

the deceased, and a brother-in-law of the plaintiff. This is not contradicted. A more serious objection is that there is no intimation of the point on which the witness can give material evidence. On the argument it was said that he would speak as to the allegation in the reply that the general course of dealing as between the order and its members with reference to payment of dues and otherwise has been such as to constitute an estoppel against the defendants and a waiver of any such right of suspension or forfeiture as is set up in the statement of defence as fatal to plaintiff's claim. Giving the plaintiff the benefit of this suggestion of her counsel on the argument, this would not be necessarily a sufficient ground for postponement. Any such course of dealing by its very terms could not possibly be proved by the statements of one witness, especially of Mr. Daniel Cinnamon—in view of his relationship to the plaintiff and of the position he took as a member of the Executive Council of the order in inducing it at first to admit the claim in question—a sufficient number of such cases to establish a course of dealing would surely be necessary to vary a contract.

This case in many respects resembles that of *MacDonald v. Sovereign Bank*, 21 O. W. R. 702. There was the same infirmity in the affidavit of the solicitor filed in support of the motion; both as to the evidence expected to be obtained and as to Consolidated Rule 618. As this is a non-jury action, I think that justice will best be done by making such an order as was made in that case by Middleton, J.

This will provide that the action proceed to trial, if the defendants so desire on their undertaking that if in the opinion of the trial Judge, Daniel Cinnamon can give any such evidence as would justify such a course—then the trial should be adjourned until his return or his evidence has been given on commission—or any other terms that the trial Judge may think right.

The cost will be in the cause unless otherwise ordered by the trial Judge for the reasons given by the learned Judge in the *MacDonald Case*, *supra*. He can best deal with the whole matter. So far as appears at present the only hope of the plaintiff is to establish the alleged estoppel said to have been created by the general course of dealing as between the order and its members. Something that one witness certainly could not prove by his own evidence.

HON. MR. JUSTICE MIDDLETON (11th April, 1913), dismissed plaintiff's appeal from above order, costs in the cause.