BETWEEN:

SAM YARMOLINSKY ..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1943
Nov. 2.
1944
May 23.

Practice—Examination for discovery—General Rules and Orders 130 and 138—Departmental or other officer of the Crown.

Held: That Rule 130 providing for the examination for discovery of a departmental or other officer of the Crown contemplates that the person ordered to be examined shall be a person in a position of responsibility and authority who is qualified to represent the Crown on the examination, make discovery of the relevant facts within the knowledge of the Crown and make such admissions on its behalf as may properly be made.

2. That the driver of an army truck is not a departmental or other officer of the Crown within the meaning of Rule 130.

MOTION for order for examination for discovery of driver of army truck as an officer of the Crown under Rule 130.

The motion was heard before the Honourable Mr. Justice Thorson, President of the Court, in Chambers.

M. Greenberg for suppliant.

W. R. Jackett for respondent.

THE PRESIDENT now (May 23, 1944) delivered the following judgment:

This is a motion on behalf of the suppliant for an order for the examination for discovery of Lance-Corporal R. G. Booty, as an officer of the Crown, under Rule 130 of the General Rules and Orders of this Court, which provides that "any departmental or other officer of the Crown" may, by order of the Court or a Judge, be examined for discovery at the instance of the party adverse to the Crown. It is stated that Booty was the driver of the truck that collided with the suppliant and it is in respect of injuries alleged to have resulted from his negligence that the suppliant brings his petition of right for damages.

Rule 130 should, I think, be considered together with Rule 138 which provides, *inter alia,* that "where any departmental or other officer of the Crown has been examined for the purpose of discovery, the whole or any part of the

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examination may be used in evidence by any party adverse in interest to the Crown". Rule 130 has been in force ever since the first General Rules and Orders of the Exchequer Court were made in 1876, but Rule 138 in its present form did not come into effect until December, 1899.

Two purposes are sought to be served by these rules, namely, the discovery of facts from the Crown and the obtaining of admissions which can be used as evidence against it.

The determination of who may be examinable under Rule 130 is not free from difficulty and the practice under the Rule has not been settled. In the only reported case which I have been able to find, *Montgomery* v. *The King* (1), Cassels J. held that the master of a government dredge was not an "officer" within the meaning of the rule. On the other hand, in *Morrison* v. *The King* (2), orders were made for the examination of an officer of the Federal District Commission and also of the R.C.M.P. constable whose alleged negligence was in issue. No reasons for these orders were given. It is desirable that the principles involved should be further considered.

It is also desirable that the motion should be dealt with apart from the special reason that might properly be given for its dismissal, namely, that an enlisted soldier such as Lance-Corporal Booty is not an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act as amended in 1938—*McArthur* v. *The King* (3), and cannot be an officer of the Crown within the meaning of Rule 130. Such a ruling would not be affected by the amendment of the Exchequer Court Act in 1943, whereby, for the purpose of determining the liability of the Crown, a member of the armed forces of Canada was deemed to be a servant of the Crown.

In England, the rules make no provision for a *viva voce* examination for discovery and recourse must be had to Canadian decisions based upon rules providing for the oral examination for discovery of an officer of a corporation.

Counsel for the suppliant relied upon a number of such decisions and contended that the test laid down by them as to whether a person was examined as an officer of a corporation was whether he was placed in a position of

(1) (1915) 15 Ex. C.R. 372. (2) (1940) S.C.R. 325.
(3) (1943) Ex. C.R. 77.

responsibility and control at the time of the cause of action and argued that since Booty was in charge of the army truck that collided with the suppliant he ought to be regarded as an officer of the Crown for discovery purposes.

The practice in the provinces of Canada with regard to the examination for discovery of an officer of a corporation is not uniform and the general observation may be made that the decisions must be examined in the light of the rules in force at the time they were rendered, including, in my judgment, the rules relating to the use that might be made of the depositions.

In Ontario, after the Common Law Procedure Act, 1856, and until 1873, discovery in actions at law was obtained by means of interrogatories, as in England, although discovery by oral examination was provided for in the Court of Chancery under Chancery Order L of 1850. *Viva voce* examination for discovery was first introduced in the Common Law Courts by the Administration of Justice Act, 1873, sec. 24. This became section 156 of The Common Law Procedure Act, R.S.O. 1877, chap. 50, and, later, after The Ontario Judicature Act, 1881, Rule 487 of the Consolidated Rules, 1888. Rule 487 provided, *inter alia*, for the oral examination of "any one who is or has been one of the officers" of a corporation "touching the matters in question in the action". Originally there appeared to be no restriction on the number of officers who might be examined, and no special order was required, but the rule was later amended in this respect—Rule 439, Consolidated Rules, 1897. There was, however, no provision for the use of the examination as evidence at the trial; the rule served only the purposes of discovery.

