

FIGHTING RUSSIANS.

INNISFAIL INTERLUDE.

NEW TRIAL APPLICATION.

INNISFAIL, May 30.

It will be remembered that recently in the Innisfail Summary Court George Smagin proceeded against Nicholas Dvorik claiming damages for assault, and at the conclusion of the hearing a verdict was given for defendant.

Yesterday morning, before Mr. A. E. Aitkin, P.M., application was made by Smagin for a new trial on the ground that he was able to adduce fresh evidence which he could not reasonably and diligently have discovered prior to the first hearing.

Mr. H. G. Wright (Messrs. McNamee and Wright) appeared for the applicant, and Mr. M. A. Vandeleur (Messrs. Mighell, Lee Bryce and Vandeleur) for Dvorik (the respondent).

Mr. Wright: This is an application for a new trial on the ground of the discovery of fresh evidence. Plaintiff discovered this evidence on the day after the trial. I propose to call plaintiff.

Mr. Aitkin: I think Mr. Vandeleur wants to talk about jurisdiction first.

Mr. Vandeleur: Yes, I do. I submit you have no jurisdiction to grant a new trial as the application for such new trial has not been made within seven days of the verdict of the court. I rely on section II (2) of the Magistrate's Court Act of 1921 which states that any party dissatisfied with any decision of the court may, at any time within seven clear days of such decision, apply to the court for a new trial. The word "court" is defined in section 2. It is a Court of Petty Sessions sitting in jurisdiction for the hearing and determination of matters under this Act, etc. If you look at Rule 14 of the Rules of Court, you will find there is a distinct difference between the notice of application for a new trial, and the application to the court itself. Three days' notice of any application for a new trial shall be given to the opposite party stating that such application is intended to be made to such court. I re-

tended to be made to such court. I refer you to Creagh's "Statute Law," page 234.

Mr. Aitkin: You have gone from Rule 178, and have not told me what has been done.

A DISTINCTION.

Mr. Vandeleur: A verdict was entered in the court on 16th May for defendant. The next step taken in the matter was that on 22nd May, a notice was filed with the Registrar of the Court stating it was intended to make this application to the court on 29th May (to-day), some 13 days after judgment. I submit that application should have been made seven days after judgment. The Act makes a difference between the application to the court, and the notice of application. Under the ordinary construction of that Act and the rules thereunder you must draw the distinction I have indicated. I refer you to liquor cases that have been decided. The latest cases on that draw a distinction between the notice of application, and the actual application to the court. There was a case at Cloncurry reported in the "Q.J.P.," 1928, page 144. There is the dictum there.

Mr. Aitkin: That is a licensing case.

Mr. Vandeleur: The Judges in recent cases drew a distinction between notice of application, and the actual application. Therefore I submit you have no power to grant the application in the present case. If you have any doubt about the matter I would ask you to reserve the point until you hear what the other side have to say in evidence.

Mr. Aitkin: You don't say that notice was served on you.

Mr. Vandeleur: It was served on the same day as it was filed.

Mr. Wright: I would like to say something.

Mr. Aitkin: Was there not something in the Hastings and Leonidas case?

Mr. Vandeleur: Yes, that was an omission to set an appeal down in time. The Full Court said that here inadvertence was not a sufficient ground for extending the time. This case is really different from that, and goes at the root of jurisdiction.

Mr. Aitkin: This is a form of appeal.

Mr. Aitkin: This is a form of appeal.

MR. WRIGHT'S CONTENTION.

Mr. Wright: I submit it is just a matter of construction of the words "Apply to the Court." Mr. Vandeleur has quoted the definition of "Court." I submit an application does not entirely consist of appearance in Court. The lodging of the notice is the commencement of the application. When I lodged the notice on 22nd May the application was then commenced. In all applications certain preliminary things have to be done, and in this case notice has to be given. I submit when I lodged that I commenced the application which should be heard here to-day. Mr. Vandeleur has quoted sections of the Liquor Act, but I don't know whether you are influenced by that very much. In the Liquor Act it says that notice must be given 28 days before the day of the sitting. I submit that would apply to the three days' notice which Mr. Vandeleur refers to. The cases Mr. Vandeleur quoted in regard to the Liquor Act would cover any defects in the three days' notice. The 22nd May was a Wednesday, and that was the day on which the notice was lodged. Application must be made in open court. The ordinary Magistrate's Court day is a Wednesday and that is why this matter was set down for the following Wednesday. This Court previously granted a new trial in a case something similar to this. I submit you will hold that by lodging the notice we commenced the application and complied with the rules.

Mr. Aitkin: I shall reserve that point.

MR. VANDELEUR OBJECTS.

Mr. Vandeleur: I am objecting to the form the proceedings are taken under. I submit they should have been by affidavit. In motions of the Supreme Court the evidence is by affidavit. It is in the court's discretion after the affidavits are filed as to whether the court will ask the persons who have been concerned in the affidavit, to present themselves for cross-examination. I submit that is the proper procedure in this case. Notice of motion was given but no affidavits were filed in support of the application.

Mr. Aitkin: The very appearance of

in support of the application.

Mr. Aitkin: The very appearance of the parties here overcomes that.

Mr. Vandeleur: I submit if affidavits had been filed showing the nature of the fresh evidence, and as probably affecting the old decision, it would have given us a chance to come here to-day. I am going to ask for an adjournment later without prejudice to my right.

Mr. Wright: If I thought you would have acquiesced in the affidavits they would have been filed.

Mr. Aitkin: They should have been filed.

Mr. Wright: It is an application to be heard in open court, and not in Chambers.

Mr. Aitkin: All right. I shall hear the application.

THE EVIDENCE.

