This was an appeal from the judgment of the Queen's Bench (Field, J., and Huddleston, B.), who, under the above circumstances, held that the party who had first issued a writ should be made plaintiff.

BRETT, L. J.—This seems to me to be a question of very great importance as to the administration of justice under the Judicature Act. I think the constant efforts of the Courts since the passing of the Judicature Acts have been, and I think have properly been, to so construe the Judicature Acts, and all the rules and orders under them, as to make as few absolute or unconditional, or what is called hard and fast rules, as can possibly be, and to make the interpretation of the Acts, and all the rules and orders, so large that the Courts can (unless they are prevented by the words of the Statute) exercise a discretion in each particular case, so as to do that which is most just and expedient between the parties. . . What is the meaning of sub-s. 7 of sec. 24 of Jud. Act, 1873 (Ont. Jud. Act, s. 16, sub-s. 8)? . . Now I desire to carry out what I have said has been the rule of conduct, as far as I know, in all the Courts and upon both sides of the Court of Appeal ever since the passing of these Acts. I desire to keep the exercise of the jurisdiction given to the Courts under this sub-s. 7 as large as I can, so as to enable the Court to do what is right and just in each particular case between the parties. I therefore think that there is no hard and fast rule, in the case of cross actions, that the one which was commenced last must be the one to be stayed. I think that the Judge must exercise his discretion as to what is the fairest mode, upon taking all matters into consideration, of trying the several disputes which exist between the parties; if there is nothing to guide him, but who was the first to issue out the writ, I should say that it would be a wise and proper mode of exercising the discretion to give that party the advantage which he has got by his diligence. For instance, if the burden of proof (and I only give this as an instance) is as much on one side as on the other with reference to separate parts of the transaction, then I should think that the person who has issued the first writ would have gained the advantage, and that the action in which he is plaintiff ought to be the action which is to be carried on. But it seems to me that if all the substantial burden of proof is upon the person who is plaintiff in the action which was begun second, it is not conclusive as to a fair and just mode of trying the dispute between the parties to stay the action in which he would begin who has the substantial burden of proof as to all the controverted matters. It would be unfair to deprive him of being the plaintiff and so having the right to begin, and it would be hard to make him the defendant, although all the burden of proof lies upon him, ahd so to give his antagonist the power of anticipating him in matters which, but for the order of the Court, he could not do. Therefore, it seems to me that the Judge must consider what is the fair mode of trying that which is shown to be the substantial matter when it will come before the jury.

HOLKER, L. J.—In this case the Court of Appeal is called upon to exercise jurisdiction, so far as I know, for the first time under the powers conferred by the Judicature Act, 1873, s. 24, sub-s. 7. It is a jurisdiction not exactly to consolidate actions, but to prevent the multiplicity of actions, by directing that instead of there being two actions between the same parties, there should be only one. . . As far as I can make it out, the right to the first word and the last is not such a substantial advantage, as both these parties seem to think. But no doubt it is of importance that as the question has to be decided, it should be decided on clear and intelligible principles, and it is to my mind a very difficult question. It is difficult because the mind of the Court is left without very much principle to guide it, but my Lord has endeavoured to lay down some principle upon which a matter of this kind should be decided, and I must say that in all he has said upon that subject I agree with him. I do not think this is a case which can possibly be decided by any fixed rule or by any hard and fast rule. The circumstances from the beginning to the end must be heard; and in one case one consideration may have more weight, more cogency, and more effect than that same consideration may have in another. . . In such a matter as this I cannot be confident; but it seems to me to be reasonable that the party to the litigation who has substantially everything to prove in it, and who would fail substantially unless the necessary evidence were produced, should be allowed to commence the proceedings at the trial, and have the control of the action.

[NOTE.—*The Imp. and Ont. sections are identical.*]