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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. OCTOBER 14TH, 1919.

HUNTER v. PERRIN.

Arbitration and Award—Enforcement of Award—Judgment—Setting aside—Judgment Directed to be Entered for Amount to be Ascertained by Registrar—Costs—Appeal.

Appeal by the defendants from the judgment of SUTHERLAND, J., 16 O.W.N. 341.

The appeal was heard by MEREDITH, C.J.C.P., LATCHFORD and MIDDLETON, JJ., and FERGUSON, J.A.

H. D. Gamble, K.C., for the appellants.

W. Lawr, for the plaintiffs, respondents.

THE COURT set aside the judgment and directed judgment to be entered for the plaintiffs for an amount to be ascertained by one of the Registrars. No costs of setting aside the judgment and no costs of the appeal. The costs of the proceedings before SUTHERLAND, J., to be paid by the defendants.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. OCTOBER 14TH, 1919.

RE COLLINS v. WILLIAMS.

Division Courts—Jurisdiction—Motion for Prohibition—Action for Commission on Sale of Land—Defence—Soldier Settlement Act, 1919, 9 & 10 Geo. V. ch. 61, sec. 71 (Dom.)—Application of—Question for Judge in Inferior Court.

Motion by the defendant for prohibition to the Third Division Court of the County of Ontario.

A. W. Langmuir, for the applicant.
D. C. Ross, for the plaintiff, respondent.

MIDDLETON, J., in a written judgment, said that the action in the Division Court was brought to recover commission payable under an agreement for the sale of land, bearing date the 28th June, 1919. The agreement was made between the defendant and one Harding. in the form of an offer by Harding to purchase and an acceptance by Williams, in which was embodied a clause, "I agree to pay W. J. Cook the agreed commission." Whether this was the commission sued for by Collins, or whether there was another agreement with Collins was not disclosed. The defendant relied, as a defence, upon the provision of sec. 61 of the Soldier Settlement Act, 1919, 9 & 10 Geo. V. ch. 71 (Dom.), which provides that "no person, firm or corporation shall be entitled to charge or to collect as against or from any other person, firm or corporation any fee or commission or advance of price for services rendered in the sale of any land made to the Board, whether for the finding or introducing of a buyer or otherwise." The Division Court Judge found that this statute did not constitute a defence, and gave judgment for the plaintiff.

The facts were not adequately disclosed. The Soldier Settlement Board of Canada, by its letter of the 24th August, stated that Harding "has made application to this Board for assistance in purchasing your property in Reach township," and that "the Board has approved of the purchase." If this was so, the transaction was not one within the provisions of sec. 61, for it was not a sale made to the Board within the meaning of the Act.

Quite apart from this, prohibition did not lie. It was for the Division Court Judge to determine all questions of fact and law arising at a trial of a plaint properly begun in his Court. There was no appeal from his decision, and there was no remedy, even if he erred, so long as he did not by his error give himself jurisdiction. This law was so long settled that it would be only pedantry to cite cases.

The motion, on this ground alone, failed, and must be dismissed with costs, fixed at $25.

MIDDLETON, J., IN CHAMBERS. OCTOBER 14TH, 1919.

MURRAY v. FITCH.

Costs—Taxation—Action Brought in Supreme Court—Costs Adjudged to be Paid on Scale of County Court—Allowance of Increased Counsel Fee—Powers of Taxing Officer at Toronto—Practice—Rule 2.

An appeal by the defendant from the taxation of the plaintiff's costs of an action brought in the Supreme Court of Ontario.

W. J. Hanley, for the defendant.
F. W. Denton, for the plaintiff.

MIDDLETON, J., in a written judgment, said that by the judgment in the action costs were given to the plaintiff on the scale of the District Court without set-off. The Senior Taxing Officer at Toronto had allowed an increased counsel fee within the limits of the County Court tariff. The sole contention of the defendant was, that where, in a Supreme Court action, costs are awarded upon the lower scale, the Taxing Officer is limited by the tariff of County Court costs to a maximum fee of $25. The Judge of the County Court may increase the fee, but it is said that the Taxing Officer has no such power. The learned Judge was of opinion that this contention could not prevail. The taxation was in the Supreme Court; the officers of the Supreme Court were to seek to apply to the taxation the provisions of the tariff of the County Court; and the Senior Taxing Officer at Toronto had jurisdiction to allow an increased fee. This certainly had been the practice for the last 40 years, and it ought not to be interfered with. Rule 2 says that as to all matters not provided for in the Rules the practice shall be regulated by analogy thereto.

