

An appeal from an order of the Master in Chambers, directing the plaintiff to answer certain questions which he refused to answer upon his examination for discovery. See 22 O. W. R. 32.

H. E. Rose, K.C., for the plaintiff.

S. Denison, K.C. contra.

HON. MR. JUSTICE RIDDELL:—The action is upon a life insurance policy—one of the defences is misrepresentation as to age. Upon the examination for discovery, the plaintiff refused to say whether the marriage certificate of the deceased (which would or might, as it is admitted, assist in proving the age of the deceased), was in the possession of his solicitors.

The ground of the objection is that the plaintiff had already made an affidavit on production in which he did not mention this document, and it is contended on his behalf that the question which he objected to answer was an indirect method of cross-examining upon that affidavit.

I may say at once that I cannot understand the refusal of the plaintiff or his solicitors to make full disclosure of this document, if it exists—if the claim is an honest one. But that does not disentitle him to take full advantage of the law if it is as he claims.

The practice which never obtained in England of cross-examining on an affidavit on production was introduced into the Upper Canada Chancery practice shortly after the reorganization of the Court of Chancery in 1849 by 12 Vict. (Can), ch. 64. Before that time the Court of Chancery had been as at first constituted in 1837, by 7 Wm. IV. ch. 2, with a Vice-Chancellor—but thereafter the Court was equipped with a Chancellor and two Vice-Chancellors. Before this the English orders passed before March, 1837—the date of the Act, 7 Wm. IV, ch. 2—and a few orders passed by the Upper Canada Court of Chancery were in force. In 1850 (7th May), new orders were issued by the Upper Canada Court of Chancery, amongst them No. 50 “Any party to a suit may be examined as a witness by the party adverse in point of interest . . . without any special order for that purpose . . .” This provision was continued by the C. G. O. of 1853, ch. 22, sec. 1 (sec. 3, Gr. at p. 28, and became in the C. G. O’s of 1868, C. G. O. 138.