

cents per mile of the distance between the residence of the defendant and the place of trial, and by sub-s. 2, "the amount of such deposit shall be indorsed on the writ of summons and copy and if the same is not actually paid and indorsed such writ and the service thereof shall be void."

Held, per WEATHERBE, C.J., and TOWNSHEND, J., that the provision of the statute was imperative and could not be waived.

Per GRAHAM, E.J., MEAGHER, J., concurring, that notwithstanding the language of the statute the requirement was waived by the filing of a paper in the nature of a defence.

J. J. Power, and R. G. McKay, for appellant. Gregory, K.C., and E. L. Gerroir, for respondent.

Before Townshend, J., Graham, E.J., Russell, J.,
Longley, J.]

[Jan. 26.

SMITH v. THOMAS.

Landlord and tenant—Parol lease, rent commencing at future day—Statute of Frauds, R.S. (1900) c. 141, s. 3.

On Nov. 11, 1905, defendant agreed to take plaintiff's house for a year from Nov. 15, at the rental of \$360 payable monthly.

The evidence shewed that after some negotiations defendant asked "if he rented the house when the rent would commence," to which plaintiff replied that "it would commence on Nov. 15, rent payable from that date." Defendant thereupon said "he would take the house."

Held, that the contract was one within the exception in s. 3 of the Statute of Frauds, R.S.N.S. (1900), c. 141, and could be enforced notwithstanding the absence of a note or memorandum in writing or an entry into possession.

Jenks, for defendant, appellant. W. B. A. Ritchie, K.C., for plaintiff.

[Jan. 26.

Townshend, J., Graham, E.J., Russell, J., Longley, J.]

SMITH v. ARCHIBALD.

Sales—Warranty—Trial—Misdirection—Verdict set aside—Costs.

Action for the price of trees sold defence that the trees were sold subject to a warranty and that part of them were not