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can come before the Court. The words of the rule so far as material are:—

> The costs of the whole action and of every particular proceeding therein and of any proceedings before the Court shall be in the discretion of the Court and the Court shall have full power to award and apportion costs in any manner as it may deem proper.

I think the taxation by the master must be regarded as having been set aside on the ground that there was no authority to tax plaintiff's costs as against defendant, no costs having been awarded to plaintiff.

Order made accordingly.

July 12.

[CIVIL JURISDICTION.]

AGENT-GENERAL OF IMMIGRATION *v.* BANK OF NEW ZEALAND.* (No. 2.)

Costs—Civil Procedure Rules, r. 378*—Schedule B.*

The Court has power to award costs to a successful party upon an application being subsequently made for that purpose, although no application for such costs had been made to the judge at the trial.

The same counsel appeared as in the last case.

The facts and arguments sufficiently appear from the judgment:—

H. S. BERKELEY, C.J. This was a motion by the plaintiff, subsequent to the trial, for an order awarding him the general costs of the action.

The trial had taken place before me without a jury, on the 20th of May last, when judgment was given for the plaintiff.

No application was made at the trial for costs and in consequence no order was then made awarding costs.

Taking the view that costs followed the event unless otherwise ordered, the plaintiff as the successful party

* See last case.

to the action entered up judgment for the amount recovered together with costs to be taxed, and subsequently brought in his bill of costs before the master for taxation.

On a summons to review I held the taxation to be irregular, inasmuch as no order awarding costs had been made, such an order being in my opinion a condition precedent, under rule 378, before either party to an action can claim costs from the other, and the taxation was set aside on that ground.

The plaintiff now makes to the Court sitting *in Banc* the motion which he should in ordinary course have made to the judge at the trial.

On this motion two questions arise, viz.:—

(1) Would the plaintiff have been entitled to costs had he asked for them at the trial?

(2) Having neglected to apply to the judge at the trial, can he afterwards make the application to the Court *in Banc?*

The first question may be answered at once and in the affirmative. The law as to costs which should bind every judge at a trial is, as laid down by Sir George Jessel, M.R., in *Cooper* v. *Whittingham* (1), "that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion and cannot deprive him of his costs." The discretion of a judge as to awarding costs must be judicially exercised. A successful party may of course waive his right to costs; he need not apply for costs: but if he does apply he must not be capriciously deprived of his costs, but only for good cause. It is clear therefore that had the plaintiff

(1) L. R. 15 Ch. D. 504.

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applied to me at the trial, I would in pursuance of my duty have awarded him his costs.

The second question presents more difficulty. It is contended by the defendant that the application for costs is now too late; that granting the case to be one in which the plaintiff would on proper application be entitled to costs such application should have been made to the judge at the trial: that costs if awarded at all can only be awarded by the judge who tried the case, and at the time that judgment is delivered.

The Supreme Court Rule 378, under which the power to award costs is given, is silent as to the time when the application for costs should be made. The words of the rule so far as material, are—

> The costs of every action, &c., shall be in the discretion of the Court; and the Court shall have full power to award and apportion costs in any manner it may deem proper.

To support his contention the defendant relies upon the following words, which appear at the end of the table of fees in Schedule B to the Rules under the heading "Counsel's fees when acting as counsel only," namely, "No fees to counsel will be allowed unless the Court in awarding costs at the time judgment is delivered shall make special order therefor."

It certainly is in practice more convenient and better in every way that the question of costs should be dealt with by the judge at the trial and the words relied on by the defendant lend much colour to the view he takes: but on careful consideration I am of opinion that the power of awarding the costs of an action is not confined to the judge who tried the case. I think that on the true construction of rule 378 the power is possessed not only by the judge but that there is a concurrent power in the Court. As used in the

Rules the word "Court" means "The (Supreme) Court or a judge thereof": that is to say "Court" means "a single judge or the full Court (the Court *in Banc*) as the case may be. The discretion as to costs will in the case of an action ordinarily be exercised by the "judge" who tried it and in that sense be exercised by the "Court," and should the discretion be exercised I do not think the Court, in the sense of the Court *in Banc*, would have any further jurisdiction; for the concurrent discretion will have been exercised and the jurisdiction exhausted. Where, however, as in this case, no application was made at the trial and therefore there was no exercise by the judge of the discretion vested in him concurrently with the "Court" it seems to me that the concurrent jurisdiction continues in the Court *qua* "Court *in Banc*" and may be exercised by it: and if so, necessarily after the conclusion of the trial; for it is clear that no application could be made after the trial to the judge *qua* judge who tried the action, for after judgment he is, *qua* presiding judge, *functus officio*. The discretion as to costs may be exercised in one of two ways. The judge may *ex mero motu* award costs to a party or deprive him of them or he may leave the parties to apply.

I adopted on the trial of this action the latter of these two courses.

The plaintiff, believing that costs followed the event and went to him as the successful party as a matter of course, made no application at the trial, and he now seeks to rectify that omission by an application to me sitting as the Court *in Banc*. The question is, can I, so sitting, entertain the application?

For the reasons I have given, I am of opinion that I can; and having the power to entertain the application I am of opinion that, on the authority of *Cooper* v.

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Whittingham (supra) which I feel bound to follow, an order for his costs must be made: and that is accordingly done.

As however these proceedings have been rendered necessary by the neglect of the plaintiff to follow the more convenient and usual practice of applying for costs at the trial; and as his right to make the application now is perhaps open to question and certainly fairly open to dispute on the part of the defendants the order for costs is made on the terms that the plaintiff do pay to the defendants the costs of this application, liberty being given to the defendant to set-off such costs against such as may be payable by him.

Order made accordingly.

Nov. 22.

[APPELLATE JURISDICTION.]

RECEIVER-GENERAL *v.* BRODZIAK AND COMPANY. (No. 2.)

Case stated—Appeals Ordinance 1876. *ss.* 3, 11—*Customs Ordinance* 1881. *ss.* 90 (4), 100—*Forfeiture.*

An appeal lies by way of a case stated under s. 11 of the Appeals Ordinance 1876 from the dismissal of a prosecution although the amount involved is under 5*l.*, s. 3 of that Ordinance only referring to cases of conviction and fine.

The Chief Police Magistrate having declined to make an absolute order of forfeiture of tobacco imported contrary to provisions of s. 90 (4) of the Customs Ordinance 1881, there being no suggestion of fraud,

Held, that the prohibition in that section was not an absolute one, but only one *sub modo*, and that the magistrate, accordingly, had a discretion under s. 100 whether he would order a forfeiture or not.*

This was an appeal by way of a case stated from a decision of the Chief Police Magistrate at Suva, dated

* See now Ordinance I. of 1895, s. 34, as to forfeitures.