

1955
 Jan. 22

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

WILLIAM ROBERTSON PLAINTIFF;

AND

THE OWNERS OF THE SHIP *MAPLE* }
PRINCE AND OLAF NELSON } DEFENDANT.

Shipping—Practice—Disclosure of document held by a person not a party to action unnecessary as preliminary step to production.

Held: That disclosure in plaintiff's affidavit of documents is not necessary as a preliminary step to a subsequent application for its production when that document is in the possession of another person.

APPLICATION for production of a document.

The motion was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

J. I. Bird for the application.

C. C. I. Meritt contra.

SMITH D.J.A. now (January 22, 1955) delivered the following judgment:

The plaintiff claims damages resulting from a collision between his vessel and a barge in tow of the *Maple Prince*. He failed to disclose in his affidavit of documents a report prepared by J. H. Todd and Sons Ltd., for the underwriters, who became subrogated to part of the plaintiff's claim. The report was prepared by J. H. Todd and Sons Ltd., in their office, signed by the plaintiff and left there. He never had in his possession either the original or any copy.

In these circumstances the defendant submits that the report should have been disclosed in the plaintiff's affidavit of documents as a preliminary step to a subsequent application for its production. I do not think this is sound. It seems to me that in a case of this kind the underwriters are not to be regarded as the *alter ego* of the assured and that moreover the report was never in the possession or power of the plaintiff. This proposition is made good by such cases as *Fraser and Co. v. Burrows* (1) *Kearsley v. Philips et al* (2); *James Nelson and Sons Ltd. v. Nelson Line (Liverpool) Ltd.* (3), *Vulcan Iron Works v. Winnipeg Lodge No. 122* (4).

(1) (1877) 2 Q.B. 624.

(2) (1882) 10 Q.B. 36.

(3) [1906] 2 K.B. 217.

(4) (1908) 18 Man. Rep. 137.

It should be noted that the *Nelson* case is very similar to this in that the application was to have included in the plaintiff's affidavit of documents a particular report which came into existence in somewhat comparable circumstances. The point is well expressed by Counsel for the plaintiff *arguendo* at page 219:

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The persons in whose possession (the report) is, hold it not as solicitors for the plaintiffs but in their capacity of solicitors to the underwriters. The fact that the action is now being conducted by the solicitors of the underwriters does not make their possession of the document the possession of the plaintiffs on the record.

It follows that in my opinion the application must be dismissed with costs.

Order accordingly.