

and evidence taken under each; that the facts sought to be established had been previously known to or their existence suspected by the party applying: where it was not alleged that the evidence sought to be obtained was material and necessary and that the party could not safely proceed to trial without it, but only that the examination would be effectual; and where no defence based upon the fact sought to be established had been set up, and no application had been made to amend the pleadings so as to enable it to be set up.

*Held*, that the order for the commission must be set aside with costs.

*W. B. A. Ritchie*, Q.C., for appellant. *R. E. Harris*, Q.C., for respondent.

Full Court.]

CUMMINGS *v.* PICKLES.

[Feb. 7.

*Practice—Notice of trial—Waiver of—Cause entered on docket improperly—Action dismissed for want of prosecution—O. 34, R. 23—Appeal from—Order—Costs.*

Defendant after giving notice of trial accepted service of a replication pleaded by plaintiff, without making any objection thereto.

*Held*, that he thereby waived his notice and admitted that the cause was not at issue when it was given.

Where defendant subsequently gave another notice, which was admittedly defective, and entered the cause on the docket of causes for trial,

*Held*, that the cause was improperly entered and that a motion to set aside the notice and to strike the cause off the docket should have prevailed.

Plaintiff did not appear at the time at which the cause was entered for trial, and an order was obtained by plaintiff under O. 34, R. 23, dismissing the action for want of prosecution.

*Held*, that there was an appeal from the order so made, and that plaintiff was not limited to an application under the order to have the judgment set aside.

Per MEAGHER, J. (dissenting). There should be no costs, as the difficulty appeared to have arisen from a misunderstanding between solicitors.

*J. A. McLean*, Q.C., for appellant. *J. J. Ritchie*, Q.C., for respondent.

Full Court.]

HARRINGTON *v.* PETERS.

[Feb. 7.

*Statute—Construction—Act changing form of procedure retroactive—Barrister and solicitor—Rendering signed bill.*

By the Acts of 1899, c. 27, s. 69, to amend and consolidate the Acts relating to barristers and solicitors, passed March 30th, 1899, it was enacted that "No action shall be brought for the recovery of fees, costs, charges,