

in this action was referred, that defendants' appeal to the Court of Appeal for Ontario from the judgment (4 O. W. R. 330, 446), pronounced upon the special case stated in this action for the opinion of the Court, had not stayed the taking of evidence upon such reference.

J. Bicknell, K.C., for defendants, contended that there was such a stay, because: (a) Rule 829 applies and has that effect; (b) the parties in stating the special case agreed that there should be such a stay.

J. S. Fullerton, K.C., for plaintiffs, contra.

ANGLIN, J.—Rule 829 reads as follows:—"Where execution of the judgment or order appealed from has become stayed, all further proceedings in the action in the Court appealed from, other than the issue of the judgment or order and the taxation of costs thereunder, shall be stayed, unless otherwise ordered by the Court appealed to or a Judge thereof; and the order may be on such terms as may seem just."

This Rule is by its terms applicable only "where execution of the judgment or order appealed from has become stayed." It does not purport to extend to all cases wherein those steps have been taken which under Rule 827 effect a stay of "the execution of the judgment or order appealed from." The judgment upon the special case, 4 O. W. R. 330 and 446, is merely an expression of the opinion of the Court upon certain questions of law submitted for its consideration. It is a judgment of which there can be no "execution" which might "become stayed." It is not to be enforced in any way. It requires nothing to be done or foreborne. Such a case as this is, in my opinion, not within the terms of Rule 829, and I am satisfied that it could not have been within the contemplation of the framers of this Rule.

The special case contains these initial words:—"The parties desire, before preceeding to take further evidence in this case, to obtain the opinion of the Court upon certain questions of law arising on the construction of the agreement on which the action is brought;" and it concludes by reserving to each party a right of appeal. The parties have had an "opinion of the Court" upon the questions submitted, and Mr. Fullerton contends that the terms of the special case which I have quoted have been thus satisfied.

The question for consideration—one of construction to be determined upon the whole document—is whether, by the introductory words of the special case, the parties intended to provide for a stay of the taking of evidence until the determination of the appeal, for the right to take which they