Under this state of affairs, a very wide interpretation was given to the term "officer". It was not confined to officials of the corporation but was extended to include persons who would ordinarily be considered not as officers but rather as servants. The following were held to be examinable officers within the meaning of the section or rule; a station agent of a railway company—*Ramsay* v. *Midland Railway* (1); the local agent of a fire insurance company—*Goring* v. *The London Mutual Fire Insurance Company* (2); the local agent of a life insurance company

(1) (1883) 10 P.R. 48.

(2) (1885) 10 P.R. 642.

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—*Hartnett* v. *Canada Mutual Aid Association* (1); the driver of a traction engine—*Odell* v. *City of Ottawa* (2). In *Leitch* v. *Grand Trunk Railway Company* (3), which became the leading authority on the subject, the conductor of a train was held to be an examinable officer. In the Divisional Court, Armour C.J. held that "officer" was a word of very wide signification and stated, at page 672:

> The object of the provision is to discover the truth in relation to the matters in question in the action, and the examination ought to be of such officers as are best able to give information respecting such matters.

In the Court of Appeal (4), an appeal from Armour C.J. was dismissed on an equal division of the court; Osler J.A., after reviewing the history of discovery in Ontario, held, at page 383:

> It may sometimes be difficult to draw the line between an officer and one who is a mere servant of the company; yet a person who is entrusted with the charge of a railway train in the course of its transit,—the conductor of the train,—is, in my opinion, as to that particular occasion, and for that particular purpose, to be regarded as an officer of the corporation as distinguished from a mere servant, no matter how temporary his employment or how summary the company's powers of dismissal;

Maclennan J.A. was of the view that the rule (Con. Rule 487) ought not to be limited to the higher or governing officers only, and stated further, at page 386:

> I think the Rule should be applied to every case to which it can be applied beneficially, irrespective of the greater or less importance of the office filled by the person proposed to be examined.

It is evident from a number of the Ontario decisions that the judges felt it quite proper to extend the meaning of the term "officer" for discovery purposes and that no harm could be done thereby, in view of the fact that the examination could not be used as evidence against the corporation at the trial, at any rate, if the corporation took no part in the examination.

An important change was made by Rule 461 (2) and (3) of the Consolidated Rules, 1897, whereby it was provided for the first time that where an officer of a corporation had been examined under Rule 439 the whole or any part of the examination might be used as evidence by any party adverse in interest to the corporation, and should

(1) (1888) 12 P.R. 401.
(2) (1888) 12 P.R. 446.
(3) (1888) 12 P.R. 541 & 671.
(4) (1890) 13 P.R. 369.

be evidence accordingly, and that where a former officer had been examined the same use might be made of the examination, by leave of the Judge. This change had no immediate effect on the decisions of the courts. In *Dawson* v. *London Street Railway Company* (1) both the conductor and the motorman of a street car were held examinable; and in *Casselman* v. *Ottawa, Arnprior and Parry Sound Railway Company* (2), a roadmaster of the railway company was held to be an officer under Rule 439. In the latter case, Street J. went so far as to say, at page 262:

> the decisions seem practically to have construed every one to be an officer who has personal control or supervision over the care or working of any portion of the railway or its property, with defined duties.

The Ontario practice was finally clarified by the Court of Appeal in *Morrison* v. *Grand Trunk R.W. Co.* (3), where it was held that an engine driver was not examinable under Rule 439. The Master had held (4), on the authority of *Dawson* v. *London Street Railway Company* (*supra*), that he was; Street J. had allowed an appeal from this decision but it had been restored by the unanimous judgment of the Divisional Court. The Court of Appeal were unanimous in allowing an appeal from the decision of the Divisional Court. Osler J.A., while he adhered to his judgment in the *Leitch Case* (*supra*), pointed out that Rule 461 (2) (3) had made a material change in the practice and that the deposition of an officer, no matter what his grade or authority, might be read against the corporation just as those of a natural party might be read against him, and expressed the view that under the circumstances the court ought not to extend the meaning of the word officer or carry the cases further than they had already gone, and went on to say, at page 40:

> It might be quite reasonable to examine for discovery merely any officer or servant of a corporation, but to allow this examination to be used as evidence against the corporation in the same way as that of a natural person may be used against himself, is a practice the justice of which, in many cases at all events, is not so clear.

and Maclennan J.A. said, at page 41:

> At the time of our decision in *Leitch's* case, 13 P.R. 369, the officers of corporations could only be examined before trial for purposes of discovery, and the depositions could not be read against the corporation. I thought and held in that case that the Rule applied to every officer

(1) (1898) 18 P.R. 223.
(2) (1898) 18 P.R. 261.
(3) (1903) 5 O.L.R. 38.
(4) (1902) 4 O.L.R. 43.

