

Ames

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 127/98

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN FITZHUGH RAYMOND WALLACE
(executor, estate Olive Maud Agatha
Lambert, deceased by his duly
appointed attorney Anthony Andrex
Lemard)

AND ANTHONY ANDREX LEMARD

PLAINTIFFS/
APPELLANTS

AND DOROTHY HOPE RAMSAY

AND EVERARD CONSTANTINE BOX

DEFENDANTS/
RESPONDENTS

Hector G. Robinson, instructed by
Patterson, Phillipson & Graham, for the appellants

Nancy Anderson and Rickie Davis instructed by Crafton S. Miller & Co.,
for the 1st respondent

July 9 and November 29, 1999

RATTRAY, P. (DISSENTING)

The question to be determined is whether in a contested hearing in probate proceedings in the Supreme Court in which the plaintiffs seek to have the court set aside Letters of Administration previously granted and decree

probate of a Will in solemn form the evidence of a witness or a part thereof may with the permission of the court be given by way of a video conference.

The action which commenced in March, 1989, seeks to prove in solemn form a document purporting to be the last Will and Testament of one Martin Augustus Box, deceased, which was executed on the 30th May, 1962.

The sole surviving attesting witness to the Will of the deceased is one Mrs. Daphne Nairn, a lady of 76 years of age at the time of the swearing of the affidavit of Hector George Robinson, Attorney-at-law, on behalf of the appellants, in December 1998.

Mrs. Nairn resides in Ocala, Florida, United States of America, but is unwilling to travel to Jamaica to give her evidence because her husband, who was 82 years of age at the time of Mr. Robinson's affidavit, requires her full time attention, particularly in relation to overseeing his daily medication.

Faced with this difficulty, Mr. Robinson sought alternatively to make an arrangement for her to travel to Orlando, Florida, approximately 80 miles away from Ocala where she resides, for her evidence to be taken by way of a video conference.

For this to be done, the requirement would be:

- (1) That an ISDN line be installed in the Supreme Court, Jamaica, by Cable and Wireless Limited and this would require three weeks' notice.
- (2) Alternatively, that the court be convened at the office of Princeton Technologies Limited, 18 Ripon Road, Kingston 5, where all the facilities are available.

The process would enable all the persons in the court/conference room in Jamaica to see a "live" image of the witness giving evidence in Florida, USA, and the witness would see all the procedures in the court/conference room in Jamaica.

Mr. Robinson further proposed that the witness could give evidence in chief by affidavit which would identify the original document to be admitted into evidence and cross-examination could take place via the video conference.

Panton, J., refused the application before him and stated, inter alia:

"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."

Thus we have before us on this question this appeal from the decision of Panton, J.

The sections of the Judicature(Civil Procedure Code) Law of Jamaica (the "Code") to be considered are sections 367, 368 and section 368(A). Section 367 reads as follows:

"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."

Section 368 reads:

"(1) A 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 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 this purpose."

And section 368(A):

(1) Without prejudice to section 368 of this law, the court or 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 ."

Having cited these sections of the Code, the trial judge stated:

"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 evidence 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 video 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."

In ***Garcin and others v. Amerindo Investment Advisors Ltd. and others*** [1991] 1 W.L.R. 1140, in the United Kingdom evidence by video conferencing was admitted by virtue of the provisions of the Rules of the Supreme Court, Order 38 Rule 3, which reads as follows:

"3(1) Without prejudice to Rule 2, the court may, at or before the trial of any action, order that evidence of any particular fact shall be given at the trial in such manner as may be specified by the order.

(2) The power conferred by paragraph (1) extend in particular to ordering 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 the 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."

This Order, as will be noted, is similar to section 368(A) of our Judicature (Civil Procedure Code) Law. Morritt, J., at page 1142 of his judgment stated however:

"Thus the court has power to determine the manner in which evidence is given but does not, as it seems to me, have power to enlarge the evidence which may be given beyond that which is legally admissible, except possibly in the particular categories set out in paragraph (2)."

And continued:

"Accordingly the first point to consider is whether evidence given by a witness abroad by means of a television linkage is admissible at all. Such evidence would be given by the witness in the place where he made his oral statement, namely, the United States. As such, it would be admissible under section 2 of the Civil Evidence Act 1968 if proved by one who heard it. Moreover, any video tape of the examination and cross-examination would be similarly admissible as a document in which the statement was made: see section 10. Thus, if both parties and the witness co-operate, a video tape of the examination and cross-examination of a witness overseas would be admissible in evidence in proceedings in England. Moreover, in such a case, the evidence so obtained would be of greater weight than the ordinary Civil Evidence Act statement, because the witness would have been cross-examined and the judge would have had some opportunity to observe the demeanour of the witness."

