

It sufficiently explains the nature of the proposed evidence, and states that he had no way of discovering this evidence before the trial. It was argued with much confidence that Rule 491 does not apply to the present case, but that it is governed by Rule 498 (3). Whatever may be the view which ultimately prevails on this question, I do not feel myself at liberty to go contrary to the deliberate opinion expressed by that eminently careful Judge the late Mr. Justice Street in *Rushton v. Grand Trunk R. W. Co.*, 2 O. W. R. 654, more fully reported in 6 O. L. R. 425. There it was distinctly said that evidence in cases like the present could be taken under Rule 491. The appointment was set aside, but it was because it was held that the proposed evidence could not be received. But, if the attempted examination was irregular, there would have been no necessity to consider whether the evidence sought to be adduced was or was not admissible. This is sufficient, perhaps, to enable me to dispose of this motion. But I venture to point out that a great deal of time may be saved and the recovery of the plaintiff be accelerated by allowing the examination to proceed. For it may turn out that when these witnesses come to be examined they may entirely negative what the defendant hopes to prove.

In any case no more harm can result to the plaintiff from the proposed evidence being taken on an examination than if the witnesses had made affidavits. In neither case can the evidence be used without the leave of the Divisional Court. It will be for them to consider how far the principle of Rule 312 requires a new trial if the evidence of the proposed 5 witnesses appears to be admissible, and sufficiently likely to lead to a different conclusion from that arrived at on the first trial.

It was argued as a reason for setting aside the appointment that the defendant's affidavit was not filed until after the date of the proposed examination. That, however, does not appear to be a condition precedent. It might be a more serious objection that it does not state that the proposed witnesses will not make affidavits. But from the character of the evidence expected to be given by them, it may well be assumed that they do not wish to appear as volunteers.

The motion will be dismissed with costs to the defendant in the appeal to the Divisional Court, unless otherwise ordered. But the examination should be stayed until the time for appealing from this order has expired.