UNREPORTED PRACTICE CASES*

STRIKING OUT—LIMITATIONS—S. 5(1)(i) Limitations Act, R.S.A. 1955, C. 177—ACTION ON JUDGMENT

The Plaintiffs were assignees of a judgment obtained against the Defendants in December, 1958, arising out of a motor vehicle accident in June of 1957. The Plaintiff sued (as distinct from taking proceedings under Rule 331) in June of 1968.

The Defendants moved to "set aside" the Statement of Claim on the grounds that the action was barred because S. 5(1)(i) of The Limitation of Actions Act, R.S.A. 1955, required that "actions on a judgment or order for payment of money [shall be commenced] within 10 years after the cause of action therein arose". In the 1970 revision the section reads "thereon".

The Master (A. D. Bessemer, Q. C.) referred to the 1970 wording, which counsel conceded to be of little, if any, significance in the interpretation of the earlier section. The Master pointed out that "therein" could refer to "actions" and that the interpretation contended for by the applicant defendant would fail to achieve the purposes of the legislation. The original cause of action was irrelevant, as it was merged in the judgment and the action was on it, not on the original cause of action. The Master referred to S. 11 of The Interpretation Act, *Lewington* v. *Raycroft* [1935] O.R. 440 at 442, and 24 Halsbury (3rd) at 193.

(Administrator M.V. Accident Claims Act v. *Sauers,* S.C.A., J.D.C., S.C. No. 93233, July 7, 1971, A. D. Bessemer, Q.C.)

DEFAULT JUDGMENT—RULE 142—AFFIDAVIT OF DEFAULT NOT NEEDED WHERE FILING IS DEFAULT—SETTING ASIDE DEFAULT JUDGMENT—HARDSHIP ON PLAINTIFF—SERVICE—CORPORATION

A Statement of Claim was served on a corporation by attaching a copy to a corridor at the registered office. A default judgment was obtained on filing the affidavit of service and a praecipe to sign judgment.

The defendant applied to set aside the judgment.

The Master held that Rule 15(2) permitted service by leaving it at the registered office, as provided by S.289 of The Companies Act.

The applicant contended that Rule 142, which provides that default proceedings may be taken on "proof by affidavit of service of the Statement of Claim and the failure to file or serve a state-

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ment of defence" required that there be an affidavit of default establishing the failure to file or serve, particularly when the Rule was compared with the old Rule 109, which said simply (on) "proper proof by affidavit".

The Master referred to *Shandro* v. *Konetsky* [1927] 1 W.W.R. 1011, in which Beck J. had said, in interpreting the old Rule, that it was a matter of indifference whether an affidavit of no defence was filed. The Master held that the slightly different wording in the 1969 Rules did not change the situation.

On the defendant's contention that he should be allowed to defend on the merits, the Master held that while there might be a real defence, it was disentitled to defend because (a) no one had been left in charge of the registered office to deal with matters such as a statement of claim (b) a seizure had been made (c) the plaintiff could be severely prejudiced if his judgment were set aside because the only apparent asset could be divided among other creditors before the matter were tried. The Master pointed out that there could usefully be some machinery to preserve the plaintiff's claim in the event that the defence was unsuccessful.

(*A. R. Merk & Associates Ltd.* v. *E. A. Parker & Associates Ltd. et al,* S.C.A., J.D.E., No. 68568, March 29, 1971; L. D. Hyndman, Q.C.)