

aside an appointment obtained by defendant for the examination of witnesses upon a motion, of which the defendant had served notice, returnable before a Divisional Court, to set aside the judgment at the trial, and dismiss the action, or for a new trial.

R. McKay, for defendant.

W. E. Middleton and J. B. Bartram, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., TEETZEL, J., RIDDELL, J.), was delivered by

RIDDELL, J.:— . . . The action was tried at Toronto, 20th September, 1907, and resulted in a verdict for the plaintiff. A notice of motion to a Divisional Court was served "for an order setting aside the judgment pronounced at the trial . . . and that judgment be entered in favour of the defendant, or for a new trial, or for such further or other order as to the Divisional Court shall seem meet, upon the grounds that the said judgment is contrary to law and evidence and the weight of evidence . . . and (4) for a new trial, upon the ground that since the trial of the action the plaintiff has discovered material evidence shewing that the proposed purchaser was not ready and willing nor in a position to carry out the purchase upon the terms as stated, and had abandoned any proposed purchase; and upon grounds, etc., appearing in the evidence had and taken at the trial, and in the evidence to be taken in support of this motion.

Notice was then given that in support of this motion would be read (amongst other things) "the examination of J. S. Thompson, H. S. Strathy, E. B. Cronyn, G. T. Sammers, and Frank C. Laing, to be taken upon and in support of this motion, the affidavit of W. G. Trethewey filed," etc.

No such affidavit as that last mentioned was in fact filed, but, this notice of motion being served on 19th October, an appointment was taken out on the 22nd for the examination of J. S. Thompson, H. S. Strathy, E. B. Cronyn, G. T. Sammers, and Frank C. Laing, as witnesses on the pending motion, and this was served upon the solicitor for the plaintiff on 19th October.

Thereupon a motion was made by the plaintiff before the Master in Chambers to set aside the appointment, upon the ground, amongst others, that the leave of the Court had