

The third objection was, that defendants were not at liberty to continue to the plant and buildings renewal fund the five per cent. authorized by sec. 6, because it did not appear to be necessary to do so for the purposes for which the fund was to be used under the statute. It would be impossible to give effect to this objection without disregarding the plain and unambiguous language of the Act.

Action dismissed with costs.

OSLER, J. A.

MARCH 3RD, 1903.

CHAMBERS.

RANDALL v. OTTAWA ELECTRIC CO.

*Leave to Appeal—Order of Divisional Court Refusing Nonsuit after Disagreement of Jury—Case Ripe for New Trial—Refusal of Leave Except on Terms.*

Motion by defendants Ahearn & Soper (Limited) for leave to appeal from order of a Divisional Court (ante 146) dismissing a motion made by the applicants for a nonsuit after a disagreement of the jury.

W. Nesbitt, K. C., for applicants.

H. M. Mowat, K. C., for plaintiff.

OSLER, J. A.—The case being now ripe for a new trial, it is a fortiori not to permit a second appeal. When the case is tried again, the point which the applicants now rely on will be open to them, if not at that trial, yet on appeal to this Court if they should fail there. If they were allowed to appeal now, and this Court should be of opinion with the Court below that the case should be tried again, the plaintiff will have been unreasonably delayed by the appeal, and if he is permitted to proceed to his second trial pending the appeal, we may see, as in *Blackley v. Toronto Street R. W. Co.* and other cases, the appeal now sought for and the appeal from the judgment on the second trial side by side in the same docket. Either way delay or expense is inevitable if defendants' appeal should not succeed, and their success is not so probable as to justify the giving of leave to appeal, especially as a refusal does not foreclose the substantial defence, and (if plaintiff should recover his intellect) further evidence may be given at the next trial. If, indeed, the applicants are prepared to consent to judgment being entered for plaintiff for the damages assessed by the jury, in case the appeal they now seek for should be unsuccessful, they have leave to appeal. But, unless leave is accepted on these terms, the motion is refused.