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THE EQUITABLE LIFE ASSURANCE OF THE UNITED STATES v. BOGIE.

Solicitor, for appellants, *J. C. Tyler*, by his agents, *Flower & Start.*

Solicitors, for respondent, *Fitzgerald & Walsh.*

H. E. M.

Appl *Hardie Rubber Co Pty Ltd v General Tire & Rubber Co* (1973) 129 CLR 521

[HIGH COURT OF AUSTRALIA.]

WILLIS AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

TREQUAIR . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 17, 18, 21, 24.

Griffith C.J., Barton and O'Connor JJ.

Evidence—Commission to examine defendant abroad—Application by co-defendants—Witnesses Examination Act (*N.S.W.*), (*No.* 34 *of* 1900), *secs.* 4, 5.

Practice—Appeal from Supreme Court—Interlocutory Judgment—Judiciary Act 1903 (No. 6 of 1903), *sec.* 35.

On an application by a party for a commission to examine a witness out of the jurisdiction, under sec. 4 of the *Witnesses Examination Act* 1900, if it is shown to the satisfaction of the Court that the witness is out of the jurisdiction, that his evidence is material, that the Court has no power to enforce his attendance, and that the party applying cannot procure it, the Court is bound in the exercise of its discretion to order the commission to issue, unless the other party can satisfy the Court that the witness can and will attend.

This principle applied to the case of an application by two of three co-defendants to have the evidence of the third defendant taken on commission in South Africa.

In considering whether a commission should or should not issue, the Court should not speculate as to whether one party or the other is likely to succeed at the trial, and should attend to the nature of the case and the pleadings so far only as to see whether there is really any question to be tried.

Under sec. 35 of the *Judiciary Act* 1903 an appeal from an interlocutory judgment may be brought to the High Court by leave in every case in which there would be an appeal to that Court as of right from the final judgment in the action or suit in which the interlocutory judgment was given.

Decision of the Supreme Court: *Trequair* v. *Willis*, (1906) 6 S.R. (N.S.W.), 292, reversed.

APPEAL from a decision of the Supreme Court of New South Wales.

The respondent was the plaintiff in a suit in equity in the Supreme Court of New South Wales, and the appellants Mary Willis and Patrick Rea were two of three defendants. The third defendant, W. N. Willis, was not a party to this appeal.

The statement of claim alleged that the respondent employed the defendant W. N. Willis as his agent to apply on his behalf for certain improvement leases; that that defendant subsequently untruly informed the respondent that he had been unable to obtain the leases; that the appellant Rea applied for and obtained the leases as a trustee for the defendant W. N. Willis at a time when the latter was, to the knowledge of Rea, acting as the agent for the respondent for the purpose of applying for them; that by virtue of a mortgage and transfer of mortgage the leases in question were transferred to the appellant, Mary Willis; and that there never had been any real consideration for the mortgage by Rea, but it had been prepared and executed and transferred to Mary Willis at the instance of W. N. Willis in order to conceal the fact that the leases had been obtained and held on his behalf. The plaintiff, respondent, offered to repay to the defendants any money properly expended by them in payment of rent or otherwise in improving the lands comprised in the leases or any additional lands acquired by them by virtue of being the holders thereof, and prayed that it might be declared that Mary Willis and Rea held these lands as trustees for the plaintiff free from encumbrances, and that the defendants might be ordered to execute transfers of the lands to him, and be restrained from dealing with them, and for consequential relief.

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The defendants filed separate defences, which were in effect a total denial of the allegations in the statement of claim.

The statement of claim was served upon W. N. Willis in Western Australia when just about to leave the Commonwealth for South Africa. The suit having been set down for hearing, an application was made by summons on behalf of W. N. Willis to have his evidence taken on commission in South Africa. It appeared from the affidavits filed in support of the summons that the applicant had left Western Australia for South Africa shortly after the service of the statement of claim. Prior to his leaving he had been arrested at Albany on a provisional warrant issued in that place in connection with certain informations that had been laid against him in Sydney, but his discharge had been ordered by a Judge of the State of Western Australia and he had been released from custody, and at the date of the application was engaged in business in South Africa. Proceedings for his extradition to New South Wales on the charges referred to were pending in the Supreme Court of Natal. The appellants filed affidavits expressing their readiness to join in the commission applied for, but were not parties to the application. The plaintiff's affidavits alleged that there was a probability of the return of the applicant to Sydney under arrest, and that he had expressed his intention of returning if the extradition proceedings failed.

