

awaited his decision. It is quite true, as Mr. Moss pointed out, that, whether the jury notice was struck out or not, the County Court sittings was one at which the action could be tried; still that does not, in my view, made it less undesirable that the junior Judge should have taken the course that he did.

What he appears to have done was, although only two weeks had passed, although there had been no want of good faith in prosecuting the action on the part of plaintiffs, to make a peremptory order to go down to the sittings, not knowing at that time whether the action should be tried with or without a jury, and that in default of his doing so his action should be dismissed.

It may be sufficient for the disposition of this appeal to say that we think that the Judge did not exercise a judicial discretion in making the order which is appealed from, and on that ground the appeal might be allowed, but, in my opinion, the case was not one coming within the Rule which was applied by the learned Judge.

The Rule which was invoked by the respondent was Rule 433, which reads as follows:

“Except in the cases provided for by Rule 434, if the pleadings are closed six weeks before the commencement of any sittings of the High Court for which the plaintiff might give notice of trial, and he does not give notice of trial therefor (or if the plaintiff has given notice of trial but does not proceed to trial pursuant to such notice), the action may be dismissed for want of prosecution.”

The learned editors of the book of Practice, Holmsted and Langton, express in a note to that Rule the opinion that an Irish case of *Foott v. Benn*, in which it was held that where there had been, as there was in this case, a trial, the Rule did not apply, is not applicable in Ontario, in view of Rules 3, 433, and 530.

We do not agree in that view, and think that the Irish case was well decided. That case is reported in 16 L. R. Ir. at p. 247. The head-note is as follows—“An action, in which the place of trial was out of Dublin, was tried at the spring assizes, 1883, when a verdict was directed for the defendant. This verdict was set aside on the ground of misdirection, and a second trial took place at the spring assizes, 1884, resulting in a verdict directed for the plaintiff, which