

MCNABB V. TORONTO CONSTRUCTION CO.—MASTER IN CHAMBERS
—MARCH 31.

Pleading—Parties—Motion to Amend Writ and Statement of Claim by Adding Plaintiffs—Substitute Plaintiff—Bona Fide Mistake—Con. Rule 313—Motion too late.]—Motion by the plaintiff for leave to amend the writ and statement of claim by adding as plaintiffs, himself and other members of a partnership. The action began on 3rd October, 1907, and was at issue on 13th December of that year. Nothing further was done except examinations for discovery until 23rd December, 1910, when a motion was made to dismiss for want of prosecution. On that application an order was made allowing the action to proceed on certain terms, one of which was that the plaintiff was to set the case down and go to trial at the Toronto non-jury sittings, within five weeks from 12th January. It was also ordered that security for costs should be given, as plaintiff has gone to reside in Alberta, and this was done, and the case set down on 1st March inst., after which the plaintiff's motion was launched, on 13th March. The Master said that it seemed clear that the motion should have been made under Rule 313, to substitute the firm as sole plaintiffs, and following *Biggar v. Kemp*, 17 O.L.R. 360, leave was given to the plaintiff's solicitor to make what was said in that case to be a necessary affidavit of a bona fide mistake on his part, if he could do so. On such an affidavit being made, and the solicitor being cross-examined, it did not appear why the present motion was not made before joinder of issue or, at latest, after the examinations for discovery. In answer to his own counsel, he said that he thought when the action was begun that there was no partnership, though one had been intended. This would have been sufficient for the success of the motion if made promptly after the examinations for discovery, but as it is now it seems too late, especially as to grant it would be to institute a new action, and nothing would be saved by this in expense. It may be that defendants would prefer that the motion should be granted, so as to preserve the order for security which would be a term of the allowance of the motion. But if this is not agreeable, then the motion must be dismissed, with costs to the defendants in any event, leaving the plaintiff to discontinue and bring a new action properly framed, or to proceed with the present action as he may be advised. This election should be made in a week so that the proper order may issue, and the pending motion for a commission to take McNabb's evidence may also be disposed of. J. M. Ferguson, for the plaintiff. J. Grayson Smith, for the defendants.