

and no doubt it was, the plaintiff was, nevertheless, in my opinion, precluded by one if not both of the Rules 311 and 362, above referred to, from taking the objection at the trial, and not less so because he did not rely upon objections of irregularity alone, but tried out the merits of his alleged defence. And if the learned trial Judge, and the Divisional Court, under the circumstances entertained the objection for the purpose of giving the plaintiff a further opportunity of setting up in the action a defence already found against him, I think that they were at liberty to impose and that they properly imposed the reasonable terms which the defendant has now twice refused. I would dismiss the appeal with costs, or if it be thought right again to give the plaintiff a locus pœnitentiæ, he should pay the costs below and of this appeal.

MOSS, C.J.O., GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing.

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JUNE 28TH, 1907.

C.A.

HAMILTON STEAMBOAT CO. v. MACKAY.

*Water and Watercourses—Navigable Waters—Hamilton Bay  
—Deed—Grant of Wharf on One Side of Slip—Derogation  
from Grant—Use of Slip so as to Prevent Access to Wharf  
—Evidence of Mode of User at Time of Grant—Admissi-  
bility—Injunction.*

Appeal by defendants from judgment of MABEE, J., 7  
O. W. R. 465.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW,  
MACLAREN, and MEREDITH, JJ.A.

W. Nesbitt, K.C., and J G. Gauld, Hamilton, for defend-  
ants.

G. F. Shepley, K.C., and E. H. Ambrose, Hamilton, for  
plaintiffs.