ORIGINAL CIVIL.

Before Mr. Justice Norris and Mr. Justice Wilkinson.

RALLI *v.* GAU KIM SWEE.

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May 14, 15, 16, 21, 25, 28, 31.
June 1, 5, 11.

Evidence taken on Commission—Commission—Documentary evidence, Objection to admissibility of—Evidence taken by Commissioner beyond jurisdiction—Notice to produce original document—Refusal to produce—Evidence Act (I of 1872), s. 63, sub-section 3, 65, 66.

If, when evidence is taken before Commissioners, a document is tendered and objected to on any ground, the opposite party is not precluded from objecting to the document at the trial on any other ground. It is not necessary to state all the objections to the admissibility of a document when it is first tendered, but the party objecting is at liberty to take any fresh objection whenever the party producing the document tenders it in evidence.

Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary, in order to admit secondary evidence of the contents of a document, that the party tendering it should have given notice to produce the original, nor is it necessary for him to prove a refusal to produce the original.

On reading the evidence taken under the commission, it appeared that the Commissioners had received and marked as an exhibit a document which had not been formally proved. An objection had been taken by the defendant's counsel before the Commissioners that the document was "immaterial and irrelevant," but no objection was taken as to want of proof.

Mr. *Evans* for the plaintiff now tendered the document.

Mr. *Jackson* for the defendant objected. Until a document is finally admitted in evidence, it is open to every objection that may be taken to the admission of a document. If the objection is that some link is wanting, the Court cannot admit it without consent.

Mr. *Evans*.—The defendants were represented by counsel before the Commissioners, and if their counsel did not choose to object that the document was not formally proved, it is too late to take the objection now. In *Robinson* v. *Davies* (1), Lush, J., said: "The only question is whether, no objection having been taken before the Commissioners to the non-production of the original invoices, it is now competent to the defendants to object that copies only

(1) L. R., 5 Q. B. D., 26.

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were produced. It seems to me clear, that if the defendants had been represented by counsel, and counsel had made no objection, no objection could be made now. If secondary evidence is received at *nisi prius* without objection it cannot be objected to afterwards. The defendants did not choose to be represented by counsel, but each party was represented by a Commissioner, and it was competent to the defendant's commissioner to have objected. If he had done so, and his objection had been overruled, it would have been a different thing. He made no objection, and I am clearly of opinion that it is too late to make one now."

Mr. *Jackson, contra.*—I don't wish to impugn the proposition laid down in *Robinson* v. *Davies* (1), that if secondary evidence is allowed to go in without objection no objection to it can afterwards be entertained. But if the evidence is illegal it may be struck out at the hearing, though no objection has been made before the Commissioner—*Hutchinson* v. *Bernard* (2); *Lumley* v. *Gye* (3). The objection is open until the document is properly proved; additional evidence may be adduced hereafter, and the plaintiff may be able to prove the document. But I can object whenever it is tendered if the proof is not sufficient. There is no such thing as a half-admitted document.

Mr. *Hill* on the same side.—With regard to *Robinson* v. *Davies* (1), the real question decided was, that primary evidence ought to be offered, but that secondary evidence can be given by consent, and the decision comes to this: that if secondary evidence is tendered and the other side are silent, that is evidence of consent and they cannot withdraw it; but if a document is not proved silence does not give proof. Either the document is in or not in. It is not necessary to raise all objections at the same time; an objection may be taken on the ground of insufficiency of stamp. That may be cured, but the person objecting would be entitled to object afterwards on the ground of want of proof of execution.

[NORRIS, J.—We are of opinion that the document ought not to be admitted. When counsel objects to a document being admitted he is not bound to state all his objec-

(1) L. R., 5 Q. B. D., 26. (2) 2 Moo. and Rob., 1.
(3) 3 E. and B., 114.

tions. If at a subsequent stage the counsel tendering the document thinks he has got over the first objection, the opposing counsel have the right to make any further objections to the admissibility of the document that they may think proper. It is open to the plaintiff to prove the document hereafter.]

A witness was called before the Commissioners to prove that a certain portion of the cutch shipped by the plaintiffs in the ship *Gertrude* had been appropriated to a particular Company in America. The following questions and answers were recorded:—

"*Question.*—Do you know what was done with the shipment per *Gertrude* so far as that appropriation that you speak of is concerned, that is, to whom it was appropriated?

"*Answer.*—To the Boston Dye Wood and Chemical Company. It was done by letter; the paper I now produce is a copy of the original letter and I know it to be a copy."

The defendant's counsel objected on the ground that it was immaterial and irrelevant.

Mr. *Evans* now tendered the copy.

Mr. *Jackson* objected on the ground that the absence of the original document had not been accounted for; that notice to produce it had not been given; and that a refusal to produce it had not been proved.