On the hearing of the summons before *A. H. Simpson* C.J. in Equity, the appellants were added as applicants, and the summons amended accordingly. The application was granted and an order made for a commission for the examination of the defendant W. N. Willis in Natal.

This order was reversed by the Full Court on appeal: *Trequair* v. *Willis* (1).

From that decision by leave of the High Court the present appeal was brought by the defendants, Mary Willis and Patrick Rea.

Langer Owen K.C. (*C. A. White* with him), for the respondent; by way of preliminary objection, submitted that the matter at issue in the appeal did not involve £300 directly or indirectly

(1) (1906) 6 S.R. (N.S.W.), 292.

within the meaning of sec. 35 of the *Judiciary Act* 1903, and therefore special leave to appeal should have been applied for. The decision appealed from does not involve the amount at issue in the suit, which is admittedly more than £300, but merely the manner in which a particular witness should be examined. It was a point of practice, its chief importance being the question of expense involved. Special leave to appeal would not have been granted in such a case. There is no case reported which has gone beyond the Court of Appeal in England.

Counsel for the appellants were not called upon.

GRIFFITH C.J. It is objected that special leave to appeal has not been given to appeal from this judgment, and that leave to appeal from it as an interlocutory judgment is insufficient, because it is not within the words of sec. 35 of the *Judiciary Act* 1903 which provides that there shall be an appeal from "Every judgment, whether final or interlocutory, which—is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of three hundred pounds; or involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of three hundred pounds." An appeal is therefore given from every judgment which involves directly or indirectly property or rights of the value of three hundred pounds, whether it is final or interlocutory. No distinction is made between final and interlocutory judgments in this respect, except that, with regard to the latter, the condition is imposed that leave to appeal must be obtained from the Supreme Court or the High Court. Thus an appeal from an interlocutory judgment involving the appealable amount lies to this Court by leave. If less than that amount is involved special leave must be obtained. The only question, therefore, is whether the judgment appealed from directly or indirectly involves property of the value of three hundred pounds. In my opinion, an appeal may be brought by leave from an interlocutory judgment in every case in which there would be an appeal from the final judgment as of right. I think that has always been understood to be the meaning of the section.

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BARTON J. and O'CONNOR J. concurred.

Knox K.C. and *Maughan*, for the appellants. The decision of the Supreme Court was based on what the Court conceived to be the merits of the suit. They thought that the appellants were only nominal defendants, and that Willis was the real defendant, and, therefore, that the application by the appellants was not *bonâ fide*. But on an application for a commission the Court should not consider the pleadings except so far as is necessary to understand the nature of the case and the materiality of the evidence which it is sought to have taken on commission, and also to see whether there is really a question to be decided. *Lawson* v. *Vacuum Brake Co.* (1) can only be applied to the particular facts of that case. So far as it purported to lay down a general principle, its authority is doubtful, and it has never been followed. The proper rule is laid down in *Coch* v. *Allcock & Co.* (2). The parties applying must satisfy the Court that the witness is material and out of the jurisdiction, and that his attendance cannot be procured. That is shown in this case. The cases dealing with the right of a party to have himself examined on commission have no bearing on the present case, because, as far as the appellants are concerned, Willis is in the position of an ordinary witness whose evidence is necessary to their defence. It is immaterial that he is alleged to be an absconder from justice. The argument that it would be more satisfactory to have a witness examined in Court at the hearing would apply to every case, and if it were given effect to no commission could ever issue. There was no evidence of want of *bona fides* or of collusion on the part of the appellants. It makes no difference that the witness is a defendant: *Hunt* v. *Roberts* (3); *Emanuel* v. *Soltykoff* (4). The Supreme Court should have followed its own decision in *Williams* v. *Mutual Life Association of Australasia* (5).

