

MACLENNAN, J.A.]

[Oct. 20.]

D'IVRY v. WORLD NEWSPAPER CO. OF TORONTO.

Appeal—Time—Extension of—Special circumstances—Terms—Notice of motion—Late service—Objection.

Where notice of appeal was given, but the appeal was not set down in due time, and a sittings of the Court lost, the time for setting down was extended, as it appeared that there had all along been a bona fide intention of appealing, and security had been given for the debt and costs, and a large sum paid for a copy of the evidence. The terms of giving further security, setting down the appeal within a limited time, and paying costs in any event, were imposed.

An objection that a notice of motion was served five minutes too late should not prevail where the delay was occasioned by the solicitor having lately changed his office. If necessary, a new service should be permitted.

H. M. Mowat, for the plaintiff.

King, Q.C., for the defendants.

MOSS, J.A.]

[Oct. 25.]

DENISON v. WOODS.

Payment into Court—Defence—Payment out—Election—Time—Con. Rules 632 et seq.—Appeal—Removal of stay of proceedings.

In an action to recover money for services rendered, the defendant pleaded that \$325 was more than an ample and sufficient payment; that he had before action paid the plaintiff \$25, and had always been ready and willing and was now ready and willing to pay him \$300 more; that before action he had tendered \$300 in payment of the services rendered, but the plaintiff refused to accept it; and the defendant brought \$300 into Court in satisfaction of all claims and demands of the plaintiff in this action.

The plaintiff did not elect to take the money out of Court, but joined issue upon the defence, and, the action proceeding, was awarded \$397.50 by the report of a referee. After the defendant had unsuccessfully appealed from the report to the High Court, and had launched a further appeal to the Court of Appeal, the plaintiff applied to a Judge of the Court of Appeal for an order to remove the stay of proceedings in the Court of Appeal imposed by the giving of security, for the purpose of allowing him to move for payment out of Court of the \$300.

Held, that the defence was so framed that if the plaintiff had desired to take the money out of Court, he must have elected to do so before replying or before the expiration of the time for replying, as provided by Con. Rule 636, and must have taken it in satisfaction of all claims of the plaintiff in the action, and have filed and served a memorandum in accordance with Rule 635. But, as the plaintiff, instead of taking this course, proceeded with the action, the defendant was absolved from his offer, and the money remained in Court subject to further order; the defendant was entitled, in the absence of special circumstance, to have it remain to be dealt with when the case should be finally disposed of; and it was open to the defendant to contend that the amount allowed by the referee should be reduced below \$300, notwithstanding