

MOSS, C.J.O., MACLAREN and MAGEE, J.J.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing. He was of opinion that the appellant had waived his right, as he might, to the proceedings not taken, and was estopped from seeking the unjust advantages which he was seeking in this proceeding. Further, he was not satisfied that the work done was such as required a petition.

*Appeal allowed; MEREDITH, J.A., dissenting.*

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DECEMBER 22ND, 1911.

STECHER LITHOGRAPHIC CO. v. ONTARIO SEED CO.

*Judgment—Motion to Vary—Court of Appeal—Restoration of Judgment of Trial Judge—Variance as to Costs of Reference—Point not Raised in Appellate Courts—Jurisdiction.*

Motion by the defendant Adam Uffelman to vary the judgment of the Court of Appeal of the 20th September, 1911 (24 O.L.R. 503, ante 34.)

The motion was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

Sir George C. Gibbons, K.C., for the applicant.

M. A. Secord, K.C., for the plaintiffs.

MOSS, C.J.O.:—This application, which, in substance, is an application to reopen the appeal and to urge objections to the judgment pronounced at the trial which were not brought before the Divisional Court nor before this Court until after judgment had been pronounced, comes late in the day, but it may be assumed for present purposes that the matter has not passed entirely beyond the power of the Court. See Con. Rule 817.

But what is sought is, to reverse the trial Judge's disposition of the costs of the reference directed. Upon reference to the learned Judge, it appears that he deliberately exercised his discretion over the costs in the way shewn in the formal judgment. Under the circumstances, it is very improbable that, even if the question had been raised before the Court upon the argument, there would have been any interference with the Judge's