The decision of the Chief Judge in Equity was on a matter within his discretion, and should not be reversed unless he acted

(1) 27 Ch. D., 137.
(2) 21 Q.B.D., 1, 178.
(3) 9 T.L.R., 92.
(4) 8 T.L.R., 331.
(5) (1904) 4 S.R. (N.S.W.), 677.

on a wrong principle: *Goldring* v. *Wharton Saltworks Company* (1).

[GRIFFITH C.J.—That is not an objection to the jurisdiction of the Court of Appeal. The discretion must be exercised judicially and in a proper manner.]

[BARTON J. referred to *Davy* v. *Garrett* (2).]

It is a very strong argument against reversing the decision of the Judge of first instance. The Court of Appeal will not interfere with such a decision merely because they differ from the Judge below.

An application by a defendant will not be regarded with the same strictness as that of a plaintiff who has chosen his own forum: *Ross* v. *Woodford* (3).

Langer Owen K.C. (*C. A. White* with him), for the respondent. Although the granting or refusing of a commission is in the discretion of the Judge of first instance, the Court of Appeal is not in any way hampered by his decision, but will consider all the circumstances of the case and inquire whether that decision is right or wrong: *Berdan* v. *Greenwood* (4); *Knowles* v. *Roberts* (5). The English rule is the same as sec. 4 of our Act, except that it contains the proviso that the Judge must be satisfied that it is in the interests of justice that the commission should go. Those words must be implied in sec. 4 of the Act. The applicants must satisfy the Court that there is a sufficient reason for the non-attendance of the witness, and the commission should not issue if it will result in injustice to the other party: *Castelli* v. *Groome* (6). All the cases which are said to establish that a different principle should be applied in an application by a defendant were cases where the defendant was a foreigner or resident abroad: *Hume Williams on Commissions*, 2nd ed., p. 23; *Ross* v. *Woodford* (7). A plaintiff and a defendant are on the same footing when applying for the examination of a person who is a mere witness: *per Baggallay* J. in *Lawson* v. *Vacuum Brake Co.* (8). *Coch* v. *Allcock & Co.* (9) is not an authority for

(1) 1 Q.B.D., 374.
(2) 7 Ch. D., 473.
(3) (1894) 1 Ch., 38.
(4) 20 Ch. D., 764 (*n*).
(5) 38 Ch. D., 263, at p. 271.
(6) 21 L.J. Q.B., 308.
(7) (1894) 1 Ch., 38.
(8) 27 Ch. D., 137.
(9) 21 Q.B.D., 1, 178.

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the contention of the appellants that, once it is shown that a witness is material and that he is abroad, the onus is on the party opposing the application to give reasons why the witness should not be examined on commission. The nature of the case and the evidence before the Court show that it is absolutely essential to the plaintiff's case that Willis should be examined in Court. The onus is always on the applicant to show strong reasons why the ordinary procedure of examination in Court should be departed from, and in this case, where issues of fraud and collusion are raised, the Court should lean the more strongly against granting the application. Willis is the real defendant, and is really most interested in the application. It is therefore, in effect, an application by a party and should be regarded strictly: *New* v. *Burns* (1). [He then referred to the pleadings and affidavits, and the interrogatories and answers which were before the Chief Judge in Equity, and contended that the application was not made *bonâ fide* in the interests of the appellants, but in order that the defendant Willis might avoid cross-examination in Court.]

If the commission is allowed to go it should be conditional upon Willis not being within the jurisdiction when the suit comes on for hearing. The Court might order that it lie in the office until it is certain that he cannot be brought back from South Africa in time. Otherwise the expense of the commission might be wasted.

Knox K.C., in reply, referred to *In re Boyse*; *Crofton* v. *Crofton* (2); and *Langen* v. *Tate* (3).

Cur. adv. vult.