The United Kingdom rule is anchored by the provisions of the Civil Evidence Act, 1968. Specifically, section 10(1) of the Act defines "document" to include:

"...

(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

(d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom:..."

This, in fact, is the exact wording of section 31B of the Jamaican Evidence Act.

In ***Arab Monetary Fund v. Hashim and others (No. 7)*** [1993] 4 All E.R. 114,

Dillon, L.J., in the Court of Appeal Civil Division cited with approval the dictum of Morritt, J., at page 1142 of the ***Garcin*** report already referred to.

He further cited with approval Bingham, J., in ***H v. Schering Chemicals Ltd.*** [1983] 1 All E.R. 849 at 853 when that judge stated:

"...I think that the object of the rule is to permit the proof of matters, or to facilitate the proof of matters, which, although in issue are largely peripheral to the major issue in the action, that is to facilitate the proof of matters which are largely, although not completely, formal. It is not, I think, the purpose of this rule to permit the adducing on an issue crucial to the outcome, as here, of material which does not rank as evidence, even for purposes of the 1968 Act and the rules of court."

The crucial matter to be established in the case before us is proof of the alleged Will of the testator Martin Augustus Box which proof, if successful, would set aside and declare null and void the Letters of Administration granted for the first-named defendant Dorothy Hope Ramsay. The issue is the validity of the purported Will of Martin Box, deceased. That validity rests upon the evidence of the witness Mrs. Daphne Nairn, the sole surviving witness to the alleged Will of Martin Box. The issue is contested and the defendants maintain that the Will is a forgery. It could never be said that the evidence of Mrs. Nairn is on a peripheral matter.

It seems however to me that crucial nature of the issue to be determined in a specific case is not a decision on the broad question as to whether evidence by means of video conferencing can be given under the provisions of Jamaican law and Rules of Court but rather the question of whether the trial judge should exercise the court's discretion in permitting or refusing the application for the evidence to be given in this manner. The provisions of our laws and our Rules of Court properly interpreted do extend to the adducing of evidence by use of this more modern technology.

Panton, J therefore erred when he determined as follows -

"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 ... Specific legislation is required to deal with this technological advance."

I however agree with Panton, J that the reason given for the inability of the witness to travel to Jamaica to give evidence, when examined carefully is that it is inconvenient for her to do so and this is not sufficient for the court as an exercise of its discretion to permit the substitution of some other method for the reception of the evidence.

Indeed, I further note that the facts in relation to Mrs. Nairn's unwillingness to travel are not deposed to by the witness herself but in an affidavit by her attorney-at-law.

The Court of Appeal is in as good a position as the court below to exercise its own discretion on the facts, and the matter should not in my view be referred to the Supreme Court for this determination. The discretion of the Court of Appeal should be exercised against the admission of the evidence by the means sought by the applicant.

I would order as follows:

- 1) That the appeal be dismissed and the order of Panton, J not to permit the evidence to be given by video-tape conference is affirmed for the reasons given in this judgment.
- 2) No order as to costs.

Bingham, J A

The facts and the arguments in this appeal have been fully set out in this matter by the Learned President and Walker, J. A. I do not propose therefore to recite them in this judgment.

Panton, J., in dismissing the application to adduce the evidence of Daphne Viola Nairn by way of video link was faced with two questions viz:

1. Did he have the jurisdiction to deal with the application?
2. If yes, whether or not he should exercise his discretion to grant or refuse the application?

The Jurisdictional Issue

In determining this question the learned judge below declined jurisdiction and having reviewed Section 367, 368, and 368A of the Civil Procedure Code he was of the view that:

"...there is no provision for the giving of oral evidence 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 video 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 witness orally and in open court.' Nor does it fall within the exception.

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."

He later added that:

"The existing legislative framework does not permit the Court to venture into the unchartered (sic) waters of the video link."

While recognising that the regular and accepted method of a witness testifying is by the examination of the witness orally and in open Court (vide section 367 of the Code), this provision is subject to exceptions viz evidence by affidavit: (vide section 368(I)).

Section 368A however, goes a step further in providing that:

"368A(I) 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 be given at the trial in such a manner as may be specified by the order or direction."

This section is in all respects in pari materia with order 38, rule 3, of the Supreme Court Practice (U K). The footnote to this order in the English Rules reads:

"Video conferencing - since oral evidence on video tape would be admissible as a document under Sections 2 and 10 of the Civil Evidence Act 1968, the **transmission of such evidence by television fell squarely within the wording of order 38 rule 3 and the Court had a discretion to admit the evidence.**" (Emphasis supplied)

Garcin v Amerindo Investment Advisors (1991) 1 W L R 1140 is relied on by learned counsel for the appellants in support of this statement made by the learned editor.

