

RE ANDERSON V. SMITH—RECENT ENGLISH PRACTICE CASES.

I may add that the official guardian concurs in this view.

A bond such, as directed was subsequently brought in, approved of and filed.

COUNTY COURT OF THE COUNTY OF ONTARIO.

RE ANDERSON V. SMITH.

Commission to take evidence under the Division Court Act.

Nadin v. Bassett (25 L. R. Chy., page 21) is not an authority to prevent an examination under a commission to a foreign country, under section 100 of the Division Court Act.

[Whitby, April 5.]

Application for a commission to take the evidence of the plaintiff, who formerly resided at Port Perry, but who now resides at Minneapolis, U. S. The claim was for medical services, and the interrogatories shewed that merely formal proof of the claim was contemplated.

N. F. Paterson, Q.C., opposed the application, citing *Nadin v. Bassett, supra*.

DARTNELL, J. J.—Section 100 of the Division Court Act provides for the issue of such a commission as asked for, if, "in the opinion of the Judge, a saving of expense will be caused thereby." I am of this opinion, and therefore think the order should go. In the case cited a similar order for the examination of the plaintiff in New Zealand was made, but, as in that case a material question in the cause was the identity of the plaintiff himself, the order was qualified by inserting a proviso "that the depositions of the plaintiff are not to be read, if the defendant requires him to appear at the trial to be examined and cross-examined." I see in this case no reason for this qualification of the order, nor do I conceive that *Nadin v. Bassett* is any authority for refusing the order, but rather the contrary.

RECENT ENGLISH PRACTICE CASES.

NADIN V. BASSETT.

Imp. O. 37, 2. 5 (1883),—Ont. r. 485.

Evidence on commission—Examining a party on commission—Identity, question in dispute.

[L. R. 25 Ch. D. 21.]

In an action for redemption the defendant admitted the plaintiff's right to redeem, if he was the person he represented himself to be, but disputed

the plaintiff's identity. The plaintiff resided in New Zealand, and now applied for an order to examine himself, two other witnesses (naming them), "and others" in New Zealand in his behalf. The Court of Appeal held, under the circumstances of this case, it was proper the order should go, but only with a proviso that the depositions of the plaintiff should not be read if the defendant required him to appear at the trial to be examined and cross-examined, no case having been made that it was practically impossible for the plaintiff to attend at the trial.

Although it is true that in considering whether justice requires an examination before special examiners, a party does not stand in the same position as a mere witness, yet there is no doubt the Court has power under this rule to direct the examination of a party.

Although the Court will not direct a mere roving inquiry, and the person who comes for an order of the above kind must show there are material witnesses to be examined, yet it is not necessary that all the witnesses to be examined should be named in the order.

Semle (per KAY, J.), the intention of this rule is not that after an order is made under it, the discretion of the Court is taken away at the hearing the cause. Without any special limitation in the order made in the present case, if the plaintiff and his witnesses were cross-examined in New Zealand the Court would be at liberty at the hearing of the case, if the defendant required the plaintiff and his witnesses to be produced in England, to order them to be examined and cross-examined again before the Court, and if the Court were of that opinion there is nothing to interfere with the jurisdiction of the Court to order the trial to stand over, or make any other which the justice of the case may require.

Quare, whether the mere addition to the order for the examination asked for, of a proviso that "this order is to be without prejudice to the right of the defendant to cross-examine the plaintiff at the trial of the action in the presence of witnesses in England, who can speak to his identity," would authorize the judge at the trial to reject the plaintiff's evidence, if he, being still out of the jurisdiction, did not appear to be cross-examined.

IN RE BURGESS.

BURGESS V. BOTTOMLEY.

Rule 96.

Next friend of infant—Conflict of interests.

[C. A.—L. R. 25 Ch. D. 243.]

Doubts having arisen as to the proper custody of an infant, a suit was commenced in her name for