

2. Where one of two defendants has appeared and pleaded, but the other defendant has not been served within the time limited for service, the appearing defendant is not entitled to treat the action as having been abandoned as against his co-defendant and to himself serve notice of trial; he should first inquire of the plaintiff as to the intention to proceed against the unserved defendant, and if it appears that the action is being informally abandoned as to the unserved defendant without service of a discontinuance, the appearing defendant may make an interlocutory application to strike out the name of his co-defendant.

*Hannesson*, for plaintiff. *Heap*, for Town of Selkirk. *Guy*, for Winnipeg Ry. Co.

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Robson, J.]      SELICK v. TOWN OF SELKIRK.      [March 23.

*Practice*—One defendant serving notice of trial before service of statement of claim on other defendant—When cause at issue—Abandonment by plaintiff of proceedings against one of several defendants.

Where there are two defendants, one of whom has not been served with the statement of claim, the cause is not at issue, although the time allowed by the Rule for such service has expired, for it is possible that plaintiff might succeed on an application under Rule 176 for leave to make the service. The defendant who has been served cannot, therefore, under such circumstances, bring on the action for trial, and a notice of trial served by him on the plaintiff should be set aside. *Ambroise v. Evelyn*, 11 Ch.D. 759, followed. *Vandusen v. Johnson*, 3 C.T.L. 505, not followed.

The proper course for the appearing defendant to take is to apply to strike out the name of the other defendant on the ground of abandonment after first inquiring as to the plaintiff's intention: *Ambroise v. Evelyn*, supra, and *Foley v. Lee*, 12 P.R. 371.

*Hannesson*, for plaintiff. *Heap*, for Town of Selkirk. *Guy*, for other defendant.