[JACKSON, C.J., AND MELISSAS, J.]

(June 24, July 1, 1950)

EMILIOS ELEFTHERIOU MAKRIS AND ANOTHER, *Appellants*,

v.

THE POLICE, *Respondents*.

(*Criminal Appeal No.* 1885).

Criminal Procedure Law, 1948, *sec.* 60—*Taking of evidence abroad—Jurisdiction of the Court to order.*

Appeal from an order of the District Court of Limassol for the taking of evidence from certain named witnesses in the United States of America by British Consular Officers for the purpose of criminal proceedings.

Held: that in making an order under section 60 of the Criminal Procedure Law the District Court did not claim a right to compel witnesses to give evidence outside the jurisdiction. The test to be applied by the Court in making such an order was whether there was a probability that effect would be given to it.

Analogy between section 60 of the Criminal Procedure Law and the corresponding section 7 of the Civil Procedure Law, 1885.

A. S. Myrianthis for the appellant No. 1.

A. Anastassiades for the appellant No. 2.

R. R. Denktash, Junior Crown Counsel, for the respondent.

The facts are fully set out in the judgment of the Court which was delivered by the Chief Justice.

JACKSON, C. J.: This is an appeal against an order made by the District Court of Nicosia under section 60 of the Criminal Procedure Law of 1948. The part of the section with which we are concerned reads as follows :—

" Any court may, in any criminal proceedings in which it appears necessary for the purpose of justice to do so, make any order for the taking of evidence on oath before any officer of the court or any other person or persons and at any place within or without the Colony, of any witness or person, and may order any evidence so taken to be filed in the court and may empower either the prosecutor or the accused to produce such evidence on such terms as such court may direct."

On the 6th May last an order was made by the President of the District Court for the taking of evidence from certain named witnesses in the United States of America by British Consular Officers for the purpose of criminal proceedings in Cyprus against the appellants. The charge against the appellants was a charge under section 327 of the Criminal Code, of uttering certain false cheques in Cyprus which purported to be drawn on certain banks in America by officials of those banks. There were also charges of false pretences in connection with the same cheques.

The purpose of the evidence which it was sought to obtain in the United States was to show whether the banks by which cheques purported to have been drawn in the United States existed in that country or not and whether the persons who purported to have drawn them existed in the United States or not and whether they had or had not authority to draw the cheques on behalf of the banks. No evidence of those points was available in Cyprus.

The order made by the President of the District Court was accompanied by a list of questions which were to be put by the Consular Officers in the United States to the witnesses to be examined there. The order also provided for questions to be submitted by the Defence to be put to these witnesses in the United States at their examination.

Objection was taken to the order on behalf of the appellants. It was objected first that the order could have no effect outside Cyprus, and in support of that proposition a New Zealand case was quoted to us in which counsel informed us that it had been held that a statute of the New Zealand Legislature which purported to make a bigamous marriage contracted outside New Zealand punishable within it could not have that effect. That was an entirely different case from the case with which we are concerned. As quoted to us by counsel, it was a case of a statute passed by the New Zealand Legislature which appeared, at any rate, to make punishable in New Zealand an act committed outside it. The case before us has no resemblance to that case and we can get no assistance from it.

It was also argued for the appellants that if an order under section 60 of our Criminal Procedure Law could be made for the taking of evidence outside Cyprus, it could only be made for the taking of evidence in some part of the British Empire. That argument was based on the ground that while provision is made by certain statutes for the taking of evidence in places within the British Empire for the purpose of proceedings in other parts of the Empire, no provision was made for a similar practice outside the British Empire, at any rate in criminal cases.

It was agreed, however, by counsel for the appellants that there is provision under the Civil Procedure Law of Cyprus of 1885 by which evidence can be taken for the purposes of actions in the Cyprus Courts in places outside the British Empire, and if therefore we were to put upon that particular section, section 7 of the Civil Procedure Law of 1885, the same construction which we are asked to put on section 60 of the Criminal Procedure Law of 1948, we should, in effect, declare to have been invalid orders which have been made by courts in Cyprus for many years.

When evidence is taken outside the British Empire in civil cases under the Civil Procedure Law of 1885 there can of course be no question of compulsion of the foreign

country. By "foreign" I mean, in this connection, a place outside the British Empire. There can be no question of compulsion on the foreign country either by Imperial Act or by a law of Cyprus. The question whether the foreign country is or is not compelled to carry out the order of the Cyprus Court cannot therefore be the test of whether it is legitimate to make an order in Cyprus or not.

An order under section 60 of our Criminal Procedure Law for the taking of evidence in a foreign country cannot mean more than that, if the evidence can be obtained, it will be admissible in the Cyprus Courts. The test of whether it is expedient, as distinct from lawful, to make such an order or not seems to be whether or not it is probable that effect will be given to it in the foreign country.

In so far as that test is concerned, we have an assurance given us by counsel who appears for the Crown that the Cyprus Government has been assured by the British Consular Officers in the United States, before whom it is proposed to take this evidence, that they will take it, and, furthermore, that the witnesses whom it is proposed to examine will appear. Accordingly, the District Court in making that order was not in the position of making an order which it had no assurance would be carried out. There was reason to think that it would be carried out, and we know from the assurance that we have been given that it will in fact be carried out.

