MASTER IN CHAMBERS. OCTOBER 5TH, 1912.

CHRISTIE BROWN v. WOODHOUSE.

4 O. W. N. 93.

Action — Discontinuance — Taking of any other Proceeding — C. R. 430 (1) — Leave to Discontinue.

MASTER-IN-CHAMBERS *held*, that the issuance of an order to produce and the taking out of an appointment for examination for discovery by a plaintiff after the delivery of the statement of defence constituted "a taking of any other proceeding (save an interlocutory application" within the meaning of C. R. 430 (1), and that therefore plaintiff was not entitled to discontinue without leave.

Schlund v. *Foster*, 10 O. W. R. 1005 followed.

Spincer v. *Watts*, 23 Q. B. D. 352, 353 and

Vickers v. *Coventry*, [1908] W. N. 12 referred to.

This was an action to recover possession of a house in Toronto, which defendant had occupied since 1892, with the consent of plaintiff company and its grantor, the late Wm. Christie. Defendant set up chiefly the Statute of Limitations though another defence of a gift from Mr. Christie was apparently hinted. The action was begun 21st February, and was at issue before vacation. The statement of defence was delivered 18th May. Two days later plaintiff took out the usual order for production by defendant—and also appointment to examine defendant for discovery on 29th May, but did not proceed with it.

On 13th September, plaintiff served a notice of discontinuance. On 1st October inst., defendant gave notice of motion to dismiss action with costs "or for such other order as may seem just."

Edward Meek, K.C., for the motion.

W. B. Milliken, against the motion.

CARTWRIGHT, K.C., MASTER:—It was objected by Mr. Milliken that the notice should have been to set aside the discontinuance, and not to dismiss the action. This is probably correct, but this could be amended now as the simple point for decision is whether plaintiff was within C. R. 430 (1) or must proceed under clause (4). This depends upon whether the action of the plaintiff after delivery of statement of defence was "a taking of any other proceeding (save an interlocutory application)."

In *Schlund* v. *Foster*, 10 O. W. R. 1005, I held that this (amongst others) was such a proceeding. This view seems