

shall be subject to cross-examination;" but this was abrogated on the 23rd June, 1894, by Con. Rule 1345, which in 1897 became Con. Rule 490: "A person who has made an affidavit to be used in any action or proceeding, other than on production of documents, may be cross-examined thereon." This is still in force.

No doubt, the exception of the affidavit on production . . . was due to a desire to prevent two examinations and to save costs. See . . . Dobson v. Dobson, *supra*.

It never was intended to prevent any examination being had or questions asked which could be had or asked otherwise than on an examination on such an affidavit. That it prevented cross-examination on an affidavit on production is beyond question. . . .

[Reference to Dryden v. Smith (1897), 17 P.R. 500, 504.]

So far is this from deciding that the opposite party cannot obtain by an examination for discovery information as to documents supposed to have been left out of the affidavit, that it (as it seems to me) certainly approves of the "usual practice of examining . . . for discovery" and of an application for a better affidavit, based upon the outcome of such practice. . . .

[Reference to Standard Trading Co. v. Seybold (1902), 1 O.W.R. 650.]

That case is far from deciding that information which would otherwise be compellable on an examination for discovery becomes privileged if and when an affidavit on production is made, and the information sought would contradict the affidavit—or, if not contradict, afford a basis for a motion for a better affidavit. It is admitted that such a document could be called for at the trial—and also (unless the affidavit on production interfered) at the examination for discovery.

I think the appeal should be dismissed, with costs to the defendants in any event. . . .

BRITTON, J.

MAY 22ND, 1912.

RE GALLAGHER.

Charge on Land—Charge in Favour of Absentee—Sale Free from Charge, on Payment of Amount of Charge into Court—Will—Terms—Payment out.

Application by Martha O'Reilly and Elizabeth Waterston for an order declaring that part of lot 13 on the east side of