

## HIGH COURT OF JUSTICE.

Barron, Loc. I.]

[Oct. 27, 1898.]

CRAWFORD v. TOWNSHIP OF ELLICE.

KERR v. TOWNSHIP OF ELLICE.

*Drainage Act R.S.O. c. 226 ss. 93-94—Jurisdiction of Referee—Notice of discontinuance—Power of Local Judge to grant orders of reference under s. 94.*

Motion for an order referring the action to the Referee.

BARRON, Loc. J.—Each action is in damages, resulting from the non-repair of drains, which it is alleged, defendants have to keep in repair and maintain. In the Crawford action a mandatory order is asked for, requiring the defendants to maintain and keep the drain in order. The pleadings are closed. It appears that proceedings were at first taken under s. 93. The notice required by that section was served in due time. Applications were made before the Referee who made certain orders. The plaintiffs on such proceedings were examined. After this the plaintiffs served but did not file notice of discontinuance. This step was taken under section 104 of the Act. The defendants set up that by reason of this, the claims of the several plaintiffs are already in another forum; that the referee is now seized of the claims; that upon the trial this contention could be successfully urged in favour of dismissal of the actions and therefore that I, as Local Judge, have no jurisdiction. It is further said that the notice of discontinuance is not in effect such a notice, because the plaintiffs have not taken out an appointment to tax the defendant's costs, or at least have not permitted sufficient time to elapse to enable defendants to do so.

The reason requiring the plaintiff to wait is, against the plaintiff, so as not to permit him to forestall the defendant, who first has the right to take out an appointment and tax costs; but I do not find that not waiting is to bar plaintiff from bringing another action within the time he reasonably should wait for another and entirely different purpose. Nor is the notice less effectual, because the plaintiffs have not ascertained and paid the defendant's costs (see *Barry v. Hartley*, 15 Prac. R. 376.) Then as to the objection that the claims of the plaintiffs are now in another forum, and that the Referee is seized thereof. It appears from the statement of claim in each case, that the claim is one in regard to which he, the Referee, has no jurisdiction except under s. 94, and that section has never been invoked to give and secure him jurisdiction. Under s. 93 the jurisdiction of the Referee is as to damages done "in the construction of drainage works, or consequent thereon." By the words "consequent thereon" is meant consequent upon the construction of drainage works. Now these actions are not for such damage at all; but for damages arising since the construction "in not maintaining the drains." There is no fault found with the drains or with their construction, on the contrary the drains and their construction