when "the liability... which was the subject matter of the action" was incurred. The Defendant argued that no liability arose until fault had been found by the court. No cases were found interpreting the word "liability" as used in Rule 372 or Rule 374.

The court referred to *Stokes* v. *Leavens* (1918) 40 D.L.R. 23, which interpreted a clause in the Manitoba War Relief Act relating to the enforcement of "liabilities", and it was held that a claim for damages in an action for tort was not a liability within the meaning of the statute until a verdict had been found. The court then cited *25 Words and Phrases* as applying to responsibility for torts as well as for breach of contracts and obligations arising out of torts as well as contracts, and *3 Words and Phrases Legally Defined,* ptd. 153 to 155, and quotations therein from *Roberts* v. *Roberts* [1962] 2 All E.R. 967, and *Hall* v. *Bonnett* (1956) S.A.S.R. 10. Reference was also made to *Littlewood* v. *George Wimpey et al.* [1953] 2 All E.R. at 915, and *Jowitts Dictionary of English Law,* at 1085. Rule 374(1) (b), in dealing with costs, refers to "commencement of the action", and was also said to be helpful in interpreting sub-rule (1) (a).

The court held that Rules 372 and 374 must mean that the judgment debtor or a transferee from him can, in the case of a judgment for damages for a tort, be examined on events and transactions back to the date of the commission of the tort. To decide otherwise would mean that a defendant in a tort action could promptly and fraudulently dispose of his assets.

(Medyniski v. *Rogozenski et al.,* S.C.A., J.D.E., 57523; L.D. Hyndman, Q.C., Master in Chambers).

PRACTICE — CLAIM AGAINST CO-DEFENDANT — RULE 77

A Defendant, in his defence, pled that he was entitled to indemnity under a contract of indemnity between himself and his co-defendant. In addition to pleading this defence, he served a notice on his co-defendant under Rule 77(1). The co-defendant moved to strike out the paragraph of the Statement of Defence setting up the contract of indemnity, and claimed that the defendant should have issued a third party notice under Rule 66. It was argued that the existence of the contract was irrelevant to the defence against the plaintiff.

The court held that the pleading was not embarrassing, citing *Meyers* v. *Freeholders Oil Co. et al.* (1956) 19 W.W.R. 546, and might be relevant, citing *Jones* v. *Calgary et al.* (1969) 67 W.W.R. 589.

To the argument that a third party notice, rather than a notice under Rule 77 should be used, the court held that such was a proper case for the use of Rule 77. It was pointed out that our discovery and production rules, 186(2), and 200(1), were wide enough to allow discovery and production from co-defendants, and there was no need for resort to third party notice for that purpose.

(Noel et al v. *St. Paul et al.,* S.C.A., J.D.E., 66608; L.D. Hyndman, Q.C., Master-in-Chambers).

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