IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN PROBATE AND ADMINISTRATION

SUIT NO. P. 300 OF 1989

BETWEEN	FITZHUGH RAYMOND WALLACE)	PLAINTIFFS
	)	
A N D	ANTHONY ANDREX LEMARD)	
A N D	DOROTHY HOPE RAMSAY)	DEFENDANTS
	)	
A N D	EVERARD CONSTANTINE BOX)	

Hector Robinson for plaintiffs
Nancy Anderson for defendants

Heard: December 7 and 8, 1998

PANTON, J.

The plaintiffs wish to have Mrs. Daphne Nairn testify on their behalf at the trial of this action in which they seek to have the Court "decree probate of the will of Martin Augustus Box in solemn form of law". Mrs. Nairn lives in Ocala, Florida. She is aged 76 and tends her ailing husband who is 6 years older than her. She is unwilling to come to Jamaica to testify although -

(1) her presence in Court would be required for no more than three hours; and

(2) the plainitffs are prepared to make arrangements for the care of her husband in her absence.

The application before me is for an order that Mrs. Nairn's examination-in-chief be provided in an affidavit, and that the cross-examination and re-examination be done by way of a video link. To facilitate this video operation, the presiding Judge in Jamaica would be required to sit elsewhere than at the

Supreme Court building on King Street in Kingston, that is, at an office in Cross Roads, St. Andrew, and Mrs. Nairn would be at a location in Orlando, Florida.

Learned attorney-at-law, Mr. Robinson, submitted that section 368 of the Judicature (Civil Procedure Code) Law provides for the admission of the affidavit as well as the production of the deponent for cross-examination. According to him, the latter requirement would be satisfied by the video link.

Section 368 reads thus:

> "(1) The Court or a Judge may, at or before the trial of an action, order or direct that all or any of the evidence therein be given by affidavit.
>
> (2) An order or direction under this section may be made or given on such terms as to the filing and furnishing of copies of the affidavits or proposed affidavits and as to the production of the deponents for cross-examination as the Court or Judge may think fit but, subject to any such terms and to any such subsequent order or direction of the Court or Judge, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose."

And Section 368A reads:

> "(1) Without prejudice to section 368 of this Law, the Court or a Judge may, at or before the trial of an action, order or direct that evidence of any particular fact may be given at the trial in such manner as may be specified by the order or direction.
>
> (2) The power conferred by subsection (1) of this section extends in particular to ordering or directing that evidence of any particular fact may be given at the trial -
>
> (a) by statement on oath of information or belief; or
>
> (b) by the production of documents or entries in books; or
>
> (c) by copies of documents or entries in books; or

(d) in the case of a fact which is or was a matter of common knowledge either generally or in a particular district, by the production of a specified newspaper which contains a statement of that fact."

It is my view that the abovementioned sections should be viewed with section 367 in mind. Section 367 reads thus:

"Subject to this Law and to any Law relating to evidence, any fact required to be proved by the evidence of witnesses, at the trial of any action commenced by writ of summons shall be proved by the examination of the witnesses orally and in open court."

The regular method of trial involves the examination of witnesses orally and in open court.

Sections 368 and 368A deal with exceptions. By section 368, evidence is permissible by affidavit but the Court may order attendance for cross-examination. Section 368A relates to the proof of particular facts in such manner as the Court may order. Specific reference is made of the extension of the power to the production of statements, documents, entries in books and newspapers.

Looking at sections 367, 368 and 368A, there is no provision for the giving of oral evidnece by a witness while that witness is in a foreign country, with a Judge sitting in a courtroom here in Jamaica. That is in effect what viedeo link means. That method of testifying does not, in my view, fall within the compass of the words in section 367 - "the examination of the witnesses orally and in open court"; nor does it fall within the exceptions.

In my view, this suggested method of giving evidence does not lie within the power of the Courts at present. Specific legislation is required to deal

with this technological advance. The general recognition of this view is seen when consideration is given to the fact that historically innovations of this type have been introduced by the legislature.

The Justice of the Peace (Jurisdiction) Act S. 34 provides for the reading of deposition. The Evidence (Amendment) Act 1995 provides for the admission of computer evidence.

In the same way that it was thought necessary to legislate for the reception of computer evidence, it seems to me that legislation is required to provide for video link. The existing legislative framework does not permit the Court to venture into the unchartered waters of the video link. There are potentially far-reaching implications involved in this technological development, however welcome it may be. For example, what if a foreign country objects to the use of its territory for the conduct of court proceedings that are being beamed outside its borders? Another query that points to the need for legislative intervention is this: does an attorney-at-law in Jamaica need a work permit to cross-examine a witness seated in a foreign country?

Assuming that there is existing legislation which permits a video link and the Court has a discretion in the matter, I am of the view that the circumstances do not permit the exercise of the discretion in favour of the plaintiffs. The witness is not ill; nor is she disabled. She is just unwilling. She does not wish to come to the land of her birth for a mere two or three hours notwithstanding that appropriate arrangements would be made for the care of her husband. It seems as if she has overlooked the fact that while she is giving her evidence on video her husband would have to be cared for by someone else.

It is outrageous that while the witness is unwilling to travel to Jamaica for a period much less than a day, the plaintiffs would have a Judge of the Supreme Court uproot himself or herself from the regular seat of justice to go somewhere else to facilitate a witness who has no just cause for not being present in open court.

The application is refused with costs to the defendants to be agreed or taxed.

Leave to appeal is granted.