to have the work done by others at a much higher price. At p. 248, Hagarty, C.J., says: "It is always open in actions like this, as I understand the law, to prove, under 'never indebted,' either a total failure of consideration, by the defendant having through the plaintiff's default derived no benefit whatever from his services, or a partial failure in mitigation of damages." And at p. 249: "The law would be very defective if a defendant were driven to cross-action for negligence instead of getting the substantial benefit of his defence, as we propose to give him here. Circuity of action ought not to be favoured."

This case was approved of in Badgeley v. Dickson, 13 A. R. at p. 500. On the authority of the above case, therefore, I think it is clear that the magistrate had jurisdiction to entertain and give effect to the defence if proven, and that on appeal the learned County Court Judge had the like jurisdiction.

The motion will therefore be dismissed with costs.

FEBRUARY 11TH, 1909.

C.A.

MILLIGAN v. GRAND TRUNK R. W. CO. . .

Appeal to Supreme Court of Canada—Leave to Appeal—Supreme Court Act, R. S. C. 1906 ch. 139, sec. 48 (e)—Extension of Time for Appealing under sec. 71—Application after Expiry of 60 Days—Jurisdiction of Court of Appeal Amount Involved not Exceeding $1,000—Absence of Special Circumstances—Refusal of Leave.

Motion by defendants for leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, 12 O. W. R. 967, and to extend the time for bringing the appeal, the defendants having attempted to appeal without leave, and their appeal having been quashed by the Supreme Court of Canada. The security on the proposed appeal had been approved by an order of MACLAREN, J.A., 12 O. W. R. 1103.

The present motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

W. Nesbitt, K.C., for defendants.

G. F. Henderson, K.C., for plaintiff.