Gowans v. Barnet, 12 P. R. 335, and should therefore be construed so as to advance the remedy.

McIndoe must attend at his own expense, and the costs of this motion will be to plaintiff in any event.

CARTWRIGHT, MASTER. NOVEMBER 3RD, 1904.

CHAMBERS.

READ v. CITY OF TORONTO.

Jury Notice—Striking out—Action against Municipal Corporation—Non-repair of Streets — Obstruction — Amendment.

Motion by defendants to strike out jury notice given by plaintiff as irregular, because plaintiff's action is for injuries caused by non-repair of highway.

F. R. MacKelcan (T. Caswell), for defendants.

Walter Read, for plaintiff.

THE MASTER.—The statement of claim, as first drawn, relied solely on non-repair. There was nothing said of what constituted the alleged non-repair. The statement of defence denied this allegation, and also set up want of notice. The statement of claim was then amended by alleging "obstruction of the highway caused by defendants negligently leaving piles of earth, stone, and gravel thereon." The following paragraphs, as in the original statement of claim, alleged non-repair as the cause of plaintiff's injury.

Counsel for plaintiff admitted that, as the pleadings now appear, the motion must succeed. He asked leave to amend further so as to rely on "obstruction" only and obtain the benefit of the decision in Clemens v. Town of Berlin, 7 O. L. R. 33, 3 O. W. R. 73. There was no allegation in that case of non-repair.

I do not think such leave should now be given. It must be assumed that the alleged obstructions were placed there by defendants. Then the case comes within the judgment . . . in Barber v. Toronto R. W. Co., 17 P. R. 293 . . . Howarth v. McGugan, 23 O. R. 396.

The jury notice should be struck out with costs to defendants in any event.

See order of Street, J., in Breakey v. City of Toronto, 13th November, 1899 (not reported) in a similar case.