UNREPORTED PRACTICE CASES

PAYMENT INTO COURT—ACCEPTANCE*

Money was paid into Court, and later an additional sum was paid in. This was accepted within the time limited by the Rules and during the actual trial, indeed three hours after being paid in. The Court held that the money could be accepted at any time up until judgment. The plaintiff was entitled to her costs up to payment in, but these were limited to the column that the judge thought appropriate to the amount he would have awarded.

(*Boucher* v. *Hinteregger et al.*, S.C.A., J.D.E., No. 77468, Dec. 19, 1974, Lieberman J.)

PARTIES—DEFENDANT DECEASED—SECTION 61(1)(c) LIMITATIONS ACT—POWER TO SUBSTITUTE PROPER PARTY*

An action for damages arising out of a motor vehicle accident was commenced against a number of defendants, including S. The Statement of Claim alleged gross negligence against "the Deceased S". The Statement of Claim was issued ten days before the limitation period expired, and three days later a personal representative was appointed for the estate of S. The plaintiff changed solicitors and the new solicitor, being unaware of the appointment of a personal representative applied to have the Public Trustee appointed as administrator *ad litem*. The Master declined to give that order, as he did not feel the Public Trustee could be both plaintiff and defendant. At that hearing, neither the solicitor for the plaintiff nor the Master was aware of the appointment of the personal representative. The Master pointed out that a misnomer could be corrected, but a substitution is generally not permitted. (citing, *inter alia, Doherty* v. *Flagstaff* (1962) 38 W.W.R. 364; *Golden Eagle* v. *I.O.M.M. & P.* [1974] 5 W.W.R. 49.) Ordinarily, the action would be a nullity: *Dredge* v. *Greer* [1961] O.W.N. 185, but section 61(1)(c) of The Limitation of Actions Act authorizes a substitution. The learned Master referred to *Buteau* v. *The Public Trustee* [1971] 3 W.W.R. 585, where an amendment was allowed. That case was distinguishable and did not refer to section 61. The section reads "Where an action is brought against a person who is in fact deceased" and might be better drafted "Where an action has been brought naming as a defendant a person who was in fact deceased".

The amendment adding the personal representative was allowed with costs to the defendants.

(*Public Trustees (Carpentier Estate)* v. *Smolski et al.*, S.C.A., J.D.E., No. 83184, 20 March, 1975, L. D. Hyndman, Q.C.)

PARTIES—AMALGAMATION OF COMPANIES—SUBROGATED INSURER*

An insurer, having subrogated rights, sued in the name of the insured for damages. After commencement of the action, the plaintiff and the defendant were amalgamated and a solicitor representing the named defendant moved to strike out the Statement of Claim.

It was pointed out that, strictly speaking, neither solicitor was instructed by the merged Company. The claim was an asset of the plaintiff and a liability of the defendant before merger and the effect was that one extinguished the other.

The Master held that the rights of the insurer could not be lost through merger. He referred to *R.* v. *Black & Decker Manufacturing* (1974) 43 D.L.R. 393. The Master held that the action was not tenable, but gave leave to the insurer to be substituted as plaintiff.

(*Atlas Construction Co. Ltd.* v. *Great West Steel Industries Ltd. et al.*, S.C.A., J.D.E. 67903, March 12, 1975, L. D. Hyndman, Q.C.)

CLAIM AND COUNTERCLAIM—NO SET-OFF AGAINST MONIES OWING TO VENDOR OF LAND—JUDICATURE ACT*

The plaintiff claimed a Vendor's lien and the defendant counterclaimed for damages for faulty construction. The plaintiff applied for an Order *Nisi*. The claim resulted from amateur conveyancing, which resulted in the Vendor's transferring his land without securing the balance of the price.

The Master held that the Vendor had a Lien, but it was subject to the provisions of section 34(17) of The Judicature Act. Because there was ample equity and the Purchaser had plenty of time to prosecute his Counterclaim, a one-year redemption period was set. The Interim Agreement did not provide for interest, so all the plaintiff was entitled to was for Judgment.

The plaintiff was entitled to Judgment notwithstanding the Counterclaim, because the Counterclaim could not be set off against an unenforceable debt, following *Renner* v. *Racz,* [1972] 1 W.W.R. 109.

(*Carr Homes* v. *Prince,* S.C.A., J.D.E., No. 80471, June 16, 1975, L.D. Hyndman, Q.C., Master.)

*Unreported Practice Cases edited by W. A. Stevenson, now Judge of the District Court of Alberta.