The appeal should be dismissed, with costs fixed at $20.

MIDDLETON, J., IN CHAMBERS. OCTOBER 14TH, 1919.

JAMIESON v. HAGAR.

Costs—Action to Enforce Mechanic's Lien—Power of Master or Referee to Fix Costs at Lump-sum—Discretion—Appeal—Judicature Act, sec. 74(4).

Appeal by the plaintiff from an order of the Assistant Master in Ordinary, in an action to enforce a mechanic's lien, fixing the costs of the plaintiff at a lump-sum.

C. W. Plaxton, for the plaintiff.
J. Parker, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff's claim was for $200.98. The claim was undisputed—the difficulty was to raise the money to pay. This was not accomplished until after a lien had been registered and a statement of claim filed. The lien-holder then demanded $62 costs for this preliminary work, and presented a detailed bill, which the Master considered in detail, and reduced to $21, being $16 fee and $5 disbursements. The plaintiff's solicitor was not satisfied, and asked for reconsideration, and produced another bill, prepared on another theory, claiming to be entitled to $53.10, this consisting of $5.10 disbursements, and the balance representing solicitor's fees. The Master, without considering this demand in detail, exercised the jurisdiction which he has of fixing the costs at a lump-sum, in the exercise of his discretion; and from this the plaintiff appealed. The appeal should fail. There was no room for the contention that in actions to enforce mechanics' liens the claimant is entitled to 25 per cent. of the claim as costs. The Act fixes 25 per cent. as a limit which cannot be transcended.

Under the Mechanics and Wage-Earners Lien Act, the general provisions of the Rules of the Judicature Act are applicable. Under sec. 74(4) of the Judicature Act, "costs of proceedings before judicial officers, unless otherwise disposed of, shall be in their discretion subject to appeal." One of the recognised modes of exercising the judicial discretion over costs is by fixing the amount at an arbitrary sum without taxation: Ryan v. Fish (1883), 4 O.R. 335, 344; Willmott v. Barber (1881), 17 Ch. D. 772. Where costs are fixed by a Judge exercising his discretion, his ruling is not subject to review; where costs are fixed by a judicial officer under the terms of the section quoted, an appeal will lie, but the same principle must apply that is always invoked where there is an appeal from a discretionary order. The appellate tribunal will

not interfere upon a mere question of quantum, at any rate unless convinced that there has been a substantial miscarriage of justice: see Conmee v. North American Railway Contracting Co. (1890), 13 P.R. 433.

In this case, having regard to the amount of the claim and all the surrounding circumstances, there could be no reason for differing from the Assistant Master. The case was not much more than a Division Court one, and the allowance appeared to be adequate for the services actually rendered.

The appeal should, therefore, be dismissed; and the learned Judge exercised the arbitrary discretion which he considered that he possessed, by fixing the costs to be paid by the appellant at $7.50.

MIDDLETON, J., IN CHAMBERS. OCTOBER 14TH, 1919.

RE COWARD.

Infant—Custody—Right of Testamentary Guardian—Infant Allowed to Visit Grandmother on Undertaking to Return—Violation of Undertaking—Custody Awarded to Guardian pending Litigation as to Will—Costs.

Motion by W. M. Maclennan, the testamentary guardian of an infant, for an order for the custody of the infant.

G. H. Kilmer, K.C., for the applicant.
N. Phillips, for Elizabeth Dunlop, the infant's grandmother.

MIDDLETON, J., in a written judgment, said that the applicant was at present the testamentary guardian of the infant. The infant was allowed to visit the grandmother upon the understanding that she would return it to the guardian. In breach of this understanding, she retained the child, and now sought to set up that letters probate of the will were improperly granted, the will not having been duly executed.

The proper course was to direct that the grandmother should restore the child to the custody of the guardian, without prejudice to any proceedings she might be advised to take in the proper Court to set aside the letters probate, and without prejudice to any application that might be made either by the grandmother or the testamentary guardian in the Surrogate Court for the granting of letters of guardianship. It might well be that, even if the will was, as suggested, improperly executed as a testamentary document, it might amount to such an indication of the wishes of the

parent as to the child's future that great weight should be given to it by any Court dealing with the custody of the child.

