

longer and heavier bars. He thus made it impossible for the defendants to plead otherwise than they did unless they were prepared to submit to any kind of bars, however difficult and burdensome to remove and restore.

The title to the land of the plaintiff and defendants was not in dispute. The terms of the right of way were clearly set out in the will. There was no reference therein to bars, and no suggested limitation of the right of way. The onus would seem to be on the plaintiff to shew the right to maintain even such bars as were there before the larger ones were put up. The manner in which the way should be used by the defendants, and the extent, if any, to which their free and full enjoyment should and could reasonably be curtailed for the protection of the plaintiff had been defined by the parties by bars of a certain length and width, erected many years ago and since maintained and acquiesced in. No question of title arose. The plaintiff's claim against the defendants was in reality for damages for their interference with the bars put up by him across the way, and to compel them to replace them if they took them down; and the amount claimed for damages was within the competence of a County Court.

The appeal should be allowed with costs and the order of Orde, J., set aside with costs.

MULOCK, C.J. Ex., agreed with SUTHERLAND, J.

FERGUSON, J.A., agreed in the result, for reasons stated in writing.

MASTEN, J., read a dissenting judgment, agreeing with ORDE, J.

Appeal allowed (MASTEN, J., dissenting).

SECOND DIVISIONAL COURT.

JUNE 30TH, 1920.

*RE TORONTO ELECTRIC COMMISSIONERS AND
TORONTO. R.W. CO.

Street Railway—Poles and Wires upon City Streets—Removal at Expense of Company for Purposes of Toronto Electric Commission—Order of Ontario Railway and Municipal Board—Dissent of Member of Board—Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 7—Determination of Question of Law by Chairman—Appeal from Order of Board—No Statutory Authority for Making Company Liable for Cost of Removal—Railway Act, R.S.O. 1914 ch. 185, sec. 59—Absence of Agreement to Pay—Position of Commission—Statutory Agent—Remedy by Action.