Before reviewing this decision it may become convenient to point out that Sections 2 and 10 of the Civil Evidence Act 1968 U K referred to above are identical to Sections 31B and 31E of our Evidence Act. These provisions would therefore give to a Jamaican Court or Judge the necessary jurisdiction in considering whether or not to exercise a discretion to grant or refuse an application to adduce evidence by this method.

In ***Garcin and Others v Amerindo Investment Advisors Limited and Others*** (supra) the headnote reads as follows:

"the Plaintiffs brought an action against the Defendants claiming payment of sums due under an investment management agreement under which the Plaintiffs' portfolios were held by a firm of investment brokers in New York. In the course of the action the Plaintiffs alleged the Defendants had made false representations about the value of the Portfolios and that the third defendant had provided a bogus statement purporting to come from the brokers, created by cutting out of the original document the parts which showed the liabilities on the account and photocopying it so as to show an apparently complete account disclosing only the assets. The office of the brokers who had been concerned in the preparation of the original document was not willing to come to England to give evidence in the action. The Defendants therefore applied to the Court for an Order under R. S. C. Order 39 that letters of request be sent to the appropriate judicial authority in New York seeking his examination on oath in New York. The Plaintiffs opposed the Defendants application and proposed that the evidence be received by the examination of the witness on oath in New York with Counsel in London examining her by means of a video link. The Defendants maintained that the Court had no jurisdiction to make an order allowing

the receipt of evidence by live television link in a civil action.

On the Defendants application for the grant of letters of request and the Plaintiffs application under R. S. C. Order 38 rule 3 for an Order that the evidence be given by television linkage:-

Held, granting the application, that since the oral evidence of an overseas witness recorded on video tape would be admissible as a document under Sections 2 and 10 of the Civil Evidence Act 1968 the transmission of such evidence by television fell squarely within the wording of R. S. C. Order 38 rule 3 and the Court had jurisdiction to make an Order allowing its receipt."

By parity of reasoning therefore given the effect of section 368(A) (1) of the Code when considered along with sections 31B and 31E of the Evidence Act I hold that the learned judge had the jurisdictional competence to consider the application.

In determining, therefore, that he did not have the jurisdiction to "enter into the unchartered (sic) waters of the video link" the learned judge was in error. This first question would if answered in the affirmative have provided him with the basis for the exercise of his discretion. Having declined jurisdiction this meant that the issue as to the manner of the exercise of his discretionary powers was thereby rendered otiose. It had the effect of disabling the judge from any further consideration of the application.

For these reasons I would allow the appeal and order that the matter be remitted to a judge of the Supreme Court to determine the

application. I would further order that the appellants have their costs here and below, such costs to be taxed if not agreed.

WALKER, J.A.:

Martin Augustus Box died on September 9, 1977, and on August 2, 1984, Letters of Administration in the deceased's estate were granted to the first respondent, Dorothy Hope Ramsay. This grant of Letters of Administration is in dispute inasmuch as it is being contended that the deceased died leaving a will. It is disputed by the first appellant, Fitzhugh Raymond Wallace in his capacity as executor of the estate of Olive Maud Agatha Lambert, who, it is being claimed, was, up until the time of her death on March 27, 1994, the executrix of the estate of the said Martin Augustus Box, deceased, and by the second appellant, Anthony Andrex Lemard, in his capacity as a beneficiary under the disputed will, and also in his capacity as executor of the estate of the said Olive Maud Agatha Lambert, deceased. The second respondent, Everard Constantine Box (also known as Everard Constantine Reid) is a beneficiary under the disputed will.

In pursuance of this dispute, the appellants filed an action (commenced by Writ of Summons) in the Supreme Court in which they claimed, inter alia, relief as follows:

"(i) That the Letters of Administration granted to the first named Defendant be set aside and be declared null and void.

(ii) That the Court shall decree probate of the will of Martin Augustus Box dated the 30th day of May, 1962 in solemn form of law in favour of FITZHUGH RAYMOND WALLACE."

This action came on for hearing before Panton, J., on December 7 and 8, 1998, at which time the appellants, as plaintiffs, sought to prove their case by

adducing the evidence of a witness, Daphne Viola Nairn, by way of a video conference or video link. Their application for leave to proceed in this way was dismissed by Panton, J., who found that he had no jurisdiction to make the order sought. It is against this decision of the learned trial judge that this appeal is now taken. So, simply put, the outcome of this appeal turns upon a resolution of the question, which is in the Jamaican context a novel one, whether there is jurisdiction in the court to permit the adduction of the evidence of a witness by way of a video conference or video link.

