

Rule 1321 is as follows: "The Court or Judge may order the examination for discovery, at such place and in such manner as may be deemed just and convenient, of an officer residing out of Ontario of any corporation party to any action. Service of the order and of all other papers necessary to obtain such examination may be made upon the solicitor for such party, and if the officer to be examined fails to attend and submit to examination pursuant to such order, the corporation shall be liable, if a plaintiff, to have its action dismissed, and if a defendant, to have its defence struck out and to be placed in the same position as if it had not defended."

The language used puts foreign corporations in the same position as those within the Province, under Con. Rule 439, in the consolidation of 1897, for some purposes.

In consequence of the questions raised as to what the term "officer" meant (see *Thomson v. Grand Trunk R.W. Co.*, 5 O.L.R. 38), on the 20th June, 1903, Rule 439(a) was passed, allowing the examination "of any officer or servant" of a corporation; but with the proviso that "such examination shall not be used as evidence at the trial."

Rule 1321 is limited to the examination "of an officer residing out of Ontario." It contains the penalty for default given in Con. Rule 454; but not the proviso against use of such examination as evidence at the trial; and the examination would, therefore, appear to be capable of being so used.

These differences in the language of the three Rules in question must have been deliberately made and must be given full effect to.

In the present case it would be a very serious matter for the defendant company, resident in Sheffield, to have judgment entered against it for default of Mr. Hampton in attending for an examination of which his company never had any notice or knowledge—or to have his admissions, made behind their back and 3,000 miles away, used against them at the trial.

The new Rule, with its serious penalty for default, and the possible use of the depositions taken thereunder, must be applied with caution so as not to do injustice or give rise to unfavourable comment on the administration of justice in this Province, which has always upheld the principle "that a fair trial is above every other consideration."

As at present advised, I think the Rule did not contemplate a case like the present, and was not intended to apply thereto, unless the person to be examined is clearly an "officer."

No doubt, an order must go, when asked for, to examine an