

two hours' rest would have considerably improved the condition of the horses.

Upon the whole evidence it seems reasonably plain that the Carrolls failed to unload the horses solely because of the little difficulty caused by the manger blocking the door of the car, and shirked this plain duty to avoid the trouble of removing and replacing part of the manger. Had they done what appears to have been their obvious duty, the rest which the horses would thus have obtained would have largely, if not wholly, counteracted any ill effects attributable to the delay of the car in the Canadian Pacific Railway yards over the previous night.

The finding that plaintiff's servants could not by the exercise of any reasonable care and caution have avoided the consequences of the only negligence found against defendants seems therefore to be wholly unwarranted by the evidence. It must, I think, be set aside and a new trial ordered upon the whole case. Costs of the former trial and of this appeal should abide the result of such new trial.

MEREDITH, C.J., gave reasons in writing for the same conclusion.

BRITTON, J., also gave reasons in writing for the same conclusion, and cited *Price v. Union Lighterage Co.*, [1903] 1 K. B. 750, [1904] 1 K. B. 412; *The "Pearlmoor,"* [1904] P. 286; *St. Mary's Creamery Co. v. Grand Trunk R. W. Co.*, 5 O. L. R. 742, 2 O. W. R. 328, 8 O. L. R. 1, 3 O. W. R. 472.

---

CARTWRIGHT, MASTER.

APRIL 10TH, 1906.

CHAMBERS.

SMITH v. MATTHEWS.

*Third Party Procedure—Indemnity or Relief over—Application to Bring in Third Party—Lateness of Application—Postponement of Trial.*

Action by a farmer who sold grain to defendant's agents between 1898 and 1900, to recover the price. The agents were made parties by the writ of summons, but after appearance the action was discontinued as against them.

The defendant now moved to be allowed to serve a third party notice on them. He alleged that he supplied the