

1939
 April 17.
 April 26.

BETWEEN:

RITA LEMAY APPELLANT;

AND

MINISTER OF NATIONAL REV- }
 ENUE } RESPONDENT.

Practice—Exchequer Court Act, R.S.C., 1927, c. 34, s. 64—Exchequer Court Rule 169—Examination of parties by commission or letters of request.

Held: That the Exchequer Court Act, R.S.C., 1927, c. 34, s. 64, does not provide for the examination of a party giving evidence in his own behalf, by commission or letters of request.

MOTION by appellant for an order that a commission or letters of request issue for the examination of the appellant at Paris, France.

The motion was heard before the Honourable Mr. Justice Angers, in chambers.

E. A. Anglin for the motion.

Roger Ouimet and *A. A. McGrory*, *contra*.

ANGERS J., now (April 26, 1939) delivered the following judgment:

This is a motion on behalf of the appellant for an order that a commission or letters of request issue, as may be appropriate under the laws of France, for the examination

under oath by interrogatories or otherwise at the City of Paris, France, of the appellant.

The subject of the present suit is an appeal from an assessment by the Commissioner of Income Tax affirmed by the Minister of National Revenue.

The motion is supported by the affidavit of Mr. Louis S. Saint-Laurent, K.C., counsel for appellant. The affidavit states (*inter alia*) that the appellant resides in Paris, France; that there are facts which, unless admitted, can only be established by the appellant's testimony; that counsel endeavoured to arrange with respondent's solicitor for a joint admission of these facts so as to avoid the necessity of obtaining the appellant's testimony in connection therewith and that he was advised recently that the proposed joint admission cannot be made; that counsel endeavoured to ascertain if there were any probability that the appellant might have to come to Canada at an early date and that he has been informed that there is no such probability; that the cost and inconvenience to the appellant of having to make a trip from France to Canada to give evidence would be much greater than the cost or inconvenience of having to take her evidence on a commission or through letters of request in France; that Mr. André Veniot, advocate, residing at 127 boulevard Malesherbes, Paris, would be a proper person to whom such commission or letters of request might be addressed.

The examination of witnesses upon oath by commission or by means of letters of request is governed by section 64 of the Exchequer Court Act (R.S.C., 1927, chap. 34), which reads in part as follows:

If any party to any proceeding had or to be had in the Exchequer Court is desirous of having therein the evidence of any person, whether a party or not, or whether resident within or out of Canada, and, if in the opinion of the Court or a judge thereof, it is, owing to the absence, age or infirmity, or the distance of the residence of such person from the place of trial, or the expense of taking his evidence otherwise, or for any other reason, convenient so to do, the Court or a judge may, upon the application of such party, order the examination of any such person upon oath, by interrogatories or otherwise, before the Registrar of the Court, or any commissioner for taking affidavits in the Court, or any other person or persons to be named in such order, or may order the issue of a commission under the seal of the Court for such examination.

The first paragraph of rule 169 of the General Rules and Orders of the Court, dealing with commissions, says:

The Court or a Judge may, in a cause where it shall appear necessary for the purposes of justice, make any order for the examination upon oath

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before any officer of the Court, or any other person or persons duly authorized to take or administer oaths in the said Court, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

Rule 169 adds nothing to section 64; in fact it is less definite.

Counsel for the respondent opposed the motion on the ground that a party is not entitled to give his testimony otherwise than *viva voce* in open court. Reliance was placed by counsel on the following decisions: *L'Abbé Warré v. Bertrand et Labelle* (1) and *Worthington v. Dame Walker* (2). In the former case the Court of Appeal and in the latter Mr. Justice Joseph Archambault held that a party cannot obtain the issue of a rogatory commission to receive his own evidence. These decisions are based on Article 380 of the Code of Civil Procedure of the Province of Quebec, which, at the time of their delivery, contained only the following clause:

When any of the witnesses or of the parties reside outside of the Province, or even within the Province at a distance of more than one hundred miles from the place where the court is held, the party who requires to examine them may obtain a commission appointing one or more persons to receive the answers of such witnesses or parties.

