

This defendants will not accept, and now move to stay the action until plaintiff herself is examined.

It was objected by counsel for plaintiff that the appointment issued under Rule 447 was irregular, as plaintiff was absent from the province, and therefore could not have been served personally. He referred to Rules 439 and 481, and cases cited in *Holmsted & Langton*, as shewing that these Rules as to discovery only applied in the case of parties resident within the jurisdiction, and that defendants must proceed under Rule 477.

The question, therefore, of regularity must turn upon whether the party absent at the time is to be deemed to be "residing out of Ontario."

What is the residence of a party within the meaning of Rule 443 (then Rule 490) was considered in *Dryden v. Smith*, 17 P. R. 500. That case shews that plaintiff's residence in Ontario is certainly at Toronto, and no appointment for her examination could be sustained if taken for any other county.

There is nothing to shew that plaintiff's absence is more than temporary. I do not think, *e.g.*, she is now residing out of Ontario so as to enable defendants, if otherwise entitled, to have security for costs. It follows that she is therefore resident in Ontario. And the only question is: Can the action be stayed until her examination is had, either here or abroad?

Plaintiff's solicitors are willing to produce her for examination in London. But defendants do not agree to this, on the ground of expense. They offer to let her examination and the trial stand until her return.

To this plaintiff's solicitors will not agree, and both parties now stand on their strict rights, which must therefore be determined here or elsewhere.

According to the best opinion I can form, defendants are entitled to examine plaintiff before the trial; and she is entitled to have this examination in Toronto. If the examination is to be other than formal, it would seem almost necessary that it should be had at Toronto for effective discovery, as pointed out in *Dryden v. Smith*, at p. 502.

On the other hand, I do not think that defendants are bound to proceed under Rule 477. They are entitled to have the examination at Toronto, and if necessary to a stay for a reasonable time until plaintiff returns and has been examined.

Rule 477 cannot be extended to the case of a party temporarily absent. Parties are in a very different position from witnesses, who are not under the control of the parties or of the Court. They cannot be allowed to use the machinery of the Court for their own ends, and refuse obedience to its rules.

An order will go as above indicated.