

Full Court.]      FERGUSON v. MILLICAN.      [Nov. 13, 1905.

*Evidence—Foreign commission—Examination abroad of defendants as witnesses on their own behalf—Terms.*

The defendant, a solicitor practising his profession in Ontario, and his wife, were still in Ontario when two actions were brought against them by a former client of the husband. Shortly afterwards they removed to the North-West Territories to take up their permanent residence there. The actions were respectively for an account of moneys intrusted to the solicitor for investment and to set aside assignments of life insurance policies.

*Held*, reversing the decisions of a Divisional Court and of a judge and the Master in Chambers, that, in the circumstances shewn by the affidavits, the defendants should be allowed to have their evidence taken on commission in the Territories, as witnesses on their own behalf, for use at the trial of the actions, but upon terms advantageous to the plaintiff as to the expense of executing the commission.

*F. E. Hodgins*, K.C., for defendants, appellants. *Middleton*, for plaintiff.

Osler, J.A.—Chambers.]      [Nov. 18, 1905.

ULYAKI v. DA' SON.

*Court of Appeal—Appeal from order for new trial—Security on appeal—Stay of trial—Rule 827—Removal of stay.*

A new trial having been ordered by a Divisional Court, the plaintiff gave notice of trial, but the defendants appealed to the Court of Appeal from the order directing the new trial, and gave the security required by Con. Rule 826, which was duly allowed.

*Held*, that the order for a new trial was "a judgment or order appealed from," within the meaning of Con. Rule 827 (1), and, the security for the appeal having been allowed, the execution thereof, by proceeding to a new trial or otherwise, was stayed pending the appeal by force of that Rule, such judgment or order not being one of the excepted cases mentioned in the Rule. The Rule is not confined to the case of a judgment or order directing the payment of money, but extends generally to all appealable judgments or orders which are to be "executed" by proceedings to be taken thereunder or in consequence thereof.

In a proper case the stay may be removed and permission given to proceed to trial notwithstanding the appeal; but as a