

SECOND DIVISIONAL COURT.

JUNE 30TH, 1920.

*PARRY v. PARRY.

Costs—Scale of—Action Brought in the Supreme Court of Ontario—Trespass to Land—Easement—Declaration as to User of Way—Judgment for Plaintiff with Nominal Damages and Costs—Determination by Taxing Officer of Scale of Costs—Rule 649—Appeal—Pleading—Onus—Jurisdiction of County Court—County Courts Act, sec. 22 (1) (d).

Appeal by the defendants from the order of ORDE, J., ante 53, 47 O.L.R. 217.

The appeal was heard by MULLOCK, C.J. EX., SUTHERLAND and MASTEN, JJ., and FERGUSON, J.A.

Peter White, K.C., for the appellants.

C. A. Payne, for the plaintiff, respondent.

SUTHERLAND, J., in a written judgment, said, after stating the facts and quoting from the reasons of Orde, J., that he was unable to agree that *Bragg v. Oram* (1919), 46 O.L.R. 312, had no application. If the defendants had sued the plaintiff for damages for interference with their right of way, enjoyed in a particular manner for many years, by erecting and maintaining longer and heavier bars than had theretofore been in use, and incidentally had asked for an abatement of the nuisance thereby caused, the action would have been one within the competence of a County Court, under sec. 22 (1) (d) of the County Courts Act, provided the claim were not for a larger amount than \$500. Because the position of the parties was reversed, and the plaintiff, having replaced the old by new and longer bars, and thus created the difficulty, brought this action for a declaration that he was entitled so to obstruct the way, the real issue was not altered.

Orde, J., seemed to have thought that the defendants, by pleading as they did, had put themselves in a position which had prejudiced the plaintiff. In reality, however, the plaintiff, knowing of the manner in which the right had always been enjoyed by the defendants, and apparently agreed to and acquiesced in by him, interfered with it, then began an action, and delivered a statement of claim by which he alleged that he and his predecessors in title without interruption for upwards of 40 years had maintained certain bars across the way, but without disclosing that he had recently taken these bars down and erected in their place

* This case and all others so marked to be reported in the Ontario Law Reports.