

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS.

JUNE 1ST, 1915.

TRUSTS AND GUARANTEE CO. v. BOAL.

Discovery—Examination of Defendant Resident out of Ontario
—Place of Examination—Rules 328, 331.

Appeal by the plaintiffs from an order of the Master in Chambers refusing to allow the plaintiffs to examine the defendant for discovery in Ontario, the defendant living in the State of New York, but allowing the plaintiffs to examine him at his place of abode.

M. J. Folinsbee, for the plaintiffs.

J. C. McRuer, for the defendant.

MIDDLETON, J., said that Rule 328 was in terms wide enough to empower an order directing a party out of the jurisdiction to attend within the jurisdiction for examination. Service would be made in Ontario, and the penalty for failure to obey would be dismissal of the action in case the plaintiff made default, and striking out the defence if the default was a defendant's; so that there would not of necessity be any extra-territorial action. Had the matter been *res integra*, such might well have been the decision; but, on Rules that could not be distinguished, it had been held that a narrower construction must prevail. In *Meldrum v. Laidlaw* (1902), not reported, it was so decided; and in *Lefurgey v. Great West Land Co.* (1906), 11 O.L.R. 617, the present Chief Justice of Ontario accepted this as correctly interpreting the Rule.

Rule 331, while indicating the remedy pointed out as appropriate, also indicated that there was a liability for contempt; but that did not assist; the non-attendance is contempt, apart from the question whether the place named is within or without the Province.

The Master had rightly interpreted the decisions; and the appeal failed; but, in all the circumstances, the costs of the appeal should be costs in the cause.