Whatever rights the grandmother might have, she must assert them properly, and not by a violation of her undertaking to return the child. The motion was dealt with solely upon this ground and upon the ground that the letters probate could not be attacked in this collateral manner.

If these proceedings were to end the litigation, no costs should be allowed; but, as this was only the beginning of the litigation, there was no reason why costs should not follow the event. The applicant should, therefore, recover costs against the grandmother, not to be levied against her personally, but to be set off against any costs that in any litigation concerning this matter might be awarded to her.

SUTHERLAND, J. OCTOBER 14TH, 1919.

PRESTON v. HILTON BROTHERS.

Nuisance—Erection of Stables and Waggon-sheds in Residential Neighbourhood in City—Action by Property-owner qui tam to Restrain—Interim Injunction—Motion to Continue until Trial—By-law of City Council—Permit—Addition of City Corporation as Defendant—Status of Property-owner to Maintain Action.

Motion by the plaintiff to continue until the trial an interim injunction granted by FALCONBRIDGE, C.J.K.B., on the 9th September, 1919.

The motion was heard in the Weekly Court, Toronto.
A. C. McMaster, for the plaintiff.
E. P. Brown, for the defendants.

SUTHERLAND, J., in a written judgment, said that the plaintiff resided in First avenue, in the city of Toronto, and owned real property fronting on the south side thereof. The defendants had recently acquired property on the north side thereof. The defendants had for some years carried on business as bread manufacturers, in premises on the south side of Gerrard street, north of a lane between that property and another property recently acquired by them on the south of the lane. In connection with their business the defendants had erected and used a large brick bakery and stables for waggons and horses. They had commenced to erect

waggon-sheds on the south side of First avenue, and threatened to erect stables on the north side thereof. The property of the plaintiff and others on First avenue was alleged to be good residential property; and the plaintiff sued on behalf of himself and all other property-owners in that locality to restrain the defendants from proceeding with the erection of the sheds and stables.

The defendants on or about the 8th February, 1919, had filed with the Corporation of the City of Toronto, which had been added as a party-defendant, an application for a permit to build stables on the north side of First avenue, which permit, it was said, had not been granted up to the 10th March, 1919. On that day the city council, pursuant to sec. 409 (2) of the Municipal Act, R.S.O. 1914 ch. 192, sec. 409 (2), passed a by-law, No. 8078, which contained the following clause: "No building shall be erected or used as a stable for horses for delivery purposes . . . on the property on either side of First avenue between Broadview avenue and Bolton avenue."

On the 24th March, 1919, the city council passed a by-law, No. 8080, amending by-law No. 8087, repealing clause 1, and substituting therefor the following clause: "No building shall be located, erected, or used as a livery, boarding, or sales stable, or a stable in which horses are kept for hire or kept for use with vehicles in conveying passengers, or for express purposes, or as a stable for horses for delivery purposes . . . on the property on either side of First avenue between Broadview avenue and Bolton avenue."

Notwithstanding these by-laws, the Architect and Superintendent of Buildings for the city corporation granted to the defendants two permits, bearing date the 12th May, 1919, the one for the erection of a one-storey frame and metal waggon-shed and the other for the erection of a three-storey brick stable on First avenue within the prescribed area.

Upon the motion to continue the injunction being made, a preliminary objection was taken, that the plaintiff as such, and even when suing on behalf of himself and all other property-owners on First avenue, had no right of action, but that such lay in the defendant city corporation alone—citing Mackenzie v. City of Toronto (1915), 7 O.W.N. 821.

On the other hand, the plaintiff's contention was that the by-law affected only, and was intended to protect and benefit only, a particular group of persons within a named area, citing Devenport Corporation v. Plymouth Devenport and District Tramways Co. (1884), 52 L.T.R. 161 (C.A.); Halsbury's Laws of England, vol. 21, p. 553; Dawson & Co. v. Bingley Urban District Council, [1911] 2 K.B. 149, at p. 159.

The learned Judge said that, on the material filed, it was, in his opinion, appropriate to continue the injunction to the trial, and he was by no means sure that the preliminary objection stood in the way. He, therefore, made the order asked by the notice of motion—costs to be in the cause unless the trial Judge should otherwise direct. The parties agreed that the trial should be expedited.

MIDDLETON, J. OCTOBER 16TH, 1919.

