

TORONTO ADMIRALTY DISTRICT.

1921  
February 14.POINT ANNE QUARRIES,  
LIMITED ..... PLAINTIFF;

AGAINST

THE SHIP *M. F. WHALEN* ..... DEFENDANT.*Examination for Discovery—Interrogatories—Reading Evidence at trial—Rules of High Court of Justice—Discretion of judge.*

*Held*, that while an examination for discovery may be ordered by the judge as a matter of convenience, in place of the delivery of Interrogatories, especially where the opposite party is in ignorance of the facts, although no special provision is made in the Admiralty Rules regarding it, such examination cannot be read as evidence at the trial. Rules 102 to 109 provide for cases where an examination may be so read at the trial but this is only permitted when the witnesses cannot attend the trial.

MOTION for an order permitting the plaintiff to read at the trial portions of the evidence of the master of the defendant ship, which was taken on his examination for discovery.

February 11th, 1921.

Motion now heard before the Honourable Mr. Justice Hodgins, in chambers, at Toronto.

*C. S. Jarvis* for plaintiff.

*A. E. Knox* for defendant.

The facts are stated in the reasons for judgment.

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HODGINS, L. J. A. now (14th February, 1921) delivered judgment.

Motion by plaintiff to read in evidence at the trial portions of the examination for discovery of the master of the defendant ship, one Malette, taken in this action before the local registrar of the Exchequer Court.

It appears that Mallette will be present at the trial.

The examination in question was allowed in place of interrogatories as, while there is no provision in the Canadian Admiralty Rules for such an examination, it is a convenient practice and less cumbersome than formal interrogatories, especially when the plaintiffs are in the dark as to the actual occurrences when the tow is said to have been injured. See *Isle of Cyprus* (1).

But the examination so had cannot be used at the trial unless the rules are wide enough to allow that to be done.

Canadian Admiralty rule 70 provides for an affidavit of discovery relating to documents, but rules 68 and 69 make discovery of material facts to depend on the delivery of and the answers to interrogatories. Oral examinations are permitted under rules 102 to 109. These however are limited to cases where the witness cannot conveniently attend the trial, in which case his evidence thus taken, may be read at the trial.

No order under these last mentioned rules was made and such an order is a necessary preliminary, if what is sworn to on such an examination is to become evidence at the trial.

(1) [1890] 15 P. D. 134.

It was urged that Rule 228, which made the practice "for the time being in force in respect to Admiralty proceedings in the High Court of Justice" applicable in all cases not provided for by the Canadian rules, would permit what is now asked. I do not think so. The rules as to evidence which govern the proceedings in English admiralty actions are found in Roscoe's Admiralty Practice, 3rd Edition, pp. 354 et seq. It is true they contain more detailed provisions than our rules do, but they are founded as to this particular instance, upon the discretion of the judge in dispensing with the attendance of a witness at the trial, and so come to the same thing in the end as our own rules.

It is particularly necessary in Admiralty cases that the witnesses should appear personally before the judge whenever possible. Here the witness in question will be present and the motion to read part of this examination is not within the rules nor based on necessity or inconvenience. It will therefore be dismissed with costs to the defendants in any event.

*Judgment Accordingly.*

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