McLAREN v. TEW—MASTER IN CHAMBERS—JUNE 11.

Evidence—Examination of Party as Witness on "Pending" Motion—No Notice of Motion Served—Appointment for Examination Set aside.]—This was an action to set aside as fraudulent a sale of assets by the defendant Wilson to the defendant Graham, and for an injunction and a receiver. Tew was made a party defendant as assignee of Wilson for the benefit of creditors. Before being served with the writ of summons, Tew was served by the plaintiffs with an appointment for his examination as a witness on a pending motion for an interim injunction and receiver, under Con. Rule 491. On this he attended on the 5th June, with counsel, but refused to be sworn, on counsel's advice, on the ground that there was no motion pending. The examination was thereupon enlarged, and the defendant Tew moved to set aside the appointment. The Master referred to the cases under Con. Rule 491 collected in Holmested and Langton's Judicature Act, 3rd ed., p. 713, saying that none of them was exactly in point. The nearest and the one on which the plaintiffs relied was Dunlop v. Dunlop, 9 O.L.R. 372. It was there decided that an ex parte motion was within the Rule; and the argument of the plaintiffs' counsel was, that it was not necessary that a notice of motion should be served in this case, unless there was a distinction between a party to an action and a stranger. In answer, it was pointed out that such a proceeding was hitherto unknown—that it would enable a plaintiff to do indirectly what cannot be done directly—and there was a clear and vital distinction between the facts of the Dunlop case and the present. It was conceded that, as soon as a motion for an injunction and receiver was served, the defendants could be examined in support if the plaintiffs thought it advantageous. The difference between the facts of this case and those of the Dunlop case was plain. In the Dunlop case, there was no one on whom a notice of motion could have been served, as the whole object was to find out some way of serving the defendant. Here, if the examination was to be of any use, a notice must be served later, and upon the person sought to be examined. To apply the decision in the Dunlop case as decisive here would seem to violate the well known dictum in Quinn v. Leathem, [1901] A.C. 510. In the same way it was lately pointed out that unforeseen and unlooked for consequences arise from case B being decided because it is like case A; then C follows because it is like B; and thereafter D from its likeness to C—though, if D had come up, instead of B, it would