

money had not been tendered the said defendant. The Referee overruled all the objections and made an order directing defendant Whitton to attend for examination at his own expense.

*Held*, the appeal should be sustained with costs. Order of Referee discharged.

*Bradshaw* for defendant Whitton.

*Hough* for plaintiff.

TAYLOR, C. J.]

DUBUC, J.]

[Dec. 1.

KILLAM, J.]

SPARHAM & C. REEV.

*Notice of motion - Short notice "by leave of the court" - Amendment - Reinstatement of case on list of appeals - Inadvertence - Power of court to rescind rule.*

An appeal had been entered on behalf of defendant from the judgment of Bain, J., allowing plaintiff's demurrer to defendant's eleventh plea.

On the appeal coming on for argument,

*Bradshaw*, for plaintiff, objected that there was no evidence before the court of a rule on demurrer having been taken out, and that consequently the appeal was improperly entered.

The court gave effect to the objection and the appeal was dismissed with costs.

*Elliott*, for defendant, subsequently on the same day applied to the court for leave to make a motion on the following day to reinstate the cause, and, upon such leave being granted, served a notice of motion to reinstate the cause, the material part of which was as follows:

"Take notice that by leave of this honorable court *in banc*, this day given, the defendant will apply to said court on Tuesday, the 1st day of December instant, at the hour of eleven o'clock in the forenoon . . . to reinstate, etc."

On the motion coming on,

*Bradshaw* objected that, by rule of court 82, the practice in equity should prevail on this motion, and, by Rule 106, Ont. R. 479, "there must be at least two clear days between the service of a notice of motion . . . and the day named in the notice for hearing, unless the court or a judge shall give special leave to the contrary," and it did not appear that leave to serve short notice had been given, citing *Hart v. Talk*, 6 Hare 611; *Harris v. Lewis*, 8 Junst 1063; *Chambers v. Toyne*, 12 W.R. 1100; *Dawson*

*v. Beeson*, 22 Ch. Div. 504; and *McMicken v. Ontario Bank*, 1 W.L.T. 249; (2) the rule having been taken out, the defendant's motion should have been to rescind the rule; and (3) as the notice of motion did not give notice of reading any material none could be read, and there was nothing before the court on which it could act.

*Elliott*, in reply,

*Held*, (1) It sufficiently appeared from the notice of motion that leave to serve short notice had been given.

(2) The notice of motion should be amended so as to ask that the rule dismissing the appeal should be rescinded.

(3) The motion to be allowed to stand over till the following day, with liberty to the defendant to file such affidavits or other material as he might be advised in support of the motion.

No costs to either party.

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