

With the order as it stands, the plaintiffs will not be subject to any possible delay. They will be fully informed as to what the defendant intends to say in defence.

The practice under Rule 485 should be the same as that governing in an application to take the evidence, under commission, of a party to a suit who went abroad after the commencement of the action, and who could not, without loss, attend the trial. The matter was fully threshed out and considered in *Ferguson v. Millican*, in the Court of Appeal, 11 O.L.R. 35. There the defendants were allowed to have their evidence taken on commission for use at the trial. Before granting a commission the Court has to be satisfied that the application is made *bonâ fide*. There seems a good business reason in this case. As "in an application for commission, the discretion of the Court is dominant. It is impossible to lay down any general rule as to when a commission will be granted."

Here the defendant seeks not to delay the plaintiffs in going to trial. He simply asks that he be not delayed or hindered in his business.

So far as I can see, there is nothing in the circumstances of the case which would render a cross-examination of the defendant more effective if given *viva voce* in Court than if taken before the Master. It is an action for damages for breach of contract.

Was the alleged agent of the defendant authorised to enter into the contract of the breach of which the plaintiffs complain?

Upon consideration of the case, I cannot see that any injustice will be done to the plaintiffs by allowing the defendant to have his evidence taken *de bene esse*. It is the defendant who takes the risk. If he is not here to meet evidence which may be given against him, if able to meet it, so much the worse for him.

In short, dealing with the present case only, it seems to me necessary for the purposes of justice that the order stands.

I dismiss the appeal; costs in the cause to the defendant.

CLUTE, J.,

DECEMBER 15TH, 1910.

*HOUGHTON v. MAY.

Execution—Seizure of Ship by Sheriff under Fi. Fa.—Ship Wrongfully Brought by Execution Creditor or with his Connivance from Foreign Waters into Sheriff's Bailiwick—Issue as to whether Ship Exigible—Public Policy—International Law—Ashburton Treaty, art. 7.

*This case will be reported in the Ontario Law Reports.