

IN THE EXCHEQUER COURT OF CANADA.

1919

December 29.

BETWEEN

HIS MAJESTY THE KING,

PLAINTIFF;

AND

THE ONTARIO POWER COMPANY AND THE
TORONTO POWER COMPANY,

DEFENDANTS.

*Discovery, right to and scope of—Co-defendants—Adverse party—
No waiver of right to refuse to answer by appearing—Ex-
chequer Court Rule No. 154.*

Under order from the Power Controller, the Toronto Power Company delivered a certain amount of electric power to the Ontario Power Company. The Toronto Power Co. subsequently assigned all its rights against the Ontario Power Company to plaintiff, who now, by its Information, as assignee of the Toronto Power Co., asks the Court to fix the amount due to the Toronto Power Co. and that the Ontario Power Co. be ordered to pay this amount.

The Toronto Power Co. filed defence but made no claim against the Ontario Power Co., its co-defendant. An appointment was taken out by the Ontario Power Co. to examine an officer of its co-defendant on discovery, the plaintiff not being notified.

The examination was begun without objection from either party and was continued until on a certain question being put, witness refused to answer.

Held, that, though any adverse party in a suit can be examined on discovery, yet such examination must be limited to the issues to be tried in the action as between the parties.¹

2. That on the above stated facts, the Ontario Power Company had no right to examine its co-defendant herein on discovery, not being an adverse party, the right thereto being against the Crown only as the adverse party.

3. That a witness submitting himself to examination for discovery does not waive his right to object to answer questions on

¹ See *Hamilton vs. Quaker Oats Co.* 46 O. L. R. 309.—(Nov. 26th, 1919).

1919

THE KING
v.
THE ONTARIO
POWER Co.
AND
THE TORONTO
POWER Co.
Reasons for
Judgment.

matter not open to the examining party, and he is not bound to answer all questions whether properly put or not.

Semble. That where a co-defendant is an adverse party, the right to discover would exist.

THIS case came on before the Honourable Mr. Justice Cassels, in Chambers, at Ottawa, on the 20th December, 1919, on application by the Ontario Power Co. to compel an officer of the Toronto Power Co. to answer certain questions put to him when on examination for discovery. The Crown was not notified that this examination was to take place.

Mr. C. S. MacInnes, K.C., and Mr. Robinson, for The Ontario Power Company.

Mr. McKay, K.C., for the Toronto Power Company.

The questions involved and those parts of the pleadings necessary to be referred to herein are stated in the reasons for judgment.

Cassels, J. (29th December, 1919) delivered judgment.

This is an application to compel the witness, Farley G. Clark, the Chief Engineer for the Toronto Power Company, to attend for examination at his own expense. The examination is intended as an examination for discovery.

The Information in this case is filed by His Majesty on the Information of the Attorney-General of Canada. The defendants are the Ontario Power Company, and the Toronto Power Company.

The Crown alleges certain claims made by the Toronto Power Company against the Ontario Power Company in respect of power furnished under the directions of the power controller. The seventh clause of the Information reads, as follows:

“7. By indenture made the 28th day of
 “March, 1919, the defendant, the Toronto
 “Power Company, Limited, assigned, trans-
 “ferred and set over unto His Majesty The
 “King and his successors in right of the Do-
 “minion of Canada any right or interest the
 “Toronto Power Company, Limited, may have
 “in or to any claim or claims, demand or de-
 “mands, against any and all person or persons,
 “firm or firms, corporation or corporations, in-
 “cluding the defendant, the Ontario Power
 “Company of Niagara Falls, in respect of the
 “matters in said Orders in Council referred to,
 “and the Attorney-General, in addition to any
 “other right of action which His Majesty may
 “have against the said defendant, the Ontario
 “Power Company of Niagara Falls, claims
 “against said Company as assignee as afore-
 “said.”

I confess, as I have stated on two or three occasions, that with this allegation on the pleadings, it is difficult to see why the Toronto Power Company should be a party to the action. All their rights have passed to the Crown. However, it was arranged that the questions should all stand over to the trial of the action when the evidence would be forthcoming and the rights of all parties determined.

The Toronto Power Company filed a defence to the action. They make no claim whatever as against the Ontario Power Company. The sole action so far as the pleadings are concerned is an action between the Crown as assignees of the claim of the Power Company against the Ontario Power Company.

1919
 THE KING
 v.
 THE ONTARIO
 POWER CO.
 AND
 THE TORONTO
 POWER CO.
 Reasons for
 Judgment.

1919

THE KING
v.
THE ONTARIO
POWER CO.
AND
THE TORONTO
POWER CO.

Reasons for
Judgment.

The Ontario Power Company issued a subpoena and notice calling upon the officer of the Toronto Power Company to submit to examination for discovery. Mr. Clark attended and was examined at considerable length, but when the questions which he refused to answer were put to him, on the advice of his Counsel he declined to answer as not being relevant to the issues raised between the defendants.

There is no question but that an adverse party can be examined under the rules of the court, but an examination for discovery must be limited to the issues to be tried in the action as between the parties.

The rule of the Exchequer Court, No. 154, reads as follows:

“Any party may, at the trial of an action or
“issue, use in evidence any part of the ex-
“amination for the purposes of discovery of
“the opposite party; but the Judge may look at
“the whole of the examination, and if he is of
“opinion that any other part is so connected
“with the part to be used that the last mention-
“ed part ought not to be used without such
“other part, he may direct such other part to be
“put in evidence.

“Where any departmental or other officer of
“the Crown, or an officer of the corporation has
“been examined for the purposes of discovery,
“the whole or any part of the examination may
“be used as evidence by any party adverse in
“interest to the Crown or corporation; and if
“a part only be used, the Crown or corporation

“may put in and use the remainder of the examination of the officer, or any part thereof, as evidence on the part of the Crown or of the corporation.”

I may mention the Crown, the informant, in the action were not notified of the examination. How can this evidence be utilized at the trial as against the Crown who are the parties suing as assignees of the Power Company. Of what relevancy can it be as between the Ontario Power Company and the Toronto Power Co. at the trial? The Toronto Power Co. making no claim whatever as against the Ontario Power Company.

It is said that because the Toronto Power Company submitted their officer to examination they are estopped from raising this question. The argument is that where a defendant appears in an action, he is estopped from disputing the jurisdiction of the Court. In that case he attorns to the jurisdiction of the Court. It is an entirely different question to say that because he submits for examination for discovery that therefore when a question is asked not open to the examining party that because he has submitted to examination he is bound to answer all questions whether they are questions properly put or not.

I would refer to the late case of *Aktiengesellschaft Für Autogene Aluminium Schweissung v. London Aluminium Company Ltd.*¹ See the language of Swinfen Eady, M. R., at page 76. There, of

1919

THE KING
v.
THE ONTARIO
POWER CO.
AND
THE TORONTO
POWER CO.

Reasons for
Judgment.

¹ [1919] 2 Ch. D. 67.

1919

THE KING
v.
THE ONTARIO
POWER CO.
AND
THE TORONTO
POWER CO.
Reasons for
Judgment.

course, the examination was by interrogatory, but this can in no way affect the principle.

Solicitor for plaintiff: *Hugh Guthrie, K.C.*

Solicitors for Ontario Power Co.: *Kilmer, Irving & Davis.*

Solicitors for Toronto Power Co.: *McCarthy & McCarthy.*