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of a corporation who might reasonably be supposed to possess knowledge of the facts, discovery of which was sought. If the depositions could at that time have been read against the corporation, I think I would not have put so wide a construction upon the Rule.

In the *Morrison Case*, Osler J.A. recommended that Rule 439 should be enlarged to admit the examination of servants of a corporation but that if this were done Rule 461 (2) and (3) might be repealed. Effect was given to this recommendation in 1903 with the result that under the present Ontario Rule 327 there can be an examination for discovery, without any order, of any officer or servant of a corporation, but such examination shall not be used as evidence at the trial.

In Manitoba, a different attitude from that adopted in the *Morrison Case* (*supra*) was taken. In *Dixon* v. *The Winnipeg Electric Street Railway Co.* (1), Taylor C.J. had held, following the Ontario decisions, that an electrician in the defendant's employ who had the control and management of the power house of the defendant was an examinable officer under Rule 379, which was similar to Ontario Rule 487. At this time, as in Ontario, the Manitoba rules did not provide for the use of the examination of an officer of a corporation as evidence at the trial. In 1899, Manitoba followed the course taken in Ontario in 1897, and made provision for its use in a manner similar to that provided by Ontario Rule 461 (2) and (3). Under this new situation, it was held by Richards J. in *Gordanier* v. *Canadian Northern Railway Co.* (2), following the *Dixon Case* (*supra*) and *Leitch* v. *Grand Trunk Railway Company* (*supra*), that the conductor of a train was an examinable officer under Rule 387 of the King's Bench Act (formerly Rule 379). The *Morrison Case* (*supra*) was cited in the argument, but Richards J. took a different view from that taken by the Ontario Court of Appeal as to the effect of the new rule whereby the examination could be used at the trial. At page 5, he said:

> The Legislature, when it enacted that the depositions might be used in evidence, did not in any way restrict the meaning of the word "officer", but left the law, as to who might be examined as an officer, untouched.
>
> The tendency of decisions appear to be to give the rule a liberal construction.

(1) (1895) 10 M.R. 660. (2) (1904) 15 M.R. 1.

and in *Shaw* v. *City of Winnipeg* (1), it was held that a water meter inspector of the corporation, who had left a trap door open, was an officer under Rule 387.

In Alberta, the Court of Appeal in *Nichols & Shephard Co.* v. *Skedanuk* (2), reversing Beck J., held that a member of a firm which sold the company's wares on a commission was not an officer within the Rule. Rule 224, as amended in 1902, permitted the examination of an officer of a corporation to be used as evidence in the same way as the examination of a party. Harvey C.J., speaking for the court, after referring to the *Morrison Case* (*supra*), said, at page 1004:

> It appears to me that the above case effectually disposes of the authoritative value of the earlier cases in interpreting our rule which has the consequences it has.

The rules as to the examination of an officer of a corporation and the use that might be made thereof, that were in force at the time of the decisions in the *Morrison Case* (*supra*) in Ontario, the *Gordanier Case* (*Supra*) in Manitoba and the *Nichols & Shephard Co. Case* (*supra*) in Alberta, were similar in effect to Rules 130 and 138 of the General Rules and Orders of this Court. The weight of authority is, I think, strongly in favour of the view that where a rule provides for the examination for discovery of an officer of a corporation, the term "officer" ought not to receive as wide an interpretation when the deposition of the officer can be used as evidence against the corporation as it may properly receive when the examination is for the purpose of discovery only and no use can be made of it as evidence or its use as such is restricted. Even where a liberal construction has been given to the term "officer", notwithstanding the fact that the examination can be used at the trial, as in Manitoba, I have not been able to find any case in any jurisdiction with rules comparable to those now under discussion that would go so far as to support a decision that the driver of a motor vehicle is examinable for discovery as an officer of the corporation in whose service he is employed.

Counsel for the suppliant relied upon a number of British Columbia decisions. In that province, the courts have given a very wide meaning to the term "officer",

(1) (1910) 13 W.L.R. 706. (2) (1912) 2 W.W.R. 1002.

