

demanding the raising of the walk between 11 and 15 inches over its former level at the side of the claimant's land" cannot be used to imply that the damages arising from raising the land did not "necessarily result from the exercise of the municipal powers," and so oust the right to arbitrate and remit the contention to the forum of the Court. The work was done voluntarily by the corporation in the exercise of its powers, and was so done as to raise the level of the highway, from which damage necessarily resulted to the frontager.

I find no error or miscarriage in the conduct or conclusions of the arbitrator. . . .

Nor do I think the sale of the land at a lessened value on account of this damage, after it had been done, deprives the owner at that time of his right to . . . compensation, although he has since ceased to be the owner. He had a vested right, which is not disturbed by the subsequent alienation.

Appeal dismissed with costs.

BOYD, C.

JANUARY 14TH, 1905.

CHAMBERS.

CANADIAN RADIATOR CO v. CUTHBERTSON.

Writ of Summons—Service out of Jurisdiction—Cause of Action, where Arising—Contract—Conditional Appearance.

Appeal by defendants from order of Master in Chambers refusing to set aside order for issue of writ of summons for service out of the jurisdiction, the writ issued pursuant to the order, and the service upon defendants in Manitoba.

C. J. Holman, K.C., for defendants.

C. A. Moss, for plaintiffs.

BOYD, C.—The contract is not in writing, and a writ has been issued in the Province of Ontario and served in Manitoba, on affidavits setting forth that the contract was to be performed by payment in this Province. This satisfies what is required by Rule 1246, and, although defendants by affidavit dispute and say that the contract was made and to be performed in Manitoba, yet that issue cannot or should not be determined in a summary way on affidavits. Yet should defendants be protected in this contention and have the benefit of it in a proper way and at a proper time.

The former common law practice was, in cases of doubt, to require plaintiff to give an undertaking to prove at the