May 24.

The judgment of the Court was delivered by

GRIFFITH C.J. In this case the Supreme Court of New South Wales reversed an order made by *A. H. Simpson*, Chief Judge in Equity, granting a commission to examine one of the defendants in South Africa. This appeal is brought by the other two defendants who have appeared and defended independently. The ground of the appeal is that the appellant defendants are not in a

(1) 71 L.T., 681; 64 L.J. Q.B., 104.
(2) 20 Ch. D., 760.
(3) 24 Ch. D., 522.

position to procure the attendance of the first named defendant, who is in South Africa, and that he is a material witness for their case.

We think that the rule laid down by the Supreme Court of New South Wales in the case of *Williams* v. *Mutual Life Association of Australasia* (1) is the correct one, with a slight modification, of which we have not any doubt that the learned Judges themselves would have approved. These are the words of the learned Chief Justice (2). He said, after referring to the case of *Norton* v. *Lord Melbourne* (3) and *Lawson* v. *Vacuum Brake Co.* (4), to the latter of which I will refer later:—"I am, however, prepared to lay down this principle, that as soon as a plaintiff or defendant shows to the satisfaction of the Court that a witness is out of the jurisdiction of the Court, and that his evidence is material, and that the Court has no power to enforce his attendance, the Court or Judge is bound to exercise its discretion, unless the other side can establish to the satisfaction of the Court that the witness can and will attend." Mr. Justice *G. B. Simpson* made use of slightly different language (2). He said:—"I agree as to what the Chief Justice has said as to the state of the law. If a witness is a material witness, and is out of the jurisdiction of the Court, and his evidence cannot be obtained by the issue of any process out of the Court, then a commission ought to issue." We agree with that statement of the law with this modification, that the party asking for the commission should establish to the satisfaction of the Court that he cannot procure the attendance of the witness. That is the general rule, to which, however, there may possibly be exceptions. The question in this case is whether it comes within any exception. The present appeal is brought by two of the defendants, although all three defendants had asked for the commission in the first instance. It may possibly be that, if the defendant who is in South Africa had made application on his own behalf, the application would not have been granted; on the other hand it might have been granted, but it is not necessary to consider that question now. The question for consideration now is whether

(1) (1904) 4 S.R. (N.S.W.), 677.
(2) (1904) 4 S.R. (N.S.W.), 677, at p. 680.
(3) 3 Bing. N.C., 67.
(4) 27 Ch. D., 137.

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the other two defendants are entitled to have the benefit of his evidence, or are to be deprived of it and compelled to go to trial without it. That the witness is material is not disputed. That the appellants are not able to procure his attendance is not disputed. The question, therefore, is whether they are to be compelled to go to trial without the means of proving their case.

Certain authorities were relied upon in support of the judgment of the Full Court, to which I will briefly refer. The first was *Berdan* v. *Greenwood* (1). That was an application by a plaintiff for his own examination abroad. The reasons given for the issue of the commission were that he was ill, and that if he crossed the Channel the effect would be to seriously affect his health. After pointing out that all applications for a commission were in the discretion of the Court, the Court came to the conclusion that it was not a case for the exercise of their discretion in favour of the applicant. *Cotton* L.J. said (2): "If, therefore, the plaintiff's evidence is necessary to his case, he must give it in the ordinary way in Court, for, in my opinion, he has not made out that he cannot do so without serious injury." That, therefore, was not a case falling within the rule enunciated by the Supreme Court of New South Wales, and which, as I have already stated, will be followed by us, with the modification stated. That case was explained afterwards by *Cotton* L.J. himself in the case of *Langen* v. *Tate* (3), where he said: "This case is quite different from the case relied upon in the Court below of *Berdan* v. *Greenwood* (1). There the Court was satisfied that the reason given for the plaintiff's not coming to England was a pretence, and was only brought forward to enable him to avoid being cross-examined in Court. The Court said that they would not assist him in that scheme, and that if his evidence were material to his case, he must come and give it in person. That authority, we think, does not apply to the present case." *A fortiori* it does not apply to this one, which is not the case of a party himself making the application. In another case relied upon, *Lawson* v. *Vacuum Brake Co.* (4) the decision, as stated in the headnote, was: "Where it is sought

