

On 6th February, 1903, this action was commenced by one of the devisees of Jeremiah Amey against Mr. Hays, as executor of her mother, for alleged waste committed by her mother on the father's real estate. The plaintiff takes nothing under her mother's will. Her sisters are perhaps properly joined with the executor as co-defendants. The substantial claim is against them. A defence by the executor would be in their interest. Since the issue of the writ and service on Mr. Hays, nothing further has been done. Mr. Hays entered an appearance on 17th February, so that, as far as he is concerned, the plaintiff is in default.

The affidavit of the plaintiff's solicitor states what is no doubt the fact, that the action has not been proceeded with at the request of one of the defendants, to enable her and her other two sisters to effect a settlement with the plaintiff. And he says very rightly that he was desirous of aiding them in this course.

Mr. Hays in his affidavit in reply submits that the other defendants are not necessary parties; that the action, as properly constituted, would be against him solely, and that he is being delayed in winding up the estate. I do not think I can determine this question at this stage. If the parties are fortunate enough to come to an amicable settlement, it will be unnecessary to decide it.

I think the practice recommended by Mr. Dalton in *Foley v. Lee*, 12 P. R. 371, should always be observed. In the present case it is clear that the action could not be dismissed. To do so would be to violate the rule laid down also by Mr. Dalton in *Siewewright v. Leys*, 9 P. R. 200, which the Court of Appeal in *Langdon v. Robertson*, 12 P. R. 139, said was the proper rule to be acted upon in these cases.

I think that the motion must be dismissed; the plaintiff will be put on terms to go over to trial at the next sittings at Napanee. If this becomes difficult, leave can be asked to postpone. The costs will be in the cause.

MACMAHON, J.

JUNE 24TH, 1903.

TRIAL.

BIRMINGHAM v. LARKIN.

*Master and Servant—Injury to Servant—Canal Works—Negligence
Dangerous Place—"Way"—Contributory Negligence.*

Action for damages for injuries received by plaintiff while at work in the employment of defendants as a carpenter's assistant, assisting Clairmont, a fellow workman, in covering