

CARTWRIGHT, MASTER.

MAY 4TH, 1906.

CHAMBERS.

SORENSEN v. SMITH.

Motion to Dismiss Action—Want of Prosecution—Order for New Trial—Failure of Plaintiff to Set down—Remedy of Defendants—Rule 234—Jury.

Motion by defendants to dismiss action for want of prosecution.

D. L. McCarthy, for defendants.

C. A. Moss, for plaintiff.

THE MASTER:—On 4th April, 1905, a second new trial was ordered by the Court of Appeal: see 5 O. W. R. 576. Nothing has since been done. Defendants now move to dismiss for want of prosecution, under Rule 234.

The motion cannot succeed in consequence of the judgment of a Divisional Court in *Diamond Harrow Co. v. Stone*, delivered 6th September, 1901, but not reported until now (see ante 685). It was there decided that in such a case as the present the Rule invoked has no application, and that a defendant's only course is to set the case down himself if plaintiff has neglected to do so. . . .

It was asked that plaintiff should be ordered to go to trial at the non-jury sitting at Sandwich on 14th instant. Reliance as to this was placed on the expression of the Court of Appeal (5 O. W. R. at p. 581) that at the next trial a jury should be dispensed with. But, as plaintiff is not in any default, he cannot be put on any terms or deprived of his right to a jury if the trial Judge does not follow the suggestion of the Court of Appeal. . . .

Motion dismissed; costs in the cause.