(1) 20 Ch. D., 764 (*n*).
(2) 20 Ch. D., 764 (*n*), at p. 769.
(3) 24 Ch. D., 522, at p. 528.
(4) 27 Ch. D., 137.

to have a material witness examined abroad, and the nature of the case is such that it is important that he should be examined here, the party asking to have him examined abroad must show clearly that he cannot bring him to this country to be examined at the trial." That is said not to be a strictly accurate statement of the decision. I will read some passages from the judgment, in order to see what was the ground of the decision. The witness whose examination was sought was a person who was said to have at one time entered into a conspiracy against the plaintiff and to have since then gone over to the plaintiff's side, and to be residing in Chicago, and it was stated that his evidence could not be procured in England. I will read from the judgment of *Baggallay* L.J. in order to show how it was considered not to be in the interests of justice to have the witness examined abroad. He said (1): "Now the only evidence that was before the Vice-Chancellor which tended in that direction is contained in the affidavit of John Battams." His Lordship then read the affidavit referred to, and continued: "Anything more vague than this testimony one can hardly imagine. It is only on information and belief, though it is true that he adds, 'I am able to make the foregoing statements from knowledge derived from letters written by the plaintiff from America to my said principals.' That is all the information we have got as to the grounds on which it is contended that this gentleman should not be examined in England. We have no affidavit from himself, and no evidence from the plaintiff himself, but it is put upon this clerk's information and belief, followed up by Mr. Harper's affidavit." *Cotton* L.J., after giving reasons why such a witness should be examined in Court, said (2):—"If, however, it could be shown that he could not be induced to come here, or that the plaintiff could not reasonably be expected to bring him here, I think it would be right to give leave to examine him abroad, and it would be for the Court or the jury at the trial to determine how far the weight of his evidence was affected by their not having seen or heard him. But I think in a case of this sort, where it is important that the witness should be examined in Court, a heavy burden lies on the party who wishes to examine him abroad, to show clearly that he cannot be reasonably expected

(1) 27 Ch. D., 137, at p. 142.

(2) 27 Ch. D., 137, at p. 143.

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to come here." *Lindley* L.J. was also a member of the Court, and he certainly put his decision upon a somewhat different ground, but he looked at the pleadings in the case, and said that he was not prepared to say that it was "for the purposes of justice" that the order should be made.

That case was referred to in the case of *Coch* v. *Allcock & Co.* (1). *Field* J., who was a Judge of very large experience indeed in matters of practice, said (2):—"The old rule which has governed the practice of the Courts for the last fifty years is not affected by the decision in *Lawson* v. *Vacuum Brake Co.* (3). It is almost a matter of course in ordinary cases that if a party swears that the evidence of the witnesses whom he seeks to examine is material a commission will be granted. There is this important exception, that if the party himself wants to be examined, and the circumstances are such as to make it apparent that it is important that the evidence proposed to be given should be subject to the test of strict cross-examination, and for that purpose his presence in Court is necessary, that, in the discretion of the Judge, may be a ground for refusing an order for a commission. This view of the law is supported by the decisions in *Berdan* v. *Greenwood* (4) and *In re Boyse*; *Crofton* v. *Crofton* (5)." *Wills* J. referring to the case of *Lawson* v. *Vacuum Brake Co.* (3), said (6):—"The decision proceeded upon the ground that the witness whom it was sought to examine had been a party to the transactions which the plaintiff was seeking to impeach on the ground of fraud." And, after referring to the circumstances in that case, he went on:—"If ever there could be a case for refusing to examine a witness upon commission, it would be that one in which such a person was the principal witness, and in such a case, therefore, if the plaintiff desired to have him examined upon commission, it lay upon him to make out that it was impossible to bring him to this country." That case was taken to the Court of Appeal, and *Lindley* L.J., who had been one of the Judges in *Lawson* v. *Vacuum Brake Co.* (3), sat, and concurred in the judgment of Lord *Esher* M.R., who,

