

Leave should be reserved to the plaintiffs to bring an action for damages, if for any reason the defendant fail to make title.

BRITTON, J.:—I agree.

FALCONBRIDGE, C.J.:—I agree in the result.

Appeal allowed.

MIDDLETON, J., IN CHAMBERS.

OCTOBER 29TH, 1912.

CAMPBELL v. VERRAL.

*Solicitor—Cross-examination upon Affidavit Made in Cause—
Right to Professional Witness-fee—Tariff of Disbursements,
Item 119—Practice—Subpœna—Refusal to be Sworn.*

Motion by the plaintiff for an order for the committal of Mr. Phelan, a solicitor, for his failure to submit himself for cross-examination upon an affidavit made by him in this action, which was brought subsequently to the action of Campbell v. Taxicabs Verrals Limited, ante 28.

J. MacGregor, for the plaintiff.

J. M. Godfrey, for Mr. Phelan.

MIDDLETON, J.:—The real question is the right of Phelan to demand payment of a professional witness-fee, and I propose to deal with the motion upon that basis.

Mr. MacGregor argued that the objection was taken prematurely, and that Mr. Phelan ought to have been sworn before demanding the fee in question. I do not agree with this; but, even if Mr. MacGregor be right, this defect in Mr. Phelan's conduct is more than offset by the fact that the subpœna served was not in any authorised form, and merely commanded attendance before "John Bruce, special examiner, on Friday the 4th October, 1912, at half past nine o'clock in the forenoon," without specifying, as it should, the purpose for which attendance was to be made. The subpœna did not require more than "attendance."

The right to a professional fee seems clear. Evidence upon a motion may be given by affidavit (Con. Rule 489); but the deponent may be cross-examined (Con. Rule 490); the witness being "required to attend in the same manner as, and his exam-