

KELLY, J., IN CHAMBERS.

FEBRUARY 11TH, 1921.

BRYANS v. PETERSON.

Practice—Costs of Order for Commission and of Commission Reserved to be Disposed of by Trial Judge — By Inadvertence Costs not Disposed of at Trial—Application to Trial Judge after Judgment and Appeal therefrom—Jurisdiction—Rule 521—Disposition of Costs—Materiality of Commission-evidence.

Motion by the defendants for an order disposing of the costs of an order for a commission to take evidence abroad and of the costs of executing the commission.

G. R. Munnoch, for the defendants.
Grayson Smith, for the plaintiffs.

KELLY, J., in a written judgment, said that at the trial of this action, in June, 1919, the evidence of David B. Tees, taken on commission in Fredericton, N.B., was put in by the defendants. The action was dismissed with costs and an appeal to the Appellate Division was also dismissed.

It appeared that the order for the issue of the commission reserved the costs of the order and the commission to be disposed of by the trial Judge. The action was tried by Kelly, J. Through oversight or inadvertence, these costs were not disposed of at the trial.

The plaintiffs' counsel objected (1) that it was now too late to make an order for their payment, and (2) that, if the matter might still be dealt with, these costs should not be allowed to the defendants, contending that the commission-evidence was procured unnecessarily and did not in any way support the defence. This latter objection could not prevail. The commission-evidence was material to a proper understanding of the case.

The important feature of the application was that until now no order for payment of these costs had been made nor had they been otherwise disposed of. That distinguished the present from a case where the matter in dispute has already been dealt with either by the Court of first instance or on appeal. The power to dispose of what was thus referred to the trial Judge has not so far been exercised; it still existed.

In *Fritz v. Hobson* (1880), 14 Ch.D. 542, an application similar to the present one was granted on several grounds, one being that an error in not bringing to the attention of the trial Judge the interim injunction, which had been adjourned to the trial, arose from the accidental omission of counsel. The application