

the solicitor should upon the taxation have declined to proceed with such taxation and have relied upon his letter offering to withdraw that account, but having in all cases proceeded to tax regardless of the different offers he could not take advantage of such.

Held, that the authorities cited were conclusive and dismissed the summons with costs.

R. M. Macdonald, for the solicitor. *Taylor*, Q.C., for the client.

Irving, J.]

HOERFNER v. HODGINS.

[Dec. 8, 1898.]

Notice of trial—For day subsequent to first day of assize—Close of pleadings.

The plaintiff gave notice of trial under Rules 345 and 346 of the B.C. Rules of 1890 for the tenth day after first day of the sittings at Nelson, B.C. These rules in part are as follows: "Notice of trial before a judge, with or without a jury, in Victoria, shall be deemed to be for the day named in such notice, or for the soonest period thereafter on which the action can be conveniently tried. . . . Sittings of the Court in Victoria, for trials of issues, with or without a jury, shall so far as is practicable, be held as often as the business to be disposed of may render necessary. This rule shall also apply to trials in any portion of the Province (other than Victoria) in which effect can be given to it."

Rule 346, "Except as provided at the end of the last Rule, notice of trial . . . elsewhere than in Victoria . . . shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given."

The action was commenced to recover an amount for architect's commission, and the defence was delivered in due course with a counterclaim for monies paid by mistake; the plaintiff delivered reply, and notice of trial was served on the 15th day after delivery of the reply to defence and counterclaim. The defendant took out a summons for an order to strike out the notice of trial on the ground (1) that it should have been for the first day of the sittings of the Court at Nelson, B.C., and not for a day ten days after the first day of the sittings and (2) that the pleadings were not closed. The defendant relied upon rules 223, 224, 225 and 226, claiming that he had 21 days to reply to plaintiff's defence to counterclaim. The plaintiff disputed the right of defendant to reply to the defence to counterclaim, and also relied upon Rules 339 and 343, providing that "Notice of trial may be given in any cause or matter by the plaintiff or other party in the position of plaintiff. Such notice may be given with the reply (if any) whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial;" and that "Notice of trial shall be given before entering the trial; and the trial may be entered notwithstanding that the pleadings are not closed, provided notice of trial has been given."

Held that the notice of trial was good.

Taylor, Q.C., for plaintiff. *J. H. Bowes* for defendant.