(JOSEPHIDES, P.D.C.)

MARGARET POWER,

Applicant,

v.

OZER BEHA,

Respondent.

(*Application No.* 9/57

Interlocutory Application No. 1).

Practice—Evidence—Evidence on commission—Civil Procedure Rules, 0.36, *r.* 1—*Matters which must first be established before an application is granted—Onus on the applicant to justify departure from the ordinary way of taking evidence—Affidavit evidence—Cases where attendance of witnesses before the trial court is absolutely necessary—Witnesses whose evidence is so important that their demeanour in the witness box should be observed and their cross-examination heard before the Court—Commission should be refused even if such refusal will prevent the evidence of the witness from being given at all.*

The Court dismissing the application that the evidence of two witnesses may be taken on commission—

Held : (1) In every case of this kind the applicant must show that the proposed evidence cannot reasonably be obtained except by the method he proposes : while in cases where it is obviously desirable that the witness should be seen in Court, he must show a degree of difficulty in producing the witness at that period which amounts to practical inability to do so.

Lawson v. Vacuum Brake Co. (1884) 27 Ch. D. 137, *followed.*

(2) These points should have been specifically dealt with and proved in the affidavit in support of the application.

(3) Following *Berdan v. Greenwood* (1881) 20 Ch. D. 764 " even if the court should be of opinion that the refusal of a commission will prevent the evidence of the witness from being given at all, yet, if the non-attendance of the witness before the tribunal which has to decide the case, and the consequent inability of the Tribunal to observe the demeanour and hear the answers of the witness, should lead to injustice towards one of the parties, the commission ought to be refused ".

(4) In my view the two witnesses whose evidence is sought to be taken on commission are most important witnesses in this case and I consider it absolutely necessary that their demeanour in the witness box should be observed and their cross-examination heard before the Court of trial.

(5) For all these reasons the application that the evidence of these two witnesses may be taken on commission is refused.

Application dismissed.

Cases referred to:

Lawson v. Vacuum Brake Co. (1884) 27 Ch. D. 137.

Berdan v. Greenwood (1881) 20 Ch.D. 764.

Interlocutory Application.

Application to the District Court of Nicosia (J. P. Josephides, P.D.C.) (in Application No. 9/57 for affiliation proceedings) that evidence of two witnesses may be taken on commission.

M. Triantafyllides for the applicant

A. Dana for the respondent.

The facts sufficiently appear in the following judgment of the learned President of the District Court of Nicosia:

J. JOSEPHIDES, P.D.C. : This is an application by the applicant in affiliation proceedings for an order that the evidence of two persons residing in England may be obtained on commission. The application is stated to be based on Order 36, rule 1, of the Civil Procedure Rules, the practice of the Courts and the general law. This application was filed on the 1st April, 1957, but it has not come on for consideration before the Court for nearly two years owing to the preliminary point of jurisdiction which was taken to the Court of Appeal.

The affidavit in support of this application is dated 28th March, 1957, and it is sworn by the applicant herself. It is a short affidavit and I think I ought to quote it in full :

"1. I am the applicant in this case.

2. I am advised and verily believe that the order applied for is necessary in the circumstances of this case.

3. I am advised and verily believe that the evidence of Mr. O'Connell has been rendered necessary by the 6th para. of respondent's affidavit, dated 22.3.57. which is absolutely untrue and that the evidence of Miss Cranston has been rendered necessary by the 4th para. of the same affidavit which is equally untrue.

4. I am advised and verily believe that the justice of the case requires that these witnesses of mine should give their evidence in the U.K. as applied for ".

The respondent's affidavit to which reference is made

(paragraphs 4 and 6), dated 22nd March, 1957, reads as follows :

"4. I have never cohabited or had any sexual intercourse with the applicant at the time material to the conception of this child or at all.

6. At the time material to the conception of this child, the applicant was living and had prior to the said time been living for a long period with another man named C. F. O'Connell. The applicant at the time material to the conception of the said child had love affairs and relations with several other male persons".

This application first came on for hearing on the 10th April, 1957, when counsel for both parties asked for an adjournment pending the determination by the Court of the preliminary point of jurisdiction. The affidavit in opposition to the present application was not filed until yesterday (17th March, 1959). Paragraph 2 states that the evidence proposed to be taken in England is " very material for the issues before the Court "; and the respondent goes on to state that " in the interest of justice it would be necessary to have the said witnesses cross-examined *viva voce* in this Court on my behalf. And that the said witnesses could be produced before the Court for cross-examination if the applicant pays the necessary expenses for their presence in Court " (paragraph 3).