*TORONTO AND SUBURBAN R.W. Co. v. ROGERS.

Railway—Expropriation of Land—Ontario Railway Acts 6 Edw. VII. ch. 30 and 3 & 4 Geo. V. ch. 36—Land "Taken" when Notice of Expropriation Served—Registry Act—Purchaser for Value without Notice—"Owner"—True Owner at Time of Expropriation—Notice—Compensation—Arbitration—Stated Case—Costs.

Case stated by the parties and heard in the Weekly Court, Toronto.

R. B. Henderson, for the plaintiff.

J. F. Boland, for the defendants Rogers.

D. J. Coffey, for the defendants Ford and Roome.

MIDDLETON, J., in a written judgment, said that the plaintiffs, at the time of the occurrences referred to in the case, were subject to the railway law of Ontario.

On the 30th August, 1911, they deposited their plan of location in the registry office, shewing, inter alia, their right of way as crossing the lands of the defendant Rogers, part of lots 7 and 8 in concession A., Etobicoke. Before this deposit, Rogers had made a subdivision plan by which streets were laid out crossing the strip taken by the plaintiff for their railway, and small lots fronting on these streets. That plan was not registered until the 26th August, 1911. Some lots had been sold by Rogers prior to the registration of the railway plan, but in respect of only one of these sales was there any registration. That was the sale to Clements by agreement of the 27th March, 1911, of "lot 82 on the north side of Dundas street," having a frontage of 50 feet by a depth of 150 feet "according to a plan of subdivision of lots 7 and 8 in concession A. of Etobicoke." This agreement was registered on the 6th May, 1911.

* This case and all others so marked to be reported in the Ontario Law Reports.

After the registration of the plaintiffs' plan and of the subdivision plan, and before the giving of the notice of expropriation, other lots were sold. Among other lots, 1 and 2 were sold to Ford on the 21st October, 1912, the agreement being registered on the 7th November, 1912, and lots 4 and 13 were sold to Roome on the 9th May, 1912, the agreement not being registered until after the notice of expropriation. On the 5th May, notice of expropriation was served upon Rogers, and a few days later a notice of motion for immediate possession. The plaintiffs were then advised of Rogers' dealings with his property, and (without prejudice to their contention) notice was given to all those who had acquired rights under him. Immediate possession was ordered and money paid into Court. All the claimants save Ford and Roome had been settled with; and the case was stated for the purpose of determining questions as to the rights of Ford and Roome.

The Act in force at the date of the plan was the Ontario Railway Act of 1906, 6 Edw. VII. ch. 30. The Railway Act of 1913, 3 & 4 Geo. V. ch. 36, assented to on the 6th May, 1913, and operative on the 1st July, 1913 (sec. 304), made important changes affecting the matter in hand.

In Toronto Suburban R.W. Co. v. Everson (1917), 54 Can. S.C.R. 395, it was decided that the governing statute was the Act of 1906; also that the giving of the notice of expropriation, and not the registration of the plan, was the taking of the lands which first conferred a right upon the railway company.

Reference to City of Edmonton v. Calgary and Edmonton R.W. Co. (1916), 53 Can. S.C.R. 406, a case under the Dominion Railway Act.

The land was not, before the notice of expropriation, extra commercium, and effect must be given to all transactions before that date. Subsequent to the beginning of the expropriation all transactions are subject to it, and any conveyance of the land is in effect only an assignment of the purchase-price or some part of it.

The effect of the Registry Act is to protect the railway company as soon as it becomes a purchaser for value without notice. It cannot be regarded as a purchaser for value until its title is completed; and any notice it may have of any transaction which took place before it acquired a right by the expropriation proceeding, and before the purchase-price was paid, must be regarded, so that the person who has acquired the right or interest may be protected. The owner at the time of the expropriation is the true owner, not necessarily the registered owner. If the expropriation is carried to completion, and the railway company registers its title on the strength of the belief that the registered

owner is the true owner, the Registry Act protects it against any unregistered conveyance. But if, before that time, it learns of any conveyance by the registered owner, it is not protected.

These two purchasers, having bought before the beginning of the expropriation, are entitled to have an arbitration to determine the compensation to be paid to them respectively, on the footing that the company had offered them respectively the amounts mentioned in the schedule to the order of the 30th May, 1913—the value to be determined as of the date of the service of the notice of expropriation.

