

Gibson, Osborne, O'Reilly, & Levy, Hamilton, solicitors for the Hoepfner Company.

Biggar & McBrayne, Hamilton, solicitors for defendant Gage.

Moss, J.A.

MAY 3RD, 1902.

C. A.—CHAMBERS.

MORRISON v. G. T. R. CO.

Discovery—Examination of Officer of Corporation—Railway Company—Engine-driver—Rules 439, 461—Leave to Appeal—Terms—Costs.

Motion by defendants for leave to appeal from order of a Divisional Court, *ante* p. 263.

D. L. McCarthy, for defendants.

J. G. O'Donoghue, for plaintiff.

Moss, J.A.—The precise point does not seem to have arisen since McLean v. G. W. R. Co., 7 P. R. 358. The C. L. P. Act, sec. 56, was then in force, and it was decided that an engine-driver was not an officer within that section. The question arose again in a different form in Knight v. G. T. R. Co., 17 P. R. 386, and it was held that an engine-driver was not an officer within the Rule then in force. On the general question as to who are and are not officers of a corporation the views of the Judges are much at variance. In view of all the circumstances, I think leave to appeal should be given. The point is said to be, and no doubt is, one of much importance, not only to the defendants but to other large railway companies, having regard to the effect given to the depositions when used at the trial under Rule 461. Defendants should bear plaintiff's costs of the appeal as well as their own, in any event.

MAY 3RD, 1902.

DIVISIONAL COURT.

LAMPHIER v. STAFFORD.

Ditches and Watercourses—Construction—Deepening—Jurisdiction of Engineer—R. S. O. ch. 285, secs. 28, 33.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in favour of plaintiff for \$5 damages and an injunction. Action for damages for trespass to land by alleged unlawful entry on plaintiff's land and digging a ditch. The defendant justified his acts under the Ditches and Watercourses Act, R. S. O. ch. 285, and the award thereunder of the engineer of the township of Richmond, in which the land is situate. The award provides for the clearing out and pos-