

I think the work of construction was defective in the two ways already indicated, namely, that the road was not carried to a sufficient height east of the cove and that the ditch on the north side should not have been left as it was. No doubt it was a somewhat difficult case for the council to deal with. The plaintiff, however, had had the benefit and protection of the natural water course to carry off the waters which would otherwise have damaged him at times of freshet.

The defendants undertook to close up the cove through which these waters naturally ran. They were required under these circumstances to take the very greatest precaution. While the course they followed appeared to be a reasonable one and was no doubt undertaken in good faith, it nevertheless was, I think, and find, defective, and the injury the plaintiff sustained flowed from these defects.

It was contended also that the remedy of the plaintiff, if any, was by arbitration. I am unable to agree with this view, but think the proper course for him to take was the one he has taken, namely, by action. Reference to *McGarvey v. Town of Strathroy*, 10 A. R. 631; *Arthur v. Grand Trunk R.W. Co.*, 22 A. R. p. 89; *Derinzy v. Ottawa*, 15 A. R. 712.

A considerable amount of evidence was given as to the damages which the plaintiff suffered in consequence of the freshet. Upon the whole I think that the sum of \$700 would fairly cover such damages, and I fix the same at that amount.

The plaintiff will also have his costs of action.

DIVISIONAL COURT.

DECEMBER 17TH, 1912.

RICKART v. BRITTON MFG. CO.

4 O. W. N. 499.

Action — Motion to Stay — Non-payment of Interlocutory Costs — Vexatious Proceedings — Principle Involved.

RIDDELL, J., 23 O. W. R. 814; 4 O. W. N. 258, on the application by defendants, stayed the action until payment of the costs of two interlocutory motions as ordered, holding that the motions had been of a vexatious character.

An action may be stayed in the discretion of the Court for non-payment of interlocutory costs, where the action is vexatious, or where plaintiff, in the course of it, acts vexatiously towards defendant.

Re Wickham, 35 Ch. D. 272;

Graham v. Sutton, [1897] 2 Ch. 367;

Stewart v. Sullivan, 11 P. R. 529, and

Wright v. Wright, 12 P. R. 42, referred to.

DIVISIONAL COURT affirmed above judgment.