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following the tendency of the earlier Ontario decisions and carrying it forward. The following have been held examinable officers: a fire warden of a railway—*King Lumber Mills, Ltd.* v. *Canadian Pacific Ry. Co.* (1); a local agent of an insurance company—*Yamashita* v. *Hudson Bay Insurance Company* (2); a pilot in sole charge of an air transport company's aeroplane—*McDonald* v. *United Air Transport Ltd.* (3); a street car motorman—*MacRae* v. *B.C. Electric Ry. Co. Ltd.* (4). In *McDonald* v. *United Air Transport Ltd.* (*supra*), Martin C.J., speaking for the Court of Appeal, held that the governing circumstance in the case before the court was that the person sought to be examined was the pilot in sole charge of the aeroplane of the defendant corporation the alleged mismanagement whereof was the basis of the action. This case would give strong support to the suppliant's contention if the rules under which it was decided were the same as those of the Exchequer Court. In British Columbia, under Rule 370c (1), any officer or servant of a corporation may, without any special order, and any one who has been one of the officers may, by order of a Court or a Judge, be examined for discovery, but there is a very important provision in the rule that such examination may be used as evidence at the trial if the trial Judge so orders. That this provision has had some effect in giving the term "officer" a wide meaning in British Columbia is indicated by the decision of Morrison J. in the *Yamashita Case* (*supra*) where he stated that the examination could do the defendant no harm, for the examination could be used at the trial only if the trial Judge so ordered.

The practice in the other provinces affords no direct solution to the problem. In Nova Scotia and Prince Edward Island, the rules do not provide for discovery by *viva voce* examination, discovery being had through the medium of written interrogatories. In New Brunswick, under Order 31a of the Supreme Court Rules, 1927, provision is made for the examination for discovery not only of any officer of a corporation but also of any person who is or has been an officer or employee, but the examination of an officer can be used as evidence only where the officer has been selected to submit to the examination, the selec-

(1) (1912) 2 D.L.R. 345.
(2) (1918) 3 W.W.R. 671.
(3) (1939) 3 D.L.R. 27.
(4) (1942) 1 W.W.R. 532.

tion to be made by the corporation or, under certain circumstances, by a Judge. This procedure follows the practice adopted in Alberta in 1914, by rules 234 and 250 of the Consolidated Rules of that year. In Saskatchewan, under Rule 233 of the King's Bench Rules, 1942, anyone who is or has been an officer or servant of a corporation may be examined, but the examination of an officer can be used as evidence only where the Court has, after enquiry, designated the proper person to be examined. The practice in the three provinces last mentioned indicates the care that has been taken by the rule making authorities to serve the two purposes of an examination for discovery in such a way as to make for full discovery of the facts and, at the same time, ensure that a corporation, which cannot be examined in person, shall not be subject to being bound by admissions made by persons who do not properly represent it. In Quebec the practice is quite different. Article 286 of the Code of Civil Procedure makes very broad provisions for examination before trial but under Article 288 such depositions must be used as evidence in the case and form part of the record, with the result that examinations for discovery are not as frequently resorted to in Quebec as in the other provinces.

If discovery of the facts were the sole purpose of the examination for discovery, there could be no objection to giving the term "officer" a wide meaning, but, even on this assumption, it would, in my opinion, be stretching the term beyond a reasonable interpretation to say that it includes such a person as Lance-Corporal Booty. While it is desirable that the suppliant should have full discovery of the facts from the Crown, it is not proper that the Crown should be subject to being bound by admissions made by persons who are not its responsible officers. While the suppliant should as far as possible be put in the same position in the matter of discovery in proceedings against the Crown as he would occupy in a suit against a private individual he has no right to be in a better position. He has no greater right to examine a servant of the Crown and bind it by the admissions made by such servant than he would have to examine the servant of an individual and bind such individual. Nor should the Crown be in a worse position in the matter of discovery than a

