

BRITTON, J., IN CHAMBERS.

DECEMBER 15TH, 1910.

CANADIAN PACIFIC R.W. CO. v. ROSIN.

Evidence—Order for Examination de bene Esse of Defendant about to Go Abroad—Con. Rule 485—Discretion—Appeal.

Appeal by the plaintiffs from an order made by the Local Master at Ottawa directing that the evidence of the defendant be taken de bene esse before the Master, pursuant to Con. Rule 485.

W. L. Scott, for the plaintiffs.

T. F. Nelles, for the defendant.

BRITTON, J.:—It was not objected that such an order was outside what was contemplated by Rule 485, but it was contended that there is no precedent for such an examination of the defendant, who, merely for his own convenience or business purposes, contemplates going abroad, so that possibly he will not be able to attend the trial and give evidence viva voce in open Court.

On the merits, I should think the plaintiffs would be rather pleased than otherwise to have the evidence taken, so that they would have it in black and white long before the trial could take place; but, apart from that, there is a danger, more or less, in any case where the party is going over the ocean, that something may occur to prevent his being able to attend the trial.

In the case of Warner v. Mosses, 16 Ch. D. 100, the Master of the Rolls, at p. 102, speaks of the Rule which is identical with 485: "I do not intend to cut down the generality of its terms, but it is confined to cases in which it appears necessary for the purposes of justice."

I cannot see that any injury can be done the plaintiffs by having this evidence taken de bene esse, but it may be an injury to the defendant if it were not taken, if his proposed business trip is of so important a character that he cannot reasonably be asked to put it off and wait for the trial of this action. There is a possibility of his not being able to attend the trial through no fault of his own. There may be an accident to the defendant, or unavoidable delay either on land or of the ship on the ocean.

Upon what took place on the argument, should I allow the appeal, it would be upon the terms that, if the defendant is not able to be present at the next sittings for the trial of causes at Ottawa, the plaintiffs should not proceed with the trial at that sittings.