

The appeal came on for hearing on the 11th January, 1910, before FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

A. J. Russell Snow, K.C., for the plaintiffs.

Frank McCarthy, for the defendant Cooper.

C. Garrow, for the defendants the Trustees of the Union Presbyterian Church.

At the hearing the Court suggested that the plaintiffs should be given an opportunity to do the work for which they claimed a lien. This was acceded to by the defendants without abandoning any rights as to costs. The further hearing was adjourned, and the work was done to the satisfaction of the defendants.

The question of costs was then argued by the same counsel.

The judgment of the Court was delivered by RIDDELL, J.:— I had occasion recently to consider the proper disposition of costs in such a case, *Dodge Manufacturing Co. v. Hortop Milling Co.*, 14 O. W. R. 3, 115, 265, where it is said (p. 4): "I think that the plaintiffs should not have brought this action at the time it was brought; that the offer . . . of the defendants to accept the machine, upon being allowed their damages, should not prejudice them on the question of costs. The order will, therefore, be that the plaintiffs . . . pay the defendants their costs of action, reference, and this motion; such costs to be set off against the amount to be paid." A motion was made for leave to appeal, and, after full argument and consideration of the authorities, this leave was refused: p. 115. A Divisional Court dismissed an appeal from the order for costs: p. 265.

All the relevant authorities are set out on p. 115; and, after reconsideration of these and of the principles which should govern the award of costs, I am of opinion that the proper rule is laid down in the *Dodge* case.

The plaintiffs, then, will pay the costs of all proceedings, including the costs of this motion—the defendants to be allowed to retain such costs from any sum payable by them to the plaintiffs.