

Motion to set aside a statement of claim as having been filed too late, and without leave.

J. Grayson Smith, for the defendant.

R. McKay, K.C., for the plaintiff.

CARTWRIGHT, K.C., MASTER:—This action was brought on the 8th January, 1908, to recover from the defendant \$150,000 and interest from the 8th February, 1907; and also \$23,619.06 and interest from the 28th February, 1907; and for other relief in respect of \$350,000 of the La Rose Mining Company. The action was tried and judgment given on the 29th April, 1910, dismissing the action with costs, without prejudice to any action the United Cobalt Exploration Company might be advised to bring—it appearing that it was entitled to the money in question. On the plaintiff's appeal to the Divisional Court on the 22nd September, 1910, the trial judgment was set aside, and United Cobalt Exploration Company was added as a party plaintiff, with liberty to all parties to amend as advised—with costs in the cause. From this judgment the defendant appealed to the Court of Appeal, and on the 16th January, 1911, the appeal was dismissed. Nothing further was done until the 10th February, 1913, when a statement of claim was delivered. This the defendant now moves to set aside as being filed without leave, and therefore irregular, under Consolidated Rule 305, the time not having been extended under Consolidated Rule 353.

In explanation of the delay, an affidavit has been filed by Mr. McKay that it was owing to the inability of the plaintiff to get a witness, who is at present in California, but with whom the solicitors are now in communication, and whom they will be able to have at the trial.

Against the motion was urged the long silence and delay and also the principle of *Hudson v. Fornyhough*, 61 L. T. 722, affirmed in the Court of Appeal, 88 L. T. J. 253, and other cases cited in Yearly Practice, 1913 (Red Book), at pp. 346, 347.

The present case, however, is, I think, distinguishable, because, by the order of the Divisional Court, the United Cobalt Exploration Company was added as a party plaintiff with its consent, and the necessary license to do business in the province having also been produced.