(1) 21 Q.B.D., 1.
(2) 21 Q.B.D., 1, at p. 2.
(3) 27 Ch. D., 137.
(4) 20 Ch. D., 764 (*n*).
(5) 20 Ch. D., 760.
(6) 21 Q.B.D., 1, at p. 3.

having pointed out that it was a matter of discretion, said, with regard to the case of a plaintiff asking for a commission to examine himself (1):—"That also appears to me to be a matter of discretion, but the discretion will be exercised in a stricter manner, and the Court ought to require to be more clearly satisfied that the order for a commission ought to be made."

These cases then in no way conflict with the rule which I stated at the commencement. Then, it is said, that, looking at the nature of this case, it is improbable that the defendants will succeed at the trial, that collusion is alleged between them and the absent defendant, and that that is a reason why they should not be allowed to have him examined abroad. So far as the objection that it is improbable that they will succeed is concerned, I will quote a passage from the judgment of *Fry* J., in *In re Boyse*; *Crofton* v. *Crofton* (2):—"In the next place, it is said that the claim is so manifestly bad on the face of the instrument that I ought to hear an argument on the preliminary question of the validity of the claim. According to the view which I take, it is my duty to attend to the nature of the case and the arguments upon it, so far only as to see whether there is any question to be tried, but not now to determine questions on the constuction or the nature of the instrument, or on the *Stamp Act*, or the *Statute of Limitations*, which, if they were determined in favour of the respondent, would be fatal to the claim, but, if this were determined against him, would leave the commission to go." For the same reason we have no right to speculate as to whether the plaintiff or the defendant is likely to succeed at the trial. We have to be satisfied that there is a question really to be tried. The defendants' case consists in a flat denial of the plaintiff's case. On that point there is one other authority to which I will refer, *Ross* v. *Woodford* (3). In that case it was held that the Court will not regard the case of a defendant applying for a commission with the same strictness as the case of a plaintiff who has chosen his own forum. *Chitty* J. said (4):—"There are many cases where the Court has been very reluctant to accede to applications by a plaintiff to take evidence abroad, because the tribunal has been

(1) 21 Q.B.D., 178, at p. 181.
(2) 20 Ch. D., 760, at p. 771.
(3) (1894) 1 Ch., 38.
(4) (1894) 1 Ch. 38, at p. 42.

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chosen by the plaintiff himself; so too with regard to the case of a plaintiff asking for a commission to examine himself, the Court has full discretion, but it exercises that discretion strictly, and does not grant the application unless a very strong case is made out; but the case is entirely different when it is the defendant's application, and particularly that of a defendant lawfully resident out of the jurisdiction, according to the ordinary course of his life and business: and to compel these defendants to come over here, at great expense to attend the trial, or give up their case, would be oppressive and unfair, and in my opinion it would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a commission to examine himself." What then is to be said when it is sought to apply these principles to the case of a defendant who does not seek to have himself examined, but another person who is out of the jurisdiction? To deny the defendants an opportunity of examining him would be to deny them an opportunity of defending themselves.

Applying the principle stated in *Williams* v. *Mutual Life Association of Australasia* (1), we are of opinion that the order made by *A. H. Simpson* Chief Judge in Equity was properly made, and that the appeal should have been dismissed.

Appeal allowed. Order of A. H. Simpson Chief Judge in Equity restored, and appeal from his decision dismissed with costs. Respondents to pay the costs of this appeal.

GRIFFITH C.J. By consent of the parties the commission is ordered to lie in the office for one month, with liberty to either party to apply to the Court of Equity to extend that period on the ground of the immediate probability of the return of Willis.

Solicitors, for the appellants, *F. Y. Wilson*, and *Beehag, Simpson & Petrie.*

Solicitors, for the respondent, *Minter, Simpson & Co.*

C. A. W.

(1) (1904) 4 S.R. (N.S.W.), 677.