By 17 Geo. V, chap. 71, assented to on the first of April, 1927, article 380 of the Code of Civil Procedure was amended by adding thereto the following paragraph:

When one of the parties resides outside of the Province he may also obtain a commission to receive his evidence.

Possibly this amendment was prompted by the reporter's note in the case of *Worthington v. Dame Walker* at the foot of page 82, which it may not be unseasonable to quote:

Cette question a été tranchée dans ce sens par la Cour d'appel: *Warré v. Bertrand*. Dans cette cause le débiteur habitait Tours, France, et a cru devoir traverser l'océan pour rendre témoignage en sa faveur. Cette jurisprudence semble étrange depuis qu'une partie peut dans tous les cas rendre témoignage en sa faveur (C.P. 316). Elle peut donner lieu à de graves injustices. Pour la justifier en équité, on peut dire que sur une commission rogatoire fermée, sauf consentement des parties le contre-interrogatoire d'un témoin est presque impossible, et *fortiori* dans le cas de la partie elle-même. Le remède semblerait être de nous permettre de faire ce que nous laissons faire ici par les étrangers en vertu des articles 1445 *et seq.* C.P. et Statuts Refondus.

(1) (1926) R.J.Q., 40 K.B. 509. (2) (1927) 30 Q.P.R., 82.

I may note in passing that articles 1445 to 1450 inclusive, being chapter LXXIV entitled "Depositions in Proceedings in Courts out of the Province," were added to the Code of Civil Procedure by 7 Ed. VII, chap. 57, assented to March 14, 1907.

Article 380 of the Code of Civil Procedure has no application in the present case. If it applied, it would obviously not, as it reads to-day, sustain the respondent's contention.

Article 380 before the amendment did not provide, in my opinion, for the examination of a party as witness in his own behalf by means of a rogatory commission; the party who wished to testify for himself had to give his evidence in open court. The judgments in *L'Abbé Warré v. Bertrand et Labelle* and *Worthington v. Dame Walker* appear to me well founded. Needless to say the cross-examination of a witness, particularly of the adverse party, on a "closed" commission under article 385 was generally not very satisfying; the cross-examination on an "open" commission in virtue of article 385A, where the cross-interrogatories are no more limited than they would be in open court, is obviously more satisfactory. I may add incidentally that the examination of a witness by means of letters of request is equivalent in effect to his examination under an "open" commission and allows his cross-examination as thoroughly as if he were testifying in open court.

The text of section 64 of the Exchequer Court Act, if perhaps not so clear on that point as article 380 of the Code of Civil Procedure, seems to me to provide merely for the examination of the adverse party by commission or letters of request, as the case may be, and not of the party giving evidence in his own behalf. Leaving aside the words that are not pertinent in the present case, the material part of section 64 is worded as follows: "If any party to any proceeding . . . in the Exchequer Court is desirous of having therein the evidence of any person, whether a party or not, . . . and, if in the opinion of the Court or a judge thereof, it is . . . convenient so to do, the Court or a judge may, upon the application of such party, order the examination of any such person upon oath, by interrogatories or otherwise . . ." I fail to see how the words "of any person, whether a party or

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not" can be said to apply to the party making the application. It seems to me that if the legislators had wished to include among the persons liable to be examined on a commission or letters of request the party seeking the issue of the commission or letters of request, they would have said it in plain words. The manner in which the phrase dealing with the subject is drafted induces me to believe that the legislators did not contemplate the examination of a party testifying on his own behalf by means of commission or letters of request.

The balance of convenience, which has to be considered when the evidence of a witness may equally be taken in open court or out of court by commission or otherwise, would undoubtedly be favourable to the issue of letters of request; but in the present case, it is not the question of convenience which I have to consider, but the question as to whether or not the issue of a commission or of letters of request on behalf of the appellant to receive her own evidence is permissible under section 64 of the Exchequer Court Act; as I have already said, in view of the wording of the section, I do not think that it is. The costs of having the appellant come from France to give her evidence in court instead of taking it by means of letters of request will be considerably higher; it will be the unhappy lot of the losing party to pay them.

The motion is accordingly dismissed; costs reserved.

*Order accordingly.*