The claimant land-owners should have their costs reserved by that order and the costs of this stated case payable to them in any event of the arbitration. No order as to Rogers' costs.

MIDDLETON, J., IN CHAMBERS. OCTOBER 17TH, 1919.

*RE SHARP AND MANDEL.

Mortgage—Mortgagors and Purchasers Relief Act—Mortgage Made before the War—Default—Application by Mortgagee for Leave to Proceed—Transfer of Equity of Redemption—Voluntary Assumption of Liability by Transferee—Inability to Meet Payments not Attributable to War—Attempt to Compel Mortgagee to Reduce Amount of Mortgage—Action against Mortgagor upon Covenant—Costs.

Motion by the mortgagee for leave to proceed to enforce a mortgage notwithstanding the provisions of the Mortgagors and Purchasers Relief Act.

P. E. F. Smily, for the mortgagee.
J. Singer, for the mortgagor.
W. H. Lockhart Gordon, for the purchaser from the mortgagor.

MIDDLETON, J., in a written judgment, said that the mortgage was made by Mandel before the war; the principal was payable by instalments; and, having regard to the terms of the mortgage, the principal was now in default. It was a second mortgage for $1,800, upon which $1,200 was now due. The first mortgage was for $3,500; the value of the property was given as $6,600 so that there was no particular jeopardy of the amount secured.

The mortgagor on the 17th May, 1919, sold the property to Bessie Finstein, who paid cash for the value of the equity, and,

it was said, had since spent $1,100 in improvements upon the property.

The mortgagee, according to her evidence, was in actual need of the money, and upon pressing for payment was told by the mortgagor and purchaser that, unless she was willing to make a substantial rebate of the amount due, they would not pay it off, claiming the protection of the Act.

There was grave doubt whether Bessie Finstein was within the protection of the Act at all, as she voluntarily assumed her liability by her contract made in 1919—the Act being for the protection of persons who were under liability at the breaking out of the war, and who were prevented from performing their obligations by reason of the state of affairs and financial stringency which followed.

It was clear, however, that Bessie Finstein had not brought herself within the provisions of the Act, for she had not shewn that she was unable to meet the payments under the mortgage "by reason of circumstances attributable, directly or indirectly, to the present war." She attributed her inability to the fact that she had spent her money in making improvements upon the property and "to the expense of all commodities owing to the war."

It would be improper to allow this Act to be made use of for the purpose of compelling mortgagees to reduce the amount of their security in order to secure payment; and in this case it was satisfactorily shewn that this desire was really underlying the attitude of the present owner of the property; and therefore, unless the mortgage should be paid off within one month from this date, the mortgagee should be at liberty to take proceedings to realise the claim against the property.

It would not be proper to permit any action upon the covenant against the mortgagor. The mortgagee should be at liberty to add the costs of the application to the mortgage-debt, and the owner of the equity should indemnify the mortgagor against costs. Unless the parties liable to pay desired taxation, these costs should be fixed at $25 and $10 respectively.

KELLY, J., IN CHAMBERS. OCTOBER 17TH, 1919.

RE BOWEN AND CANADIAN ORDER OF FORESTERS.

Insurance (Life)—Contest between Beneficiary under Policy and Beneficiary under Will of Deceased Assured—Insurance Company Allowed to Pay Insurance Moneys into Court—Issue Directed.

Motion by the society for an order allowing it to pay into Court moneys payable under an insurance certificate for $1,000 upon the life of Vincent Bowen, now deceased.

Lyman Lee, for the society.

Nicol Jeffrey, for Annie Elizabeth Bowen, mother of the deceased.

L. Goetz, for Hilda Bowen, widow of the deceased.

KELLY, J., in a written judgment, said that the widow of the assured, who was also the sole beneficiary under his will, which had been admitted to probate, relied upon Re Monkman and Canadian Order of Chosen Friends (1918), 42 O.L.R. 363, as determining in her favour her claim to these insurance moneys.

If the only question involved were whether the will had effected a change of the beneficiary in favour of the widow, the learned Judge would have felt bound by the decision in that case, the wills there and here being practically identical in form. But counsel for the claimant—the mother of the assured, who was named as the beneficiary on the face of the certificate—urged on the argument, and there was a suggestion of it in one part of the correspondence between the representatives of the parties, that his client, in addition to any rights she might have as such beneficiary, set up an agreement under which also she claimed to be entitled.

