

The plaintiff contended that the procedure of Rule 337 could not be applied, and that where a party ordinarily resident within Ontario leaves the Province the right to examine him must be asserted under Rule 328.

It was not necessary to determine this question upon the present application, because the order made on the 26th June was not appealed from within due time, and, moreover, it was accepted by the plaintiff, in such a way as to preclude him from appealing therefrom, by making the subsequent application to extend the time within which the plaintiff should attend.

The order of the 26th June would in effect be an order under Rule 328, for, assuming the plaintiff to be out of Ontario, the Court ordered the examination to be taken at Toronto, that being admittedly the most "convenient place."

Having regard to the circumstances disclosed and the failure of the plaintiff to comply with the terms of the order of June, the default would amply justify the provision for the dismissal of the action for want of prosecution in the order extending the time.

On the hearing of the appeal, with the assent of both counsel, the learned Judge withheld judgment to allow the plaintiff's solicitor to endeavour to find his client, it having been made to appear that the real reason for the default was the fact that the plaintiff's solicitor was unable to find his client, who appeared to be travelling from place to place and had failed to keep in touch with his solicitor.

The time for which the decision was to be withheld had now expired; and, on notice being given to the plaintiff's solicitor, he admitted that he had not yet found his client.

The appeal failed and should be dismissed with costs to the defendant in any event of the cause.

The action was based upon a distress for rent, and a large sum of money was claimed. If the claim was put forward in good faith, the plaintiff ought to have kept in touch with his solicitor, and could not complain of the dismissal of his action, when his solicitor, after 6 months' diligent search, could not find him.