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private individual would be. Since the Crown cannot be examined for discovery in person, discovery can be made only through a person who represents the Crown. When an order has been made under Rule 130 for the examination of a person as a departmental or other officer of the Crown, the Crown will be bound by whatever admissions such a person may make on his examination. The Crown has, therefore, a right to have the proper kind of person examined, since on the examination the person ordered to be examined represents the Crown and speaks for it. The difficulty involved in giving full effect to the two purposes of an examination for discovery has been realized in the various provinces. In Ontario, as has been seen, full effect has been given to the discovery purpose of the examination and the rule allows the examination not only of an officer of a corporation but also of a servant, but the other purpose has been abandoned altogether for no use of the examination as evidence is permitted. In other provinces, such as Alberta, Saskatchewan and New Brunswick, the difficulty has been met by allowing the use of the examination of an officer of a corporation as evidence but only if the officer has been selected by the corporation or the court or designated by the Court for the purpose. It was suggested, that a similar practice should be adopted in this Court and that the Judge before whom an application under Rule 130 is made should name the deputy minister of the department concerned or such officer as the deputy minister might designate. There have been cases where such an order has been made, and there is merit in the suggestion, but I have come to the conclusion that such a practice is not authorized by the Rule. The suppliant has the right to make his application and the Judge who hears it must deal with it on its merits and either allow or dismiss it; he has no right to delegate the appointment of the officer to be examined to anyone else.

The kind of officer who should be ordered to be examined under this Rule is suggested by the definition of an officer of a corporation given by Moss J.A. in *Morrison* v. *Grand Trunk Ry. Co.* (*supra*), at page 43:

> the officer of a corporation who, if there was no action, would be looked upon as the proper officer to act and speak on behalf of and to bind the corporation in the kind of transaction or occurrence out of which the action arose, would, *prima facie*, be the proper person to be examined in

the first instance under Rule 439. And I would venture to say further that the fact that a person holding some position of subordinate rank or grade which some might call an office, happened to be the person whose dealing or conduct had given rise to the action, ought not necessarily to subject such person to examination on behalf of the corporation for the purposes of discovery any more than if he was an officer or employee under an individual party to an action.

In my view, similar principles should be adopted in this Court as long as Rules 130 and 138 remain in their present form. Rule 130 providing for the examination for discovery of a departmental or other officer of the Crown contemplates that the person ordered to be examined shall be a person in a position of responsibility and authority who is qualified to represent the Crown on the examination, make discovery of the relevant facts with the knowledge of the Crown and make such admissions on its behalf as may properly be made. Beyond this general statement I do not think it possible to go. I agree with the remarks made by Moss J.A. in the *Morrison Case* (*supra*), at page 43:

> The question of what persons are examinable under the Rule as officers of a corporation must always become more or less a question of fact, and it may generally be found more easy to say who is not an officer within the Rule than to lay down any rule for general guidance.

I am unable to accept the contention that the term "officer" in Rule 130 is wide enough to include the driver of an army truck. To hold that it is would mean that in a case such as this there is no distinction between an officer and a servant of the Crown. The elimination of such a distinction is not warranted and I must hold that the driver of an army truck is not a departmental or other officer of the Crown within the meaning of Rule 130. The suppliant's motion must, therefore, be dismissed.

No injustice to the suppliant need result from this decision. The fact that a person in the service of the Crown may know more about the facts of a case than anyone else or, indeed, be the only person with any personal knowledge of them does not give the suppliant the right to examine such person for discovery, if he does not come within the meaning of the Rule providing for such examination. He has no right under the rule to examine a servant of the Crown for discovery. Nor does the fact that a person has no personal knowledge of the facts prevent

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him from being a proper officer to be examined, for he is being examined, not as an individual as to his own knowledge of the facts, but in his capacity as an officer of the Crown as to the facts that are within the Crown's knowledge; it is discovery from the Crown that is being sought. It is well established that where an officer of a corporation is being examined for discovery he cannot refuse to answer merely because he has no personal knowledge of the facts. In *Goodbun* v. *Mitchell et al.* (1), it was held by the Court of Appeal of Manitoba that a witness on his examination for discovery as an officer of a company must not only answer as to his individual knowledge but must also enquire and get such information as he can from the other officers or servants of the company who have personal knowledge of the facts. This follows the English authorities which lay down a similar rule with regard to the answering of interrogatories—*Bolckow* v. *Fisher* (2); *Southwark Water Co.* v. *Quick* (3). The same practice should be followed on an examination under Rule 130. Such person as is ordered to be examined as an officer of the Crown under the Rule must acquaint himself with the relevant and admissible facts and, if he cannot answer the questions asked, the examination may be adjourned in order that he may ascertain the necessary facts and give the answers on the resumption of the examination. If such a course is followed adequate effect can be given to the two purposes of an examination for discovery that have been referred to.

In view of the unsettled practice under the Rule thus far, while I dismiss the suppliant's motion, the dismissal will be without costs.

Order accordingly.

(1) (1928) 37 M.R. 451. (2) (1882) 10 Q.B.D. 161.
(3) (1878) 3 Q.B.D. at 321.