The general rule, as prescribed in section 367 of the Judicature (Civil Procedure Code) Law (the "Law"), is that any fact required to be proved by the evidence of witnesses at the trial of an action commenced by Writ of Summons (as in the instant case) shall be proved by the examination of the witnesses orally and in open court. But there are exceptions to this general rule of procedure.

Sections 368 and 368A of the Law provide for these exceptions. Section 368 reads as follows:

- "(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 thus:

- "(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 was on section 368A(1) that counsel for the appellants relied in arguing that the jurisdiction for which he contended does, indeed, exist. Mr. Robinson drew attention to Ord. 38, r. 3 of the English Rules of the Supreme Court which is, substantially, in pari materia with section 368A above. Ord. 38, r. 3 reads as follows:

- "38/3 3.--(1) Without prejudice to rule 2, the Court may, at or before the trial of any action, order that evidence of any particular fact shall be given

at the trial in such manner as may be specified by the order.

(2) The power conferred by paragraph (1) extends in particular to ordering 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."

In developing his argument, Mr. Robinson submitted that sections 2(1) and 10(1) of the English Civil Evidence Act 1968 are, respectively, the counterparts of sections 31E(1) and 31B of Part 1A of the Jamaican Evidence Act. Section 2(1) of the English Act reads:

"2.--(1) In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible."

whereas section 31E (1) of the Jamaican Act reads:

"31E.--(1) Subject to section 31G, in any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of

any facts stated therein of which direct oral evidence by him would be admissible.”

Section 10(1) of the English Act provides:

“10.--(1) In this Part of this Act--

‘computer’ has the meaning assigned by section 5 of this Act;

‘document’ includes, in addition to a document in writing--

(a) any map, plan, graph or drawing;

(b) any photograph;

(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

(d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

‘film’ includes a microfilm;

‘statement’ includes any representation of fact, whether made in words or otherwise.”

whereas section 31B of the Jamaican Act provides:

“31B. In this Part--

‘document’ includes, in addition to a document in writing--

(a) any map, plan, graph or drawing;

(b) any photograph;

- (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;
- (d) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom."

In ***Garcin and Others v. Amerindo Investment Advisors Ltd. and Others*** (1991) 1 W.L.R. 1140 Morritt, J., had to grapple with the question whether the court had jurisdiction to make an order allowing for the receipt of evidence by live television link in a civil action. The headnote of ***Garcin*** conveniently summarises the facts and circumstances and the manner of the disposition of that case. It reads as follows:

"The plaintiffs brought an action against the defendants claiming payment of sums due under an investment management agreement under which the plaintiffs' portfolios were held by a firm of investment brokers in New York. In the course of the action the plaintiffs alleged that the defendants had made false representations about the value of the portfolios and that the third defendant had provided a bogus statement purporting to come from the brokers, created by cutting out of the original document the parts which showed the liabilities on the account, and photocopying it so as to show an apparently complete account disclosing only the assets. The officer of the brokers who had been concerned in the preparation of the original document was not willing to come to England to give evidence in the action. The defendants therefore applied to the court for an order under R.S.C., Ord. 39 that letters of request be sent to the appropriate judicial authority in New York

seeking his examination on oath in New York. The plaintiffs opposed the defendants' application and proposed that the evidence be received by the examination of the witness on oath in New York with counsel in London examining him by means of a video link. The defendants maintained that the court had no jurisdiction to make an order allowing the receipt of evidence by live television link in a civil action.

On the defendants' application for the grant of letters of request and on the plaintiffs' application under R.S.C., Ord. 38, r. 3 for an order that the evidence be given by television linkage:--

Held, granting the plaintiffs' application, that since the oral evidence of an overseas witness recorded on video tape would be admissible as a document under sections 2 and 10 of the Civil Evidence Act 1968 the transmission of such evidence by television fell squarely within the wording of R.S.C., Ord. 38, r. 3, and the court had jurisdiction to make an order allowing its receipt; and since the receipt of the evidence in that manner was cheaper and more expeditious than the procedure by letters of request and did not preclude recourse to other means if it proved unsatisfactory, the court in the exercise of its discretion would make the order sought by the plaintiffs."

