

for discovery had been taken and the motion to set aside the order for production of 2nd December had been disposed of. The language of Mr. McKay's letter of 9th December (the part which I have italicised) could not admit of any other interpretation.

After more than 5 weeks had passed, and on 18th January, 1909, the defendants' solicitors wrote to Mr. McKay's firm that they were instructed to press the action to trial "at the earliest possible moment," and that if plaintiff did not set the case down and serve notice of trial, the defendants would be obliged to do so. The letter then went on: "The arrangement between us mentioned in your letters of 9th and 12th December last, as to the examination of your client, we desire now to terminate, and have served you with notice of examination for" the 28th January.

Plaintiff's solicitors replied the same day, making no objection. On the contrary, they expressed a hope that the examination would be possible on 28th January. But it is now contended that the arrangement as contained in the letters of 9th and 12th December has been terminated and wholly set aside by the defendants' solicitors, and that the plaintiff is at liberty to proceed without being examined for discovery.

To this, however, I am unable to accede. The plaintiff has had not only the benefit of the arrangement for the period to which it was at first expected to extend, but far beyond 28th January, so that on 5th April he still has not been examined, and the case is still awaiting its appearance on the peremptory list.

In my opinion, the fair construction of the letter of defendants' solicitors of 18th January is that it was only the arrangement "that the examination for discovery of Mr. Stow stand indefinitely for the present" that has terminated; and this is borne out by that letter going on to state that notice of plaintiff's examination for 28th January had been served.

To this view Mr. McKay appears to have acceded without any demur at the time. Nor does he assist the plaintiff's contention as now put forward. On the contrary, Mr. Arnoldi states in his uncontradicted affidavit, filed on this motion, that he has personally applied to Mr. McKay, who made the arrangement, and that he agrees with the