Compulsion in the foreign country is not the test. The test appears to be whether it is probable that effect will be be given to the order, and we know, in this case, that it will. We can therefore see no reason for imposing on the operation of section 60 of the Criminal Procedure Law of 1948 a limitation which is not imposed, and never has been imposed, on the corresponding provision relating to civil actions which is contained in section 7 of the Civil Procedure Law of 1885.

We think, therefore, that the District Court was right in holding that it had jurisdiction under section 60 of the Criminal Procedure Law of 1948 to make the order that it did make.

But other objections were made to that order which did not depend on jurisdiction. It was said in the first place that there was nothing before the Court to entitle it to say, in the words of the section, that "it appeared necessary for the purpose of justice" that the evidence should be taken in the United States. It was said, arguing from the analogy of the practice in civil proceedings, that it was desirable that there should have been affidavits of some sort before the Court. What these affidavits could or should have contained we were not told, and it seems difficult to imagine that they could have contained anything which was not apparent to the Court from the course of the proceedings

before it. It was clearly necessary for the determination of the charge before the Court that there should be evidence establishing, one way or another, whether the documents which were the subject of the charges were false or not. No affidavit was needed to show that this was necessary. It was clearly apparent from the course of the proceedings that evidence upon that point was not obtainable in Cyprus, and we can see no reason why the Court should not have held that it was apparent, in the course of those proceedings, that the evidence required was necessary for the purposes of justice.

There was a further argument, however, which was based on the fact that the prosecution was guilty of considerable delay in making the application to take evidence abroad and that the application should be refused on that ground. There can be no doubt that there had been considerable delay. The appellants were charged in April, 1949, and it was not until the close of the evidence for the prosecution that application was made to the Court to take evidence abroad to fill a gap which the evidence had disclosed. That application was made on the 21st June, 1949, and it appears that this was a date two months after the close of the evidence for the prosecution. Now, it is clear that that is a delay which ought not to have occurred. It ought to have been apparent to the prosecution when they instituted the charge that evidence would be necessary to establish these particular facts to which I have alluded. It should also have been evident that the means by which it was hoped to establish these facts, namely, by officials of Cyprus Banks giving evidence from American directories, would not be sufficient to do so.

At the same time, the case is a serious one and it clearly is desirable in the public interest that it should be satisfactorily determined and though the delay, as we must say, was an improper one and ought not to have occurred, we still think that, having regard to the nature of the case, it was not sufficient to prevent the court from making the order. That was the view which the Court, which has all the proceedings before it, formed for itself, and we feel unable to say that the Court was wrong.

We think, therefore, that we must hold that the Court had jurisdiction to make the order that it did make, that there was sufficient material before it to entitle it to say that it was necessary for the purpose of justice that it should make that order, and that the delay which had occurred, undesirable though it undoubtedly was, was not sufficient to prevent the Court from making the order which it saw reason to make.

Our conclusion therefore is that this appeal must be dismissed.

In dealing with the order in what I have just said on behalf of the Court I have referred to it as an order which provided for questions to be put to the witnesses in the United States of America by both sides. I am assuming that it is such an order and that the questions of the defence will go with the others.

While dismissing the appeal we will extend the 10 days which were given to the defence to submit their questions to 10 days from to-day.

Appeal dismissed.

Note by Chief Justice:

In the oral judgment recorded as above, I omitted to refer to the case of In re Drucker (1902, 2 K.B. 211) which was quoted for the appellants. In that case a court refused to make an order, under section 27 of the Bankruptcy Act, 1883, for the examination of the debtor and his brother in Switzerland. The reason for the decision was that the court could not compel the debtor and his brother to come up for examination, nor could it punish them if they refused to come. Nor would the court make the order in the optional form, that they should be examined if they thought fit to submit. Consequently the court considered that the words in section 27 " or in any other place out of England " must be limited to places within the jurisdiction of the British Crown.

In arriving at the conclusion expressed in the oral judgment recorded above, we distinguished Drucker's case on the following grounds.

Whatever power the Imperial Parliament may have to legislate for places within the King's dominions but outside the United Kingdom, the Cyprus legislature cannot legislate for places outside Cyprus. Thus an order by a Cyprus Court for the taking of evidence outside Cyprus, whether in civil or in criminal proceedings, could never rest on the ground that obedience to the order could be compelled by the Cyprus Court. Obedience to the order of the Cyprus Court might or might not be compelled by the law of the country in which the evidence is to be taken, but whether that place is within or without the King's dominions, compulsion could not rest on the Cyprus law. The test which appears to have been applied by the English Court in Drucker's case cannot therefore be the test in the construction of the Cyprus law relating to the taking of evidence outside Cyprus, whether in civil or in criminal proceedings.

Moreover, in Drucker's case, there was no reason to suppose that the debtor would consent to be examined abroad. There was every reason to suppose that he would not. Further, it is to be observed that an earlier order had been made in that case by an unspecified authority, on application by the debtor's mother, for her own examination in Switzerland and the validity of that order was not questioned.