HEIDNER AND COMPANY.....PLAINTIFF;

AGAINST

THE SHIP *HANNA NIELSON*

1926

March 30.

Practice—Admiralty—Interrogatories—Admissibility of evidence

The defence alleged "that it is the custom for vessels engaged in trading between ports on Puget Sound and Europe to touch at various ports on the west coast of the United States, etc. . . ." Thereupon plaintiffs applied for an order compelling defendant to answer the following interrogatory: "What instances of the custom alleged . . . have occurred, and when."

Held, that, as it is not the purpose of the question to obtain the names of witnesses of the defence, nor to see the opponent's brief but is nothing more than "particulars of the specific occasions" upon which vessels deviated from their voyages, and upon which the defence relies

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to establish the existence of the custom alleged, that such evidence is material, and the application should be allowed.

2. That the testimony of witnesses giving their opinion or judgment, as to the existence of a custom, should not be received; it is the fact of a general usage or practice which must be proved. Unless witnesses can, of their own knowledge, give instances of the usage having occurred, their testimony is not entitled to much weight, before the court.

APPLICATION by plaintiffs to compel defendant to answer interrogatories.

Application heard before the Honourable Mr. Justice Martin at Vancouver.

E. C. Mayers, for plaintiffs.

Martin Griffin, for defendant.

The facts are stated in the reasons for judgment.

MARTIN L.J.A., now this 30th day of March, 1926, delivered judgment.

Martin L.J.A.: This is an application to administer interrogatories and objection is taken to one of them, viz:—

what instances of the custom alleged in paragraph 7 of the defence have occurred and when?

That paragraph is as follows:

In the alternative and with further reference to paragraphs 3 and 4 of the statement of claim the defendant says that it is the custom for vessels engaged in trading between ports on Puget Sound and Europe to touch at various ports on the west coast of the United States for the purpose of loading cargo and to touch at various ports in Europe for the purpose of discharging cargo, and that the plaintiff was aware of such custom at the time of the shipment and consented and agreed that the said vessel should, if those in charge of her so desired, call at such places for such purposes.

This sets up a very wide not to say sweeping custom, and it is obvious that in order to meet it adequately at the trial in the unrestricted shape in which the defendant has chosen to put and keep it on the record, the plaintiff will be compelled to incur great expense to an extent which cannot now be foreseen or even estimated, and it is to avoid such consequences, so far as possible, that the said interrogation is proposed. The defendant, a Norwegian ship, objects to it on the ground that to allow it would be to compel the defendant to disclose the evidence of its defence and cites *Kennedy* v. *Dodson* (1); *Knapp* v. *Harvey* (2), and *The Shropshire* (3), while the plaintiffs cite

(1) [1895] 1 Ch. D. 333 at p. 341. (2) [1911] 2 K.B. 725 at p. 732.
(3) [1922] 38 T.L.R. 667.

Tucker v. *Linger* (1); *Johnson* v. *Earl Spencer* (2); *Hennesy* v. *Wright* (3); *Sea Steamship Co.* v. *Price Walker & Co.* (4), and *In re Chenoweth* (5), and I have consulted many others, including, e.g., those cited in Taylor on Evidence, 11th ed., vol. 2, pp. 817-8, and *Fleet* v. *Merton* (6), and in *Southwell* v. *Bowditch* (7), the result is well summed up by Taylor, *supra:*—

> In all these cases (of custom or usage of trade or business), it is the fact of a general usage or practice prevailing in the particular trade or business, and not the mere judgment and opinion of witnesses, which is admissible in evidence, and unless the witnesses can state instances of the usage as having occurred within their own knowledge, their testimony will seldom be entitled to much weight.

As Lord Justice Vaughan Williams says in *Knapp* v. *Harvey supra,* p. 728:

> In regard to the admissibility of interrogatories there is always great difficulty in laying down any absolutely hard and fast rules

and the decisions of the Court of Appeal in England are impossible, in my opinion and with all respect, to reconcile wholly, doubtless owing to the fact that the matter of the reasonableness of the interrogatory always depends upon the particular circumstances of the case and hence an Appellate Court is reluctant to interfere with the discretion exercised below, as the Lord Justice points out supra, and as Lord Justice Lindley says in *Kennedy* v. *Dodson,* supra, p. 340:

> Under ordinary circumstances we should not think of interfering with the decision of the judge in the court below in a matter which is very much a matter of discretion.

