

THE MASTER gave effect to defendants' contention referring to *Castor v. Township of Uxbridge*, 39 U. C. R. 113; *Barber v. Toronto R. W. Co.*, 17 P. R. 293; *Atkinson v. City of Chatham*, 26 A. R. 821; *Huffman v. Township of Bayham*, 26 A. R. 514; holding also that it made no difference that the statement of claim did not shew whether defendants themselves placed the roller in the street.

Order made striking out jury notice. Costs to defendants in the cause.

MACMAHON, J.

DECEMBER 17TH, 1903.

TRIAL.

MELLYCK v. WATT.

*Sale of Goods—Action for Price—Condition as to Test—
Non-fulfilment—Dismissal of Action—Costs.*

Action to recover \$443.63, the price of a gas engine alleged to have been purchased by defendants from plaintiff. The engine was a second-hand one. The defendants were starting a brick yard at Attercliffe station, near Dunnville, and needed an engine to run their brick machine. Plaintiff offered to sell them the machine in question and put it in running order for \$400. Afterwards plaintiff ascertained from one Dashwood, a mechanical engineer at Dunnville, that the cylinder of the engine was broken, and it would be necessary to send for a new one to Philadelphia. Plaintiff then offered to take \$275 for the engine, the defendants to pay for the cylinder and the duty and freight thereon and Dashwood's account for repairs. Defendants agreed to purchase on these terms if, on being tested, the engine was found to be satisfactory for the purpose for which they desired it. A cylinder was procured and repairs made. After several tests at Dunnville, the engine was removed to Attercliffe, and Dashwood went there four times to make tests. On one occasion he got the engine to run the brick machine light, i.e., without any clay being in the machine. But the engine failed to run the brick making machine and the earth-crusher, which was part of the machinery, although the test was made when both were running light. During the last test, which was on 30th September, 1903, the engine did not run satisfactorily even to Dashwood himself, and after that defendants concluded that the engine would not be sufficient for their purposes, and sent it back to Dunnville. The removal of the engine took place on 23rd July, and plaintiff made no claim against defend-