

PHYSICAL EXAMINATION OF PLAINTIFF IN PERSONAL INJURY CASES.

BY JAMES BAIRD, ESQ.

THE compulsory examination of the plaintiff in an action for damages sustained in a railway accident, or in any case where personal injuries have been sustained by reason of the alleged negligence of a railway or other corporation, through the acts or conduct of its employees, or of an individual, where the injuries are attributable to a common carrier's neglect, or that of his employee is exciting considerable interest among jurists as well as surgeons, corporations and others, who are defendants in this class of cases.

It would hardly be possible, in a short article to discuss the subject at length; but I have felt that it might serve a useful purpose to introduce the consideration of some of the questions involved by a cursory examination of the present state of the law in Ontario, England, and some of the States of the American Union.

In *Reily vs. City of London, et al.*, 14 Ont. Pr. Rep. 171 the question was fully discussed.—This decision was made 7th March, 1891, on an appeal from the decision of a master in ordinary, refusing a motion for an order to compel the examination of a woman who had brought suit to recover damages for an injury in a negligence case.

Such an order had been made in *Kerr vs. Town of Parkdale*, but a similar order had been refused in *Allen vs. Township of Yarmouth*. (Not reported.)

The Master in Ordinary, Mr. Thomas Hodgins, Esq., Q.C., placed it upon the ground:—

"That by the common law any unlawful 'setting upon,' or interference with another's person, is an insult (*insultus*), and that the court had no right or power to order to be done by surgeons what the common law forbids," and he held—

"If these defendants are entitled to this compulsory exhibition and examination of the person of this plaintiff, in such a way as their surgeons may determine, it must follow that they have also the right to have a similar exhibition and examination made by or before the jury, for a jury is entitled to see as well as to hear for themselves.

"And if one part of the person may be subjected to such an examination, so may every part; and thus judicial sanction might be given to a proceeding trenching upon another rule of law governing the exposure of the person.

"On no principle of law, that I am familiar with, can acts which involve what is forbidden by the criminal law be authorized by order of the court."

This decision of the master was affirmed on appeal. The opinion by Street, Justice, holding:—

"I am clearly of the opinion that the learned master was right in the result at which he arrived, and that his appeal should therefore be dismissed. The order asked for, if made would carry the law of discovery to a degree hitherto unknown to the English and Canadian law in cases of this nature. It is true that in certain exceptional cases parties have been compelled to submit to examinations such as that now asked, as for example in actions in the English Divorce Courts for annulling marriages upon grounds necessitating such examinations, in order that the court might not be imposed upon. But in actions of our courts the parties have certain limited rights of examination