The merits of these respective claims were not before the learned Judge for determination; but, in view of their nature, he thought the $1,000, less the applicant's costs of this motion and of paying in, should be paid into Court, and there should be an issue to determine, as between the claimants, which of them was entitled.

BIGRAS V. O'CONNOR—SUTHERLAND, J.—OCT. 14.

Contract—Sawing Timber—Termination of Agreement by Owner of Timber—Recovery by Saw-mill Owner for Work Done and Moneys Expended—Damages for Wrongful Termination—Counterclaim.]—The plaintiff was the owner of a saw-mill, and the defendant was the holder of a license to cut timber in the White Fish Lake Indian Reserve. On the 14th May, 1917, the parties entered into an agreement for the cutting of the defendant's timber by the plaintiff's saw-mill. In this action the plaintiff claimed $2,000.15 for expenditures, services, and work done under the agreement and $5,000 damages by reason of the cancellation or determination of the agreement by the defendant. The defendant counterclaimed damages for breach of the agreement. The action and counterclaim were tried without a jury at Sudbury. SUTHERLAND, J., in a written judgment, after setting out the facts and examining the items of the plaintiff's claim with particularity, stated his conclusion that the plaintiff was entitled to recover $2,006.66 upon his first claim and $1,000 for damages with costs, and that the counterclaim should be dismissed with costs. Judgment accordingly. G. E. Buchanan, for the plaintiff. C. McCrea, for the defendant.

SUNDSTROM V. YATES—LENNOX, J.—OCT. 16.

Mortgage—Action upon—Defence—Fraud and Misrepresentation—Failure to Prove—Mistake in Mortgage as to Amount Payable—Plaintiff Allowed as Indulgance to Recover Full Amount Claimed—Amendment—Costs.]—Action to recover $2,000 and interest on a mortgage executed by the defendant in the plaintiff's favour. The defence was that the mortgage was based upon a transaction which the defendant was induced to enter into by certain false and fraudulent representations made to him by the plaintiff. The action was tried without a jury at a Toronto sittings. LENNOX, J., in a written judgment, said, after stating the facts, that the proviso for payment in the mortgage was contradictory: the total sum mentioned was $2,000, but the specific payments to be made were three, of $300 each, and a final payment of $200, making in all $1,100. No doubt, this was an error in conveyancing, but the plaintiff did not ask for reformation or for a declaration of the intention of the mortgagor and mortgagee. The learned Judge said that he was disposed to think that representations material to the contract and false to the knowledge of the plaintiff were made to and acted upon by the defendant; but this was merely conjecture. The defendant had failed to prove the misrepresentation, and could not succeed upon his defence.

Strictly speaking, the plaintiff was entitled to recover only $1,100 and interest upon his mortgage; but as an indulgence he should have judgment for $2,000 and interest, without costs. If the plaintiff desired to amend, he was at liberty to apply before the entry of judgment. J. S. Beatty, for the plaintiff. A. C. Kingstone, for the defendant.

SCOTT v. GARDINER—KELLY, J.—OCT. 17.

Report of Master—Motion to Open up—Defendants not Appearing on Reference—Denial of Indulgence—Notice of Settling Report not Given to Defendants—Rule 424—Report Set aside for Purpose of Notice of Settling only—Costs.]—An appeal by the defendants from the report of the Master at Windsor. The appeal was heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that the defendants were given ample opportunity to present before the Master any evidence they might have chosen to submit; but, after repeated enlargements at their request, and though due notice was given them of a peremptory appointment for the day on which the Master did proceed, and notwithstanding that on that day and shortly before the proceedings commenced they were personally informed that the matter would be then proceeded with, neither they, nor any one representing them, appeared. They now set up that the Master should have allowed them to give evidence and that they had material evidence to submit. In the circumstances, they were not entitled to further indulgence on that ground. They also complained that notice of settling the minutes of the report was not served upon them, as required by Rule 424. It is not disputed that this notice was not given to them, and no special reason has been assigned for dispensing with notice. On this latter ground the report should be set aside to permit of notice of settling being given and thus affording them an opportunity of appearing or being represented on the settling. For this purpose and to this extent the report is set aside and the matter referred back. Costs of the appeal to be paid by the plaintiff to the defendants. B. H. Symmes, for the defendants. W. J. Beattie, for the plaintiff.