George Smagin (Johnstone Shire Council employee) said he was the plaintiff in this application for a new trial. He was present at the court hearing on 15th and 16th May last. At the hearing he gave evidence himself, and evidence was given for him by Dr. Craig and Constable Wallace. At the time of the trial he was not aware of any other witnesses. Since the trial he had discovered from

Don Dragoroff that S. Siwczynski would have been able to give evidence for him.

"A RUSSIAN."

Mr. Vandeleur: What countryman are you?—A Russian.

What countryman is the man Don Dragonoff?—A Russian too.

What does the new witness speak?—Russian.

On the morning of the last hearing at this court didn't you and Siwczynski go into Mr. McNamee's office?—No.

Where was Siwczynski boarding at the time of the hearing of the case?—I could not say.

How long have you known Siwczynski?—We fought at the war together.

Mr. Aitkin: So he has known him 15 years.

Witness: It was in 1915 when I first met him but we have not been on friend-

WITNESS: IT WAS IN 1915 WHEN I FIRST met him, but we have not been on friendly terms.

WAS HE EXPELLED?

Mr. Vandeleur: Did Siwczynski ever show you papers which he has shown to a lot of people around this district setting forth that he had been expelled from America?—No.

Stanley Siwczynski deposed that he was a motor-mechanic residing at Innisfail and knew both plaintiff and defendant. On 11th ult., witness was coming along a road at East Innisfail with a motor car between 5 and 5.30 p.m., going home to Dvorik's place. The car got bogged on the way. Witness saw a fight between Smagin and Dvorik. He got out of the car and walked, and Smagin was in front of him on the river bank. Witness saw Dvorik walk out from the motor boat landing. Mrs. Dvorik then came on the scene. Plaintiff and defendant spoke between themselves, but witness could not hear what they were saying. Smagin had a sugar bag over his shoulder, and Dvorik had a spanner in his hand. Witness saw Dvorik hit Smagin somewhere under the jaw or on the chest with his fist. Smagin swung the bag around his head.

Mr. Aitkin: This is not a new trial at present.

Mr. Wright: I wanted to give you a good idea of what the evidence would be.

"STARTED TO RUN."

Witness: Smagin started to run, and Dvorik ran after him. He did not hit Dvorik but just swung the bag. Dvorik got up to him and Smagin turned around and faced him. Smagin swung the bag around, and Dvorik hit him with the spanner on the right arm, then over the head with the same spanner. Dvorik turned around and walked home. Smagin talked to Mrs. Dvorik but I could not hear what was said. I went home and later had a conversation with Dvorik. I said to Dvorik "You cannot kill a man with a spanner." He replied, "Yes I could. I hit him over the

"Yes I could. I hit him over the arm pretty solid, but when I came to the head I steadied the spanner down." Then Dvorik picked up a small spanner and said, "If the police come down I will say I hit him with this."

Mr. Wright: When did Smagin first approach you about giving evidence?—On 17th May, the day after the case.

Mr. Vandeleur: How many times did you see Smagin after 11th April and the date of the hearing of the case?—Once.

When was that?—On 17th May.

Oh no. The hearing finished on 16th May. The assault took place on 11th April. How many times between 11th April and 16th May did you see Smagin?—I don't know. It might have been two or three times that I spoke to him.

DISCUSSING THE FIGHT.

You never discussed the fight at all?—No. I didn't want to be in it.

You discussed it with Dragonoff?—No.

He discussed it with you?—Yes. We knew we might be witnesses.

Didn't you talk with Smagin?—No. How friendly were you with him?

—I was not friendly with him.

You met him on the road after he had been assailed and he did not speak to you?—No.

How far were you off?—About a chain.

How long have you known Smagin?—Since 1915.

You are from the same country and speak the same language?—I can speak the language, but I am not of the same country.

Have you ever had a row with him?—Not exactly a row.

Mr. Aitkin: You have had differences with him?

Witness: Yes.

Mr. Vandeleur: Didn't you go to Townsville with Smagin after the last hearing of this case?—I did.

You interviewed a solicitor with him?—Yes.

...you interviewed a solicitor with him?—Yes.

Do you know whether Smagin has money?—I don't know.

Don't you think you interested yourself more than an ordinary spectator by going to Townsville with Smagin to see a solicitor?—No. He asked me to go.

Mr. Aitkin: How could you see from that distance a spanner used to move a half-inch nut?

Witness: I didn't say that. I—

Mr. Aitkin: Don't you talk to me. That is enough.

After further evidence Mr. Aitkin reserved his decision in the matter of the application for a new trial.

"WERE YOU THROWN OUT OF AMERICA?"

Were you thrown out of America for introducing liquor there?—That has nothing to do with it. I will make whoever told that lie prove it.

Mr. Aitkin: (to witness): You hold your tongue.

Mr. Vandeleur (to witness): Is it a fact that you have been showing people a form to the effect that you have been thrown out of America?—No. I have my papers and can go back there if I want to.

You came to my office on other business and you made it clear to me that Smagin was going to spend £100 on this matter and that you were going to interest yourself in the case?—No. I asked you how many days there were in which to appeal.

Didn't you say if it cost him £100 he would appeal?—No.

Did you offer your services as a witness in this case to whichever side would pay you £25?—I didn't do that.

Mr. Aitkin: If he had admitted he was "up for sale" as a witness that would have ended this application.

"THERE WAS A FIGHT."

Mr. Vandeleur (to witness): There was a fight over at East Innisfail that afternoon?—What do you mean?

I mean that Dvorik and Smagin were fighting?—Yes.

You saw the beginning and end of it?—Yes.

Did you see Dvorik with two spanners in his hand?—I saw one.

Mr. Aitkin: How far away were you when you first saw Dvorik?

Witness: About three chains away.

Mr. Aitkin: How could you see