

plaintiffs and Millar (the amount to be determined on a reference), and ordered George A. Case personally and the company to pay the costs of the plaintiffs and Millar.

From this judgment an appeal was taken to a Divisional Court by George A. Case and G. A. Case Limited, with the result that these two defendants were relieved from the judgments pronounced against them by the trial Judge.

The appellants have urged before us that the judgment of the trial Judge against the two defendants named should be restored, and that, in addition, George A. Case personally should be condemned to pay damages.

As regards their position as defendants in this action and their legal liability, George A. Case personally and G. A. Case Limited occupy distinctly different positions. Let us first consider that of George A. Case. When the case was taken to the Divisional Court, the present appellants did not cross-appeal as to that part of the judgment which dismissed the action as to him save as to costs, so that they now cannot obtain anything higher than a restoration of the judgment of the trial Judge. Their appeal as to damages must, therefore, be dismissed.

As to costs, it has been well settled that sec. 119 of the Judicature Act and Rule 1130, which provide that costs shall be in the discretion of the Court or Judge, and that they shall have full power to determine by whom and to what extent the costs are to be paid, do not enable the Court or Judge to condemn a successful party to pay the costs of an unsuccessful party, and that a plaintiff can not be awarded costs against a defendant except where it is held that he had a right of action. See *Mitchell v. Vandusen*, 14 A.R. 517; *Fleming v. City of Toronto*, 19 A.R. 318; *Dicks v. Yates*, 18 Ch. D. 76; *Andrew v. Grove*, [1902] 1 K.B. 625.

The trial Judge having held that the plaintiffs had no right of action against Case personally, and this not having been appealed against, the Divisional Court was quite right in reversing that part of the judgment which condemned Case personally to pay the plaintiff's costs; and the appeal must be dismissed so far as it relates to him.

The action and the appeal, in so far as they affect G. A. Case Limited, stand upon a entirely different footing. It is a distinct legal entity, although it is so closely associated and indented with George A. Case as an individual. The formation of the company was a mere device to enable George A. Case to continue to carry on his business as a broker, with-