

Judgment was given for plaintiff's claim, but he was allowed only Division Court costs, on the ground that the action was within the jurisdiction of a Division Court. The defendant was not allowed a set-off of his excess of costs.

W. H. Bartram, London, for appellant.

W. H. Blake, K. C., for defendant.

BOYD, C.—There was ample evidence before the Judge that the account sued for was settled before action, and nothing was in dispute as to the amount due on the footing of the account. The defendant did not dispute that the amount was owing, but by way of counterclaim for inferior work it was sought to escape payment. The correspondence put in was sufficient evidence of a settled account, and the Judge inclined to take that view during the argument, and gave judgment on the footing that the claim sued for was the balance of a settled account and within the jurisdiction of a Division Court. He had also a discretion whether to award a set-off of costs or not, and he has exercised his discretion by leaving the matter with Division Court costs to plaintiff and no set-off. See *Re Lott v. Cameron*, 29 O. R. 73; Division Courts Act, sec. 72, (c) and sec. 79.

MEREDITH, J.—The judgment appealed from having been given on the 9th December, 1902, the appeal should have been set down for the sittings of a Divisional Court beginning 12th January, 1903 (Rules 352, 795), such sittings not being merely a postponed sittings, and the appeal having been set down for a later sittings was out of time, but the Court had power under Rule 353 to enlarge the time, and, as the appellant was misled by the change of date, the case was one for the granting of that indulgence. *Reekie v. O'Neil*, 31 O. R. 444, distinguished.

Upon the merits of the appeal MEREDITH, J., agreed with the conclusion of the Chancellor.

Judgment affirmed with costs.

MARCH 5th, 1903

DIVISIONAL COURT.

DAVIDSON v. GRAND TRUNK R. W. CO.

Railway—Animal Killed on Track—Liability—Proximate Cause—Fencing—Switch—Main Line—Intervening Lands.

Appeal by defendants from judgment of Judge of District Court of Muskoka, awarding to plaintiff \$75 damages. The