[ZEKIA, J. and ZANNETIDES, J.]

KAYA DJAFER, *Appellant (Defendant)*,

v.

PAYKER KAYA, *Respondent (Plaintiff)*.

(*Turkish Family Court Appeal No.* 1/59).

Practice—Recalling witness—Discretion of the Court—Recalling after a party's case is closed, allowed only under special circumstances—Convenience of Counsel—Civil Procedure Rules, 0.38, *r.*1.

Defendant's counsel being engaged in some other Court did not manage to appear for the dft. at the time appointed for his convenience. The trial Judge went on to hear the plaintiff and his witnesses in the absence of the dft. and his counsel. The case for the plaintiff was closed and when the Judge was examining a certain witness called at the instance of the Judge, defendant's Counsel with his client came to Court and having obtained leave to appear and join proceedings, applied for leave to have the plaintiff recalled for cross-examination generally and not on a specific point or points. He was in effect asking for the reopening of the case for the plaintiff. Leave was refused. On appeal by the defendant against the ruling,—

Held: (1) The Court may at any stage of the trial either at its own instance or that of a party recall a witness for further examination or cross-examination. Though after a party's case is closed this will only be allowed under special circumstances.

Statement in Phipson's, On Evidence, 9th edn. p. 507, *approved.*

(2) The inability of an advocate to appear at the trial of his client at the time fixed owing to his being engaged elsewhere before another Court cannot in itself constitute a special circumstance enabling him to recall a witness for cross-examination.

(3) A Judge is at liberty, on the request of the parties in an action and for adequate reason, to make special arrangements as to the date and time for the hearing of a particlar case, but the paramount consideration is always the public interest which requires Courts to attend their business promptly and deal with them in the order they are listed for hearing.

Statement by Lord Reading, C.J., in (1920) W.N.34, *followed.*

(4) The trial Judge was right in refusing in the circumstances to re-open the case.

Cases referred to:

Statement by Lord Reading, C.J., in (1920) W.N.34.

R. v. Seigley, 6 Cr. App.R.106.

R. v. Sullivan (1923) 1 K.B. 47.

Appeal dismissed.

Interlocutory Appeal.

The appellant-defendant appealed against the ruling of the Turkish Family Court of Limassol (Judge Sh. S. Ilkay) dated the 27th January 1959, in Action No. 69/58, whereby he was refused leave to recall the plaintiff for cross-examination after the latter's case was closed.

R. M. Malyali for the appellant.

Halit Ali Riza for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was read by:

ZEKIA, J. : This is an appeal against a ruling of the Turkish Family Judge of Limassol refusing to recall the plaintiff for cross-examination by the defendant after the case of the former was closed.

The Court's ruling reads as follows:

> "The hearing to-day was to be resumed at 9 a.m., but on the application of the defence it was left to 11 a.m. and the defence counsel promised to be in Court by 11 a.m. sharp. The hearing was resumed at 11.20 a.m. in the absence of defence and the defendant and his counsel appeared only at 12.30 p.m. The claimant closed her case and 2 witnesses called by the Court and only after that this application has been made. The application of the defence is refused".

Order 38, rule 1 of the Civil Procedure Rules is the relevant enactment.

> "Each witness, when his examination-in-chief is closed, is liable to be cross-examined by the opposite party and to be re-examined by the party calling him, and after re-examination may be questioned by the Court, and shall not be recalled or further questioned save through and by leave of the Court".

The recalling of a witness is a matter lying within the discretion of the trial Judge. What happened in this case is that the defendant's counsel being engaged in some other Court did not manage to appear for the defendant at the time appointed for his convenience and the Judge went on to hear the plaintiff and her witnesses, who appeared in time, in the absence of the defendant and his counsel. The case

for the plaintiff was closed and it was when the Court was examining a certain witness called at the instance of the Court that the defendant's counsel with his client came to Court and having obtained leave to appear joined proceedings.

Counsel for the defendant was in effect asking for the re-opening of the case for the plaintiff because he wanted to cross-examine the plaintiff generally not on a certain point or points due to other evidence adduced which needed elucidation.

The following extract from Phipson, On Evidence, 9th edn. p. 507, can usefully be cited although it relates to criminal trials:—

> "So, the Judge may at any stage of the trial, either at his own instance or that of a party, recall a witness (including the prisoner, R. v. Seigley, 6 Cr. App. R. 106), for further examination or cross-examination (R. v. Sullivan (1923) 1 K.B. 47) ; though after a party's case is closed, this will only be allowed under special circumstances (*ante*, 48)".

The inability of an advocate to appear at the trial of his client at the time fixed owing to his being engaged elsewhere before another Court cannot in itself constitute a special circumstance enabling him to recall a witness for cross-examination. A Judge is at liberty, on the request of the parties in an action for adequate reason, to make special arrangements as to the date and time for the hearing of a particular case, but the paramount consideration is always the public interest which requires Courts to attend their business promptly and deal with them in the order they are listed for hearing.

> "The hearing will not be postponed or taken out of due order merely to suit the convenience of counsel" (Statement by Lord Reading, C.J. (1920) W.N. 34).

We think the trial Court was right in refusing to re-open the case in the circumstances.

Appeal dismissed with costs.

Appeal dismissed with costs.