Mr. *Evans.*—Section 65 of the Evidence Act provides that "secondary evidence may be given of the existence, condition or contents of a document,

"(*a.*) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when after the notice mentioned in s. 66 such person does not produce it." And s. 66 provides that "secondary evidence of the contents of the documents referred to in s. 65, clause (*a*) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the

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circumstances of the case. Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it." And clause (*b*) of the section provides that the notice may be dispensed with, "when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

The reason of the rule is, that it is useless to serve notice on a person beyond the jurisdiction of the Court when there would be no means of enforcing the production of the original.

It is a relaxation of the English rule. We had no power to compel the attendance of witnesses before the Commissioners, and no means of issuing notices to any person to attend through any Court. I have only to show that there was an original written, and that this is a copy of it in order to use it as secondary evidence. I am entitled to do so because the original is in the possession or power of some person beyond the jurisdiction of the Court. No objection was taken before the Commissioners that the document spoken to by the witness was only a copy. If that objection had been taken we might have been able to produce the original. In any case the Court has the power under the section to dispense with a notice.

Mr. *Jackson, contra.*—The document was objected to when originally tendered. On the Evidence Act it is clear that this copy is not admissible. Is the Court to assume that it was intended to alter the English law? The Evidence Act merely condenses Taylor on Evidence with some alterations which are manifest. There is no code in England; the law of evidence is Judge-made law and can be modified from time to time.

The first five exceptions in s. 66 are clearly in accordance with English law. As to the sixth it can be interpreted to be also in accordance with the English law. In England it would be necessary to prove that notice had been given, and that the person to whom it was given refused to comply with it. The reason is that it is necessary to get the best evidence if possible, and to satisfy the Court that an endeavour has been made to get it—Taylor on Evidence, 7th Edition, p. 409. There is no question, but that according to English law, notice and a refusal to comply with it

would have to be proved. Clause (*b*) of s. 66 provides that notice is not required "when the person in possession of the document is out of reach of or not subject to the process of the Court." Section 65 provides for the admission of secondary evidence "when, after the notice mentioned in s. 66, such person does not produce" the original document. That shows that there must be proof of refusal to produce. The mere fact that the document is not produced is not sufficient to allow the admission of secondary evidence. The words must be read, "if such person after such notice does not produce." If that is so the law is in entire accordance with the English law. There must be evidence explaining the non-production of the original, otherwise the original might be in Court and secondary evidence be given of its contents. Upon what principle can it be said that, because a person is out of the jurisdiction, he is not to be asked to produce an original document? In England there are no degrees of secondary evidence; here there are—see s. 63. This copy could only come under clause (3) of s. 63. There is no evidence to show that it was made from or compared with the original. Merely saying that it is a copy is not a sufficient compliance with the Act.

Mr. *Phillips* on the same side.—Section 63 provides that where the person is out of the jurisdiction, secondary evidence may be given after the notice required by s. 66 has been given. The last paragraph of (*a*) applies to everything which has gone before. If the Legislature meant to exempt such documents from the rules as to notice it would not have included them in a provision which refers to all. "Such notice" is the notice prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable. It is not said that no notice need be given. There must be at least such notice as the Court considers reasonable. All notice is not dispensed with. It is not reasonable that no attempt should be made to produce the original.

NORRIS, J.—We are of opinion that the document is admissible. Mr. Jackson says that it is not proved to be a copy within the meaning of s. 63 of the Evidence Act, and that if it is a copy at all it comes under subsection 3. The witness says: "The copy now produced is a copy of the original, and I know it to be so."

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Mr. Jackson says that that is not sufficient to show that the document is a copy made from or compared with the original. I think the fair interpretation is that the witness knew it to be a copy made from the original from personal knowledge. Then was there an original document? The evidence shows that a letter was sent to the Boston Dye Wood Company, and that certain action was taken upon it.

Then is this copy admissible in evidence? Section 65 says: "Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

"(*a.*) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when after the notice mentioned in s. 66 such person does not produce it." There is therefore a clear legislative enactment that notice, or a reasonable notice, must be given, but that is qualified by s. 66, clause (*b*) which dispenses with notice "when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

Mr. Jackson argued that there must be evidence of a refusal to produce the original document. I do not see that that is required by the Act at all, and I do not think that it is requisite.

Mr. Phillips wishes us to read "such notice" as applying to statutory notice first and then to reasonable notice. That I think would be governed by or subject to sub-section 6 of s. 66. The Boston Dye Works are persons out of the jurisdiction of the Court, and we think therefore that notice was not requisite and that the copy is admissible.

Solicitors for the plaintiffs: Messrs. *Sanderson & Co.*

Solicitors for the defendants: Messrs. *Watkins & Watkins.*