As to the general purpose of interrogatories, the unanimous decision of the Court of Appeal in *Hennesy* v. *Wright* supra, is a safe guide to the English practice which is the same as our own, and as it has not been overruled despite later observations by certain judges, I adopt it in the language of Lord Esher M.R., with Lords Justices Lindley and Lopes concurring, at p. 447, as follows:

> The objection taken by the defendant is that the answers to the interrogatories cannot disclose anything which can be fairly said to be

(1) [1882] 21 Ch. D. 18 and 34.
(2) [1885] 30 Ch. D. 581, 596.
(3) [1888] 24 Q.B.D. 445n, at p. 447.
(4) [1903] 8 Com. Cases 292, 295.
(5) [1902] 2 Ch. 488, 496.
(6) [1871] L.R. 7 Q.B. 126.
(7) [1876] 1 C.P.D. 374.

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material to enable the plaintiff either to maintain his own case or to destroy the case of his adversary.

It must be admitted that if the answers could be material for either of these purposes, the interrogatories ought to be answered, but I think it must equally be admitted that, if the answers could not be material for either of these purposes we ought not to order the defendant to answer. The question, therefore, is whether the answers to the interrogatories objected to could, in our view, be material for either purpose.

The *Shropshire* case, supra, cited by the defendant's counsel really confirms this view because the court said, inferentially, that interrogatories which "disprove the case of the defendant" were permissible.

Applying this principle in the present case, it cannot be denied that the information sought by the plaintiff is both material and calculated to destroy the defensive case set up by his adversary, and once that position is reached then the objection that the defendant's evidence is necessary in part disclosed vanishes and is reduced to other valid grounds, such as that the names of witnesses cannot be disclosed as admitted in *Knapp* v. *Harvey* supra, in which case, however, it is to be noted that an order had been made compelling the plaintiff to give particulars of the "specific occasions" upon which he relied to prove that the defendant's dog had bitten other persons before biting the plaintiff; the court refused to order interrogatories disclosing the names of the persons who had been bitten because, bearing in mind the information already obtained by the particulars, it came to this conclusion, p. 739:

> Being of opinion that, having regard to the information already given by the particulars, the sole object of putting these interrogatories is to get the names of the plaintiff's witnesses, I am not disposed in the present case to depart from the rule that it is not permissible to put interrogatories asking the names of persons for the mere purpose of getting the names of the witnesses whom the other party is going to call at the trial. It is admitted that there is a limitation to the right of administering interrogatories of this kind. In my opinion where a party is asking for the names of persons who will be witnesses for his opponent, it lies on him to shew that it is necessary for him to ask their names for the purpose of establishing some material fact, not necessarily a fact directly in issue, but some fact that is material to the proof of his case.

Nothing of that kind is sought by the interrogatory before me; ships are not witnesses, and what is desired is in substance nothing more than "particulars of the specific occasions" upon which certain vessels deviated from their voyages from the neighbouring ports of Puget Sound so as

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to establish the custom relied upon; nor does this infringe the further sound rule that one party cannot be permitted to "see the brief of the other side in order to know exactly what they are going to produce," in other words, discover the details of the evidence. *Benlow* v. *Low* (1), and also see *Osram Lamp Works Limited* v. *Gabriel Lamp Company* (2).

Upon the whole circumstances of the case I am of the opinion that it is both reasonable and just that the interrogatories be allowed.

I have not overlooked the submission that it may not be easy or convenient for the defendant's owners who are said to be in Norway, to obtain the information in support of the very broad defence they have elected to set up, but that inconvenience is of their own making and cannot, from any aspect, debar the plaintiffs from their right to be put in a position to meet the said plea; and fortunately the means of communication between this port and Puget Sound are frequent and rapid so that the inconvenience may not be so great as it is at present anticipated.

Application granted.