

The defendant, however, admits that the proper sum is \$388.76, and undertakes to allow that sum as a preferential claim. This reduces the amount in controversy in the proposed appeal to the sum of \$589.80 and the costs, if they should be treated in any way as an element in considering whether there are special reasons for treating the case as exceptional.

With regard to the costs, there appear to be a number of reasons which might fairly influence the learned Chancellor in dealing with them as he did. And the Divisional Court, which was fully alive to the error as to the amount, having treated that as not affording any sufficient reason for interfering, and being satisfied on other grounds with the award of costs against the plaintiffs, it would require very special grounds to justify a further appeal from the discretion virtually twice exercised with regard to the disposition of the costs.

As to the remainder of the claim, even if I was more inclined than I am, as at present advised, to doubt the propriety of the decision with regard to it, I would not feel at liberty to treat that as a sufficient ground for allowing a further appeal where the amount involved is so considerably less than the statutory sum.

So far as the matter turned on questions of fact, it cannot be said that there is not evidence to support the concurrent findings of the two tribunals; and, on the face of these findings, I do not think there is really any question of law involved.

The order I make is that, upon the defendant undertaking to allow the amount of the plaintiffs' preferential claim at \$388.76, the motion is dismissed, but under the circumstances without costs.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT.

SEPTEMBER 7TH, 1909.

WOODBURN MILLING CO. v. GRAND TRUNK R. W. CO.

Railway—Animal Killed on Track—Agreement for Use of Siding—Construction—Protection of Railway from Animals—Negligence—Leaving Gate Open—Duty of Railway Company—Implication of Terms in Contract.

The plaintiffs' claim was for the value of a horse killed upon the defendants' railway, owing, as alleged, to the negligence of the defendants.

The action was brought in the County Court of Middlesex, and was tried with a jury, whose finding was that the horse was killed