

in October last defendants offered to buy the same for \$2,250, but they were not to have possession until payment; that defendants paid a deposit of \$375, and some time in October unlawfully took possession, but refuse to give up possession or pay the balance of the purchase money.

The second action was begun on 28th May, claiming specific performance of an alleged agreement made on 3rd October, 1906, for sale of the lot in question. The plaintiff in this at the same time delivered a statement of claim, and Berry delivered a statement of defence and counterclaim on 3rd September, being the day on which the statement of claim was delivered in his action.

On 6th September a statement of defence and counterclaim was delivered in the first action, repeating the allegations made in the statement of claim in the second action, and on 14th September Berry replied to and joined issue on this.

The first action might be tried by a jury, but the second is a non-jury case. The jury sittings at North Bay are fixed for 7th October, and the non-jury for 9th December. But under the Judicature Act, sec. 90, and Rule 538 (e), the latter can be set down for the earlier sittings, and there is no reason why it should not be ready for trial at that time, especially as both parties are anxious for a speedy hearing.

It was conceded that an order should go staying one of these actions. The only question was which should be stayed. This is a matter of some difficulty. The whole question is fully considered in *Thomson v. South Eastern R. W. Co.*, 9 Q. B. D. 320. It will be sufficient to refer to that case without repeating the remarks of Brett, L.J. From these it appears that the question of which is the earlier action is not important, unless there is nothing else to guide the Judge. The ratio decidendi is concisely stated by Holker, L. J. (at p. 335): "In such a matter as this I cannot be confident, but it seems to me to be reasonable that the party to the litigation who has substantially everything to prove in it, and who would fail substantially unless the necessary evidence were produced, should be allowed to commence the proceedings at the trial and to have the control of the action." In this he was adopting the ground on which the matter was put by Brett, L.J.

Applying this principle to the present case, it would seem to follow that the second action is the one which should be