

On this Lord Bowen said (p. 357): "It is not necessary in the present case to decide that point."

The inclination was apparently to answer the query affirmatively, and I think it may be said that wherever a judgment has been entered on default of either party, a possible remedy is provided by Rule 358; and that, so long as that Rule can be invoked, the action is still pending. In all such cases the motion has to be made in the action, which must therefore be viewed as still pending—otherwise no motion could be made—and the only remedy would be by petition, if any remedy existed.

Then it follows that if the action is pending, the solicitor on the record is still solicitor until a change has been made as directed in Rule 335.

The motion will therefore now be heard on the merits, as soon as the defendant can be heard from by his solicitor.

[See *Newcombe v. McLuhan*, 11 P. R. 461.—ED.]

ANGLIN, J.

FEBRUARY 20TH, 1905.

WEEKLY COURT.

LYE v. McCONNELL.

*Discontinuance of Action—Right of Defendant to Prevent
—Specific Performance—Payment of Purchase Money
into Court by Defendant—Right to Judgment.*

Motion by defendant to set aside a notice of discontinuance of the action served by plaintiff.

J. Lorn McDougall, Ottawa, for defendant.

A. F. May, Ottawa, for plaintiff.

ANGLIN, J.—This action was brought on 7th June, 1904, for the specific performance of an alleged contract for the sale by plaintiff to defendant of certain mining lands. . . . Defendant's appearance was entered on 14th June. On 5th August defendant paid into Court \$3,619.48, purchase money and interest, in satisfaction of plaintiff's claim, and duly notified plaintiff's solicitors of such payment. Defendant's solicitors, by letter, asked for proof of title. In moving to set aside a præcipe order for security for costs, plaintiff, on 23rd June, made affidavit that he owned the lands in question.

Plaintiff now alleges that, towards the end of June, having an opportunity to sell the lands in question to an-