

From Falconbridge, J.]

[April 4.

SNELL v. TORONTO RAILWAY COMPANY.

Master and servant—Negligence—Street railway—Motorman—Person in charge or control—Workmen's Compensation for Injuries Act, R.S.O. c. 160, s. 3, sub-s. 5.

The motorman of a car running on an electric system is a "person who has the charge or control" thereof within the meaning of sub-s. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. c. 160, and his employers are liable in damages to a fellow servant for injuries sustained while in discharge of his duty, owing to the motorman's negligence in passing too close to a waggon which is moving out of the way of the car. Judgment of FALCONBRIDGE, J., affirmed.

James Bicknell, for appellants. T. C. Robinette, and J. M. Godfrey, for respondents.

HIGH COURT OF JUSTICE.

Armour, C. J.]

GIRARDOT v. WELTON.

[April 3.

Costs—Counterclaim—Relief obtainable without cross-action—Set-off

The counterclaim of a defendant, properly so-called, is a claim by the defendant for a relief which cannot be obtained by him in the action; and calling a claim made by the defendant a counterclaim cannot make it one.

The plaintiff claimed a declaration that his interest as a chargee upon land could not be sold under the power in the defendant's mortgage upon such land, and, in the alternative, that he was entitled to redeem the defendant. By her pleading in answer the defendant alleged certain facts justifying her right to exercise the power of sale, and "by way of counterclaim" claimed payment of her mortgage, sale or foreclosure, possession, costs and damages. The action was at the trial dismissed with costs, the defendant not desiring a foreclosure, which she was offered.

Held, that the relief claimed by the defendant was obtainable by her in the action brought against her, and was not the subject of a cross-action or counterclaim; and the only costs taxable by the plaintiff against the defendant were such costs as were occasioned to the plaintiff by reason of the claim made by the defendants, treating it as a claim properly made in the action and dismissed; and such costs should be set off *pro tanto* against the defendant's costs of the dismissal of the action. The judgment dismissing the "counterclaim" with costs meant that such costs should be taxed as were appropriate to it in its true character.

Semble, that in this province the law as to set-off is different from the English law, and here a set-off should not be treated as a counterclaim nor be pleaded as such.

F. E. Hodgins, for plaintiff. S. White, for defendant.