

money to pay plaintiff, and that his agents said they did pay him.

The motion being made late (for sufficient reasons) and the action being on the list for trial, defendant also moved for a postponement of the trial.

W. H. Blake, K.C., for defendant.

J. E. Jones, for plaintiff.

THE MASTER:—As at present advised, I do not think it is open to plaintiff to object to the issue of the third party notice. But I would require further consideration before expressing a positive opinion on the point.

Assuming that plaintiff can be heard at this stage, I still think the order should go. It will not, however, be considered as *res judicata* as against the third parties.

Mr. Jones contended that this was not a case for any relief over to defendant as against his own agents. He argued that if plaintiff proved he had not been paid, then this might open the accounts between defendant and his agents, which were settled between them nearly 4 years ago. This, he said, shewed that there was no ground for third party procedure, under *Miller v. Sarnia Gas Co.*, 2 O. L. R. 546, as, if the accounts were taken, there might be a larger balance shewn to be due to defendant. That, however, was an action of tort, and it might well be that the corporation, if liable to defendants, would have to pay damages which would be far in excess of what plaintiff might recover from the gas company.

Here the action is not of that character. The only issue as between plaintiff and defendant is payment or not. Defendant says he gave the money to his agents, and they represented to him that plaintiff had been paid.

In this state of affairs it seems that defendant has *prima facie* a right to relief over against his agents, within the terms of Rule 209, and is entitled to have them bound by the result of plaintiff's action against him as their principal. If plaintiff recovers anything against defendant, he will be entitled to judgment against them for that same amount on proof of his case as against them.

I refer to *Wade v. Pakenham*, 2 O. W. R. at p. 1185. I see no reason to recede from what I there said was the test of the proper application of the Rule, and I think this case comes within the right to "indemnity or other relief over."