

Motion by the plaintiff for an order for committal of Mr. Phelan, a solicitor, for his failure to submit himself for cross-examination upon an affidavit made by him in this action.

J. McGregor, for the plaintiff's motion.

J. M. Godfrey, for Mr. Phelan.

HON. MR. JUSTICE MIDDLETON:—The real question is the right of Phelan to demand payment of a professional witness fee, and I propose to deal with the motion upon that basis.

Mr. McGregor argued, that the objection was taken prematurely, and that Mr. Phelan ought to have been sworn before demanding the fee in question. I do not agree with this, but even if Mr. McGregor be right, this defect in Mr. Phelan's conduct is more than offset by the fact that the subpoena served was not in any authorized form and merely commanded attendance before "John Bruce, special examiner, on Friday, 4th October, 1912, at half past nine o'clock in the forenoon," without specifying, as it should, the purpose for which attendance was to be made. The subpoena did not require more than "attendance."

The right to a professional fee seems clear. Evidence upon a motion may be given by affidavit (Consolidated Rule 489), but the deponent may be cross-examined (Consolidated Rule 490), the witness being "required to attend in the same manner as, and his examination shall be subject to the same rules as apply to the examination of a party for discovery," Consolidated Rule 492.

The examination, may, therefore, take place when the witness is "served with a copy of the appointment and a subpoena and upon payment of the proper fee." Consolidated Rule 443. The proper fee is indicated by the tariff item 119. "Barristers and solicitors . . . other than parties to the cause, when called upon to give evidence in consequence of any professional service rendered by them . . . per diem \$4." The affidavit upon which examination is sought is an affidavit made by a solicitor as solicitor relating entirely to the proceedings in this cause and another cause in which the plaintiff herein was plaintiff and the defendants were "Taxicabs Verrals Limited," 23 O. W. R. 6, 4 O. W. N. 28. All the solicitor's knowledge was acquired by him in the course of the rendering of profes-