Paragraph 4 states : " To have a lawyer appointed on my behalf for the purpose of cross-examining the said witnesses in U.K. would involve me in expending a considerable amount of money and if I was successful in the above proceedings I would not be in a position to recover my costs from the applicant because the applicant has got no properties in Cyprus.....".

This is the gist of the opposition.

It is well known that the principle on which a Court grants an application for evidence on commission is where such evidence is required for the purposes of justice ; and it has been held in many cases in England that the expression " for the purposes of justice " means for the purposes of justice between the plaintiff and the defendant, in this case between the applicant and the respondent. The matters which must be proved before the application will be granted are five:

(1) that the case involves a real issue for the Court to try ;

(2) that the application is *bona fide* :

(3) that the examination abroad will be effective ;

(4) that the witnesses to be examined are material and their evidence admissible ; and

(5) that there is some good reason why the witnesses cannot be examined here.

As to the first requirement, there is no doubt that the case involves a real issue for the Court to try ; and as regards the second point, I am satisfied that the application is *bona fide*. With regard to the third point, I can take judicial cognisance that the examination abroad of the witnesses will be effective as there is statutory provision in England whereby requests for evidence on commission may be entertained and the evidence obtained.

As regards the fourth point, that the witnesses to be examined are material and their evidence admissible, it is common ground that the evidence of these two witnesses is material. In fact it is admitted by the respondent in his affidavit filed in opposition. With regard to the admissibility of their evidence, I am satisfied that it is legally admissible.

The final requirement is really the more difficult to decide, and that is that there is some good reason why the witnesses cannot be examined here. This point like the last, goes to the gist of the application, and it must be specifically dealt with and proved in the affidavit in support : *Lawson* v. *Vacuum Brake Co.* (1884) 27 Chancery Division, 137. The applicant, in asking that a witness shall be examined out of Court instead of at the trial, is asking for a departure from the ordinary procedure regulating the conduct of a trial, and it lies on him to justify the departure. He must show that, in the words of Lord Justice Cotton, in *Berdan* v. *Greenwood* (1881) 20 Chancery Division, 764 (Note), " It is necessary for the purposes of justice that the ordinary way of taking evidence should be departed from ".

In this case Mr. Triantafyllides, at this stage, is applying that he should be given time to file an affidavit in answer to the point raised by the respondent that the witnesses could be produced before the Court for cross-examination if the applicant took the necessary steps to do so. But from the authority quoted above it is evident that the onus was on the applicant at the time of the filing of the application to support it by evidence on affidavit showing that the witnesses could not be examined otherwise than on commission abroad. The authority states that this point must be specifically dealt with and proved in the affidavit in support. The applicant should not wait until this point is taken by the respondent when filing his affidavit in opposition.

In *Berdan* v. *Greenwood* (*supra*) it was stated that " Even if the Court should be of opinion that the refusal of a commission will prevent the evidence of the witness from being given

at all, yet, if the non-attendance of the witness before the tribunal which has to decide the case, and the consequent inability of the tribunal to observe the demeanour and hear the answers of the witness, should lead to injustice towards one of the parties, the commission ought to be refused". The degree of necessity which the case involves of the witness being seen in Court, his demeanour observed, and his cross-examination heard, appears therefore to constitute the standard which will regulate the granting or refusing of applications for an examination.

To summarize therefore : in every case the applicant must show that the proposed evidence cannot reasonably be obtained except by the method he proposes ; while in cases where it is obviously desirable that the witness should be seen in Court, he must show a degree of difficulty in producing the witness at that period which amounts to practical inability to do so : *Lawson* v. *Vacuum Brake Co.* (*supra*).

As I have already stated these points should have been specifically dealt with and proved in the affidavit in support of the application. The evidence of O'Connell is stated to be that he did not have any sexual relations with the applicant in this case, and the evidence of Miss Cranston is to the effect that the applicant co-habited with the respondent. In my view these two witnesses are most important witnesses in this case and I consider it absolutely necessary that their demeanour in the wintness box should be observed and their cross-examination heard before the trial Court.

For all these reasons the application that the evidence of these two witnesses may be taken on commission is refused.

In view of the delay in the filing of the affidavit in opposition I reserve the question of costs to be costs in cause.

Application dismissed. Costs in cause.

There is one point with which I ought to deal now, and that is the date of trial. I must fix such a date as to enable the applicant to make arrangements to bring over these two witnesses to give evidence.

Hearing fixed for the 18th, 20th and 21st May, 1959, at 9.30 a.m.

Interlocutory Application dismissed.