

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), varied the judgment by inserting a declaration that plaintiff has a lien for the amount due in respect of the mortgage, upon it being ascertained how much, if anything, is to be deducted in respect of the work alleged not to be completed according to the agreement of 30th October, 1905, but mortgage not to be delivered until that is ascertained by reference to the Master. Further directions and costs reserved.

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CARTWRIGHT, MASTER.

DECEMBER 4TH, 1907.

CHAMBERS.

CURRY v. STAR PUBLISHING CO.

*Pleading—Statement of Claim—Irregularity—Naming Place of Trial other than that Named in Writ of Summons—Waiver by Taking Proceedings in Action.*

Motion by defendants in an action for libel to strike out as irregular the part of the statement of claim which named Toronto as the place of trial, the plaintiff having in the writ of summons named Cayuga as the place of trial.

E. G. Long, for defendants.

Gideon Grant, for plaintiff.

THE MASTER:—Whether in such a case the statement of claim is irregular is one on which some difference of opinion exists. The point has never been expressly decided, though referred to in *Town of Oakville v. Andrew*, 2 O. W. R. 608, and in *Geedy v. Wabash R. R. Co.*, 9 O. W. R. 677.

If such a variance is to be considered an irregularity, it should be moved against at once, as any subsequent proceedings would be a waiver. Here there has been an important step taken by the motion to consolidate, which has gone to the Divisional Court. The statement of defence was also due on or before 15th November, and on 7th November, and again on 22nd November, time was given for this, on the solicitor for defendants consenting to take short notice of trial, so that plaintiff should not be thrown over the January sittings, "in case any of the cases would be heard then." This could only refer to a trial at Toronto.