

1977

Febr. 28

[MALACHTOS, J.]

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ESTA  
SHIPPING  
CO. LTD.  
v.  
NIKIFOROS  
A. M. LASKOS

ESTA SHIPPING COMPANY LIMITED,

*Plaintiffs,*

v.

NIKIFOROS A. M. LASKOS,

*Defendant.*

(Admiralty Action No. 34/75).

*Evidence—Admiralty Action—Evidence given at hearing of interlocutory application which has been withdrawn—Whether it can be considered as evidence at the trial of the action.*

In the course of the trial of this action counsel for the defendant sought to put in evidence the evidence given by a certain Rizzouto who was called as a witness and gave evidence on the 29th August, 1975 at the hearing of an interlocutory application which was withdrawn and dismissed, half way through its hearing.

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Counsel for the plaintiff objected to the above course.

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*Held*, dismissing the application, that this being a civil case the said evidence could be considered as evidence given at the trial of the action with the consent of the other side, but since the other side has objected the Court has no power to order that the evidence given in an application which was withdrawn should be considered as evidence given in the present proceedings; and that, accordingly, the application will be dismissed. (*The Owners of the Steamer "Janet Quinn" v. The Owners of the Motor Tanker "Forest Lake"* [1966] 3 All E.R. 833 distinguished).

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*Application dismissed.*

Cases referred to:

*The Owners of the Steamer "Janet Quinn" v. The Owners of the Motor Tanker "Forest Lake"* [1966] 3 All E.R. 833.

**Application.**

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Application by defendants to consider as evidence given at the trial of the action the evidence of a witness given in an interlocutory application which was withdrawn.

*L. Papaphilippou*, for the plaintiffs.

*G. Mitsides*, for the defendant.

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The following ruling was delivered by:-

5 MALACHTOS, J.: At this stage of the proceedings the de-  
fendant seeks to put in evidence the evidence given by a  
certain Rizzouto who was called as a witness and gave  
evidence on the 29th August, 1975 in an application filed,  
together with the filing of the action by and on behalf of  
10 the plaintiff company for an order of the court ordering  
the defendant to deliver forthwith to the plaintiff company  
the ship "BARBARA S" flying the Cyprus flag, which is  
berthed at Naples in Italy for safe keeping till the determi-  
nation of the action and/or till further order of this court.  
15 Half way through the hearing of the application and, par-  
ticularly, on the 2nd October, 1975, Mr. Papaphilippou,  
counsel for the plaintiff company, made the following state-  
ment: "In view of the fact that evidence has been ad-  
20 duced on the merits and considerable time of this court  
has been expended, and such evidence is necessary to be  
adduced on our side, I think it would have been a better  
course in the interests of justice for both sides to fight the  
case on the merits and we have agreed with my learned  
25 friend to have this application withdrawn with costs in  
cause and apply for a speedy trial of the case on the me-  
rits".

And Mr. Mitsides stated that, that was so.

This court then made the order that the interlocutory  
application filed on the 24th June, 1975, was dismissed as  
withdrawn and the costs were ordered as costs in cause.  
30 An order then was made as to the time for filing the plead-  
ings and the action took its usual course.

So, we are faced now with an application that evidence  
given in an application which was withdrawn to be con-  
sidered as evidence given at the trial of the action. This  
35 being a civil case it could be done, of course, with the  
consent of the other side, but since the other side has ob-  
jected I do not think that the court has any power to order  
that the evidence given in an application which was with-  
drawn should be considered as evidence given in the pre-  
40 sent proceedings.

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In his effort to support his case counsel for the defendants cited the case of *The Owners of the Steamer "Janet Quinn" v. The Owners of the Motor Tanker "Forest Lake"* [1966] 3 All E.R. 833. This case is clearly distinguishable from the case in hand. The application was granted as the defendants did not oppose it but, on the contrary, they supported it. In the said case during the hearing of a collision action involving foreign ships, the witnesses were masters, first officers and other members of the ship's companies concerned, including the master of a third vessel. Certain of these witnesses had their evidence taken fully and were cross-examined, and the case was adjourned part heard. The trial judge fell ill and certain evidence was then taken on commission, which was also tested by cross-examination before an examiner. The trial judge retired before the adjourned hearing was resumed and another judge was appointed, pursuant to R.S.C. Ord. 5, r.8(2), to try the case *de novo*. On an application on a summons for directions that, on the new trial, the evidence already given at the part-heard proceedings should be used on the ground not only of the saving of expense but also on the ground of inconvenience to the witnesses already called and the shipping companies who employed them, it was held that the application would be granted.

This was a summons for directions heard in open court in which the applicants, the plaintiffs, owners of the steamer Janet Quinn, with the support of the defendants, the owners of the motor tanker, Forest Lake, applied for an order that the action tried between the parties before Hewson J., assisted by Capt. D. Dunn and Capt. D.A.G. Dickens, Trinity Masters, on Dec. 14, 15, 16 and 20, 1965, at which stage evidence had been given by the master of the Janet Quinn, the master and the second officer of the Forest Lake, and the chief officer of the Harpula, a British Shell tanker, be continued. Hewson, J., became ill before the trial could be continued after the Christmas vacation, and in January, 1966, evidence of the chief officer of the Janet Quinn was taken on commission. Hewson, J., retired on Sept. 30, 1966, and on Oct. 4, 1966, Sir Jocelyn Simon, P., pursuant to R.S.C. Ord. 4, r.8(2), made an order that the trial be heard *de novo* before Karminski, J. The collision between the Janet Quinn and the Forest Lake, both of which were foreign ships,

took place on Aug. 23, 1963, and the chief officer of the Janet Quinn had died since giving evidence on commission.

Therefore, the present application is dismissed.

- 5 Needless to say that the witness who gave evidence may be called as witness in the present proceedings.

*Application dismissed.*

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