

be used by the customers for the purpose of operating their machinery and for the purpose of obtaining power for use in their business as millers, and for no other purpose.

J. V. Teetzel, K.C., for defendants.

G. Lynch-Staunton, K.C., for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J.) held that the object of the provision in the second paragraph was to guard against the current being used for any other than power purposes, and there was nothing to prevent the customers using the current for these purposes in any place to which they might choose to transmit it, and nothing to confine the use of it by the customers to any existing mill on the premises. Therefore, the performance of the agreement has not become impossible, and the rule in *Taylor v. Caldwell*, 3 B. & S. 826, was inapplicable. But the plaintiffs were not entitled to recover the monthly payments claimed. The current was not supplied after 25th April, 1901, it having been on that day cut off, if not by plaintiffs, at least with their consent. Readiness to supply the current is not enough to entitle them to recover. The plaintiffs are entitled to damages for the refusal of defendants to perform their contract, but that is not the form of the action, and there is no evidence upon which the damages can be assessed.

Appeal allowed and judgment reversed without costs, and new trial directed, with leave to plaintiffs to amend. Costs of the former trial to be costs in the cause unless the trial Judge otherwise directs.

FEBRUARY 16TH, 1903.

DIVISIONAL COURT.

HOGG v. TOWNSHIP OF BROOKE.

*Way—Non-repair—Injury to person—Accumulation of Snow—Responsibility of Township Corporation.*

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 568) dismissing action to recover damages for injuries sustained by plaintiff by reason of the alleged negligence of defendants in permitting an accumulation of snow to remain on part of number 9 side road in the 3rd concession of the township of Brooke, in front of one Pellow's farm, by reason of which, it was alleged, the highway became out of repair and unsafe to travel, and owing to the bad and dangerous state of the highway the horses drawing a waggon in which plaintiff was travelling became imbedded in the snow, and were unable to proceed, and plaintiff in assisting the