

C. L. Cham.]

OROK V. GARVIN.

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P. C. 59; *Shuttleworth v. Cocker*, *Ib.* 77; *Morrison v. Salmon*, *Ib.* 387.

RICHARDS, C. J.—The words of the section of the Common Law Procedure Act were the same as those of the Imperial Statute 3 & 4 Vic. cap. 24, sec. 2. The first part of section 1 of the Statute of Ontario, 31 Vic. cap. 24, sec. 1, is to the same effect as the Imperial Statute referred to. "If the plaintiff in any action of trespass, or trespass on the case, recovers by the verdict of a jury less damages than eight dollars, such plaintiff shall not be entitled to recover, in respect of such verdict, any costs whatever, whether the verdict be given on an issue tried, or judgment has passed by default, unless the judge or presiding officer before whom such verdict is obtained, immediately afterwards, or at any future time to which he may postpone the consideration of the matter, certifies on the back of the record, in the form hereinafter provided, to entitle the plaintiff to full costs," &c. Under the Imperial Statute and the Common Law Procedure Act the proviso is to the effect, that the statute should not apply if the judge "certifies on the back of the record that the action was really brought to try a right besides the right to recover damages for the trespass or grievance complained of, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious." In the Statute of Ontario this proviso is entirely omitted, and it is left quite in the discretion of the judge to certify, to entitle the plaintiff to full costs or not. The decisions under the repealed act may nevertheless be looked at, for I apprehend that under the existing statute the judge would certify when he would have done so under the repealed section of the Common Law Procedure Act.

In *Shuttleworth v. Cocker*, 9 Dowl. P. C. 82, Tindal, C. J., in referring to the English act said, "I take the object of this act to be to prevent plaintiffs from bringing actions of a vexatious and litigious nature, where only a small damage has been sustained, and where no right whatever is in issue between the parties; and if actions are brought in such instances, certificates cannot be granted, and the plaintiffs lose their costs." That was an action wherein the plaintiff, the owner of a house, complained of the defendant, who was the owner of a mill and workshop, that he used the engine, &c., on his premises, so that noise, smoke and injurious dust came from them and injured the plaintiff's house, and rendered it uninhabitable. The defendant in answer pleaded not guilty, that is, he denied that that which was stated on the face of the declaration had taken place. The learned Chief Justice then proceeds: "Looking at these circumstances the plaintiff declares that his house is rendered uninhabitable by reason of the defendant's acts, and on the other side the defendant, insisting on going on with the works which he has commenced, and which the plaintiff says form the ground and gravamen of his charge, who can say that a question of right does not arise between the parties. The plaintiff complains that his right to his house, free of the nuisance which is alleged on the record, is invaded, and the defendant says on the other side that this, which is alleged to be a nuisance,

is in fact none at all. Therefore looking at the facts of the case it does not appear to be one in which the plaintiff is going on vexatiously, or for small damages only, but that it is a case in which the right came in question. On the evidence which was adduced the case took the same course. The defendant strove not so much to prove that the plaintiff had sustained very small damages only, and the cross-examination was very much directed to that point, as that the defendant had adopted modes of carrying on his manufactory with as little injury as possible, still maintaining his right, however, to carry on the same business. Therefore, in my opinion, it is an action really brought to try a right besides the mere right to recover damages; and one cannot but ask why, if it were not so, the defendant did not admit the right of action and proceed only on that part of the case which would be directed to the mitigation of damages."

Bosanquet, J., in his judgment, said: "In order to support the defendant's view, the action must not have been brought to try the right, and the defendant must have admitted he had no right to do the act; and if the real question was as to the damages only, there is no doubt that it would be a case in which the judge should not have certified. * * * The defendant insisted that he was not in the wrong, that he was right; and, in consequence, the plaintiff had no right to maintain the action."

In *Morrison et al. v. Salmon*, *Ib.* 392, the case above cited is approved of, and in reference to it, Bosanquet, J., said: "Nuisance may either be brought to recover damages for an injury to an acknowledged right, or to try a question whether the defendant has or has not a right to do that which he has done, which is very commonly the subject of question in an action of this sort." Maule, J., said: "Supposing the plaintiffs had proceeded in the Court of Chancery for an injunction * * * and the Court had said that there was some uncertainty as to their rights, and that they must establish it in a court of law. The plaintiffs must in that case bring their action in order to substantiate their right; and if the argument which has here been brought before the Court were to prevail, they would be deprived of their costs."

It appeared at the trial of this case that the persons under whom defendant held had taken a lease of the land overflowed from the plaintiff, which had expired, and plaintiff was willing to grant a lease to defendant for the term for which he had agreed to take the mill, at a small rent, and that defendant had declined to take this lease.

Under the facts of this case, and under the decisions referred to, I am of opinion, if this action had been one which was exclusively within the jurisdiction of the Superior Courts, I should have felt bound to certify under the first section of the act of Ontario to entitle the plaintiff to full costs.

The defendant did not content himself with admitting he had overflowed defendant's land, and contending that only small damages were committed, but, as stated by Chief Justice Tindal, in the case referred to, had stoutly con-