

and that the language of Rule 439 (*a*), as it now stands (amended by Rule 1250), is inapplicable to a case like the present, because an officer out of the jurisdiction cannot "be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness." That this is the case is shewn by *Central Press Association v. American Press Association*, 13 P. R. 353.

It was further argued that recourse must, therefore, be had to Rule 477; but that this Rule only speaks of "parties residing out of Ontario;" and that an officer of a litigant corporation is not a party, nor in a similar position in regard to discovery, as his examination cannot be used as evidence at the trial.

These objections, though sufficiently formidable to require attention, are perhaps not insuperable.

Against them all is, first, the uniform practice heretofore to the contrary. This is entitled to great weight, though the maxim "*communis error facit jus*" may not be strictly applicable.

It has, however, often been said by Judges of eminence that it is more necessary that the practice should be settled than that it should be technically correct.

The argument based on the heading and sub-heads of chapter VII. seems to be displaced by Rule 7, which says that "the division, etc., of these Rules shall not affect their construction."

The more serious argument founded on the language of Rule 439 (*a*) can reasonably be met by considering the origin of the practice as to discovery, and the method of obtaining it in the case of corporations.

The matter is discussed in *Bray on Discovery*, pp. 73-77, and in the judgment of Jessel, M.R., in *Wilson v. Church*, 9 Ch. D. at pp. 555, 556.

Formerly it was necessary to make an officer of the defendant corporation a party for purposes of discovery.

This is no longer necessary after Order XXXI., r. 5, which is the equivalent of our Rule 439 (*a*).

At present, therefore, in such cases, some suitable officer of the corporation is to be deemed to be a party for the purposes of discovery, and is substantially covered by the word "parties" in Rule 477 to that extent.