[JOSEPHIDES, P.D.C.]

MARGARET POWER,

Applicant,

v.

OZER BEHA,

Respondent.

(*Application No.* 9/57)

(*Interlocutory Application No.* 2).

Practice—Evidence—Evidence on commission—Civil Procedure Rules, 0.36, *r.* 1—*Where ill-health is relied on in applying for evidence to be taken on commission an affidavit by a medical man is necessary—Application should be made promptly—Cases where attendance of witnesses before the trial court is necessary.*

This application that the evidence of two witnesses may be taken on commission follows the one dismissed by the learned President of the District Court of Nicosia (J.P. Josephides) on the 18th March, 1959, by his judgment reported in this volume at p. 254, *ante.* Dismissing the application the learned President,—

Held (1) Following *Abraham* v. *Norton* 1 D.P.C. 266, where ill-health is relied upon as a ground in applying for evidence to be taken on commission, the application should be supported by the affidavit of a medical man. On this point, therefore, the application fails.

(2) This application was not made promptly.
Steuart v. *Gladstone* (1877) 7 Ch. D. 394, *followed.*

(3) But irrespective of these two points, in my view these two witnesses are important witnesses in the case and I consider it absolutely necessary that their demeanour in the witness box should be observed and their cross-examination heard before the trial court.

Berdan v. *Greenwood* (1881) 20 Ch. D. 764, *followed.*

Application dismissed.

Cases referred to:

Abraham v. *Norton* 1 D.P.C. 266;

Steuart v. *Gladstone,* (1877) 7 Ch. D. 394;

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 order), whereby the applicant applied for an order directing that the evidence of two witnesses should 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.

JOSEPHIDES, P.D.C. : This is an application filed on the 8th May, 1959, by Margaret Power, the applicant, for an order that the evidence of two persons, that is to say, Mr. C. O'Connell of Bletchley, Bucks, England and Miss E. Cranston of Redhill, Surrey, England, be obtained in the United Kingdom on commission.

On the 18th of March, 1959, I dealt with a similar application by the same applicant, dated the 1st April, 1957, and I refused it on the grounds given in my ruling on that date. In deciding whether the present application should be granted, I have to consider three points:

(1) Whether the application is supported by adequate evidence ;

(2) Whether it was promptly made ; and

(3) Whether it is necessary for the purposes of justice that the ordinary way of taking evidence should be departed from.

As to the first point, that is to say, whether the application is supported by adequate evidence, I have before me an affidavit in support of the application sworn by one George Papadopoullos, who is the head clerk of the applicant's advocate. Attached to that affidavit there is a certificate which purports to be a medical certificate by one Harold N. Sittle in respect of the state of health of one of the witnesses, namely, Miss Cranston. That certificate states that Miss Cranston " suffers from an allergic condition which renders her unable to travel by air or sea ".

In respect of the other witness, that is, Mr. O'Connell, there is no medical certificate, but in paragraph 7 of the above affidavit it is stated that the applicant informs her advocates that O' Connell " is suffering from a malignancy of the throat and he is under continuous treatment. A medical certificate will be available but as it has not yet reached us it cannot be produced now ". Mr. Triantafyllides has informed the Court that he has not received that medical certificate, and he has asked that the application should be stood over until such certificate is received. So far as this point is concerned I do not think it will make any difference whether the medical certificate is received or not, because there is authority for the proposition that where ill-health is relied upon as a ground in applying for the evidence of a witness to be taken on commission, it should be supported by the affidavit of a medical man. A certificate signed by a person who we do not know whether he is a registered practitioner or not is not sufficient evidence for the purposes of this application. The authority for the above proposition is the case of *Abraham* v. *Norton*, 1 D.P.C. 266. That disposes of the first point.

As to the second point, that is to say, whether the application was promptly made, there was, I think, ample time for the applicant, after the disposal of the jurisdiction point by the Supreme Court on the 30th April, 1958, to put all the material evidence available before the Court by the 18th March, 1959, when I dealt with the first application for evidence on commission. One of the settled principles in these applications is that a party should not be dilatory : *Steuart* v. *Gladstone* (1877) 7 Ch. D. 394.

But, irrespective of these two points, I think the most important question is whether it is necessary for the purposes of justice that the ordinary way of taking evidence should be departed from. I dealt with that point in my previous ruling, and I think I can usefully refer to some extracts. The leading case on this point is that of *Berdan* v. *Greenwood* (1881) 20 Ch. D. 764. The ground of the application in that case was that the witness was suffering from fatty degeneration of the heart, which would render a sea voyage perilous to him; the application was granted by the Exchequer Division, but on appeal the order for the commission was discharged. It was stated in that case 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".[1] Baggallay, L.J., (*at page* 766) stated that " a *prima facie* case would be made out for the commission, if it was clear that the witness could not possibly attend here except at the risk of his life, because then the refusal of a commission would practically prevent his giving his evidence at all. I am bound to say that would be a very strong argument in favour of granting a commission. But, as I have already pointed out, this case ought not to depend simply and solely on the evidence of this one witness. And I think that even in the extreme case where the refusal of a commission might prevent the evidence of the witness from being given at all, yet, if the Court was satisfied that the non-attendance of the witness before the tribunal which had to decide the case would lead to injustice to the defendant, the commission still ought to be refused ".

In my view these two witnesses are important witnesses in the case and I consider it absolutely necessary that their demeanour in the witness box should be observed and their cross-examination heard before the trial Court.

For all these reasons the application that their evidence should be taken on commission is dismissed with costs.

Application dismissed with costs.