

trial should be had—as upon a disagreement of the jury upon all points.

Both appeal and cross-appeal dismissed without costs.

SUTHERLAND, J.:—I agree in the result.

MCNAUGHTON V. MULLOY—MASTER IN CHAMBERS—APRIL 2.

Practice—Dismissal of Action for Want of Prosecution—Delay—Counterclaim—Terms—Costs.]—This action—to wind up a partnership and for payment by the defendant to the plaintiff of a promissory note for \$500 given in connection therewith—was commenced on the 24th November, 1910. The statement of defence was delivered on the 23rd March, 1911. Since that time nothing had been done, though there had been admittedly three sittings of the High Court at North Bay at which the case could have been entered. The defendant now moved to dismiss the action for want of prosecution. The defendant supported the motion by his own affidavit, in which he said that through the partnership with the plaintiff he had lost all his property, and the costs of defending the action were greater than he was financially able to sustain. He also said that he had made arrangements to remove from Petrolia to a portion of the province of Ontario much less accessible, and that he must move in the course of the next six weeks. The plaintiff in answer said that he had instructed his solicitors to serve notice of trial to proceed with this action (presumably for the sittings at North Bay on the 20th May next); but, in view of the admitted poverty of the defendant, he was willing to discontinue on payment of his costs. Counsel for the defendant did not accede to this disposition of the case—nor did he give a more favourable reception to the Master's suggestion that the plaintiff should be allowed to take a dismissal without costs, and that the whole question between the parties should end now. He offered to discontinue the counterclaim without costs, but pressed for a dismissal of the action with costs. This counterclaim was for completion of an alleged settlement of the partnership, under which the plaintiff was to pay the defendant \$500 cash and surrender the defendant's note for \$500, the plaintiff taking the assets and liabilities. The Master said that, except in a case where a dismissal would enable a defendant to set up the Statute of Limitations, such an order would be in