Again, the general principle of oral testimony in open court and the exercise of the court's discretion in relation to an order under the English R.S.C. Ord. 38, r 3 was considered in the recent case of **Arab Monetary Fund v. Hashim and others (No. 7)** (1993) 4 All E.R. 114. In that case, while agreeing with the general approach taken by Bingham, J. in **H v Schering Chemicals Ltd.** (1983) 1 All E.R. 849; (1983) 1 W.L.R. 143 where Bingham, J. said:

"I think that the object of the rule is to permit the proof of matters, or to facilitate the proof of matters, which, although in issue, are largely peripheral to the major issue in the action, that is to facilitate the proof of

matters which are largely, although not completely, formal. It is not, I think, the purpose of this rule to permit the adducing on an issue crucial to the outcome, as here, of material which does not rank as evidence, even for purposes of the 1968 Act and the rules of court."

Neill, L.J. expressly approved the general proposition that the provisions of Ord. 38, r. 3 may properly be used to enable evidence to be given by a video link, himself saying:

"Order 38, r 3 may be used, however, to enable evidence to be given by a video link. I can also imagine that there may be cases where evidence of particular facts which are not merely peripheral may be given by the production of documents. It would be inappropriate, however, to attempt to catalogue the circumstances in which an order under Ord 38, r 3 may be made. But I am quite satisfied that the order under Ord 38, r 3 in this case should not include any documents whose authenticity is challenged or any facts which remain genuinely in dispute."

Now, where the instant proceedings are concerned, the evidence of the witness, Nairn, is crucial to the appellants' case and the fact of the matter is that, for whatever reason, Mrs. Nairn is unwilling to come to Jamaica from the United States of America where she presently resides for the purpose of giving that evidence. By parity of the reasoning which Morritt, J. employed in the *Garcin* case, a line of reasoning with which I respectfully agree, it is, I think, true to say that if the appellants' request were granted in the instant case the required evidence would be given by Mrs. Nairn in the United States of America, which is the place where she would have made her oral statement. As such, it would be admissible under section 31E(1) of our Evidence Act if proved by someone who heard it. Furthermore, in such a situation any video conference or video link of

the examination and cross-examination of the witness would be similarly admissible as a document in which the statement was made in terms of section 31B of the Jamaican Evidence Act. Accordingly, a video conference or video link of the examination and cross-examination of the witness in the United States of America would be admissible in Jamaica in circumstances where the trial judge in Jamaica would have had the advantage of observing and assessing the demeanour of the witness. In considering this matter, the case of ***Mungo D. P. Henderson v. S.B.S. Realisations Limited*** (unreported), in which judgment was delivered by the English Court of Appeal on April 30, 1992, is also most helpful. That case involved a negligence action arising out of a burglary. Householders were suing builders, alleging that their premises on which the builders were working had been left unsecured and that the burglar had gone in and stolen some property. The Plaintiff householder wished to call his daughter to give factual evidence. It was inconvenient for her to return to England to give that evidence. She had emigrated to Canada between the incident and the trial. The Plaintiff applied to the County Court judge for her evidence to be given by video link. That was opposed by the defendants, and the judge's order that she be examined on a video link was appealed to the Court of Appeal presided over by the Master of the Rolls. In the course of his judgment, the Master of the Rolls had this to say:

"A video link is, for all practical purposes, very much the same as hearing the evidence in court. I agree that there are technical problems about it and it may be that it is marginally preferable that the evidence should be heard in court."

I gratefully adopt the approach of the Court of Appeal in *Henderson's* case and have no hesitation in applying such an approach to my consideration of the instant case. In my judgment, section 368A(1) of the Law confers upon our court the necessary jurisdiction to entertain the appellants' request for an order to permit the adduction of the evidence of the witness, Nairn, by way of a video conference or video link. Indeed, in this regard, I should be prepared to express myself in like manner as Balcombe, L.J. did in giving the second judgment of the court in *Henderson's* case by saying that this present court "should be very loath so to construe the statutory provisions relating to jurisdiction or so to exercise its powers of the rules as to preclude the use of technological improvements which the law ought to be minded to accept wherever appropriate." I think, therefore, that Panton, J. was wrong in finding that "the existing legislative framework does not permit the court to venture into the unchartered (sic) waters of the video link."

Accordingly, I would allow this appeal with costs and also order that the case be remitted to the Supreme Court for exercise of the court's discretion as to whether and in what circumstances the appellants' application to adduce the evidence of the witness by way of a video conference or video link should be permitted, assuming, of course, that the appellants persist in pursuing such an application, and for trial thereafter.

RATTRAY, P:

By a majority, appeal allowed. Costs to the appellants here and in the court below to be taxed if not agreed.

Further ordered that the matter be remitted to the Supreme Court for trial.