Mouritz

Evidence on Commission: Two Hearings

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Part One
Evidence on Commisssion, Alexander v. Jokl And Others
19th February 1947

Witwatersrand Local Division.1947. February 19. Blackwell, J. *Evidence – Commission* de bene esse – *Granting of – Expert evidence.*

In an application by the defendants in an action for defamation for leave to take evidence on commission of certain witnesses in England, respondent contended that these witnesses would be giving expert evidence of a nature differing in no material respect from expert evidence which was available in South Africa. The action was of vital importance to the respondent and of considerable importance to the medical profession, particularly to those interested in physical education and training. It arose out of an article published in a journal in which the applicants, as joint editors, had attacked the technique of psychophysical education practised by the respondent. It was clear from the papers filed that a mass of scientific evidence would have to be given: The nature of the evidence which these expert witnesses intended giving was set out in the proceedings.

Held, that as the action concerned the whole of the respondent's contentions and claims, and as the evidence was reasonably necessary for the purposes of justice, the application should be granted.

Carnes v. Maeder (1939, W.L.D. 207), considered.

Application for leave to take evidence on commission. The facts appear from the reasons for judgement.

O. Pirow, K. C. (with him *M. van Hulsteyn*) for the applicants. *H. J. Hanson, K. C.* (with him *A. Fischer*) for the respondent.

Blackwell, J.: This is an application by the defendants in an action for defamation for leave to take on commission in England the evidence of certain nine witnesses. The application is opposed in regard to the majority of these witnesses, but it is conceded by the respondent that the application

to take the evidence on commission of three of them cannot be resisted. The first of these witnesses is an official of the British Ministry of Health, the second is Lt.-Col. S. A. Parker, who occupies the position of Professional Officer in charge of physical education in the Ministry of Education, London, and the third is Brig. T. H. Wand-Tetley, C.B.E., inspector of physical training, Imperial Army, London. In regard to the other six, whose names I will mention presently, the respondent's contention, briefly, is that these witnesses will be giving expert evidence of a nature differing in no material respect from expert evidence which is available to the applicants in this country.

Before proceeding further I think I should give some indication of the nature of the action itself. The plaintiff is Frederick Matthias Alexander, who, although he is not so described in the summons, I take it is a lay healer practising a particular form of curative technique. In the declaration he says that he is the founder of a technique of psychophysical education, known as the Matthias Alexander technique, and that he has for fifty years carried on, and still carries on for reward, the profession of teaching and expounding the said technique.

The three defendants in the action, Dr Ernst Jokl, Dr Eustace H. Cluver and Dr Bernard M. Clarke, are gentlemen of considerable eminence in the medical world in this country. They are jointly the editors of a bi-weekly scientific journal called *Manpower*. In March, 1944, this journal published an article dealing with the plaintiff's technique, and apparently dealt with it in a very drastic fashion, because the plaintiff says that the article, read as a whole, means and was understood to mean, that his technique is without scientific basis and is, from a scientific point of view, contemptible and nonsensical, and, more particularly, that the article means that he is dishonest, untruthful and that he is a charlatan and a quack. Now, whether or not the defendants alleged that the plaintiff was a dishonest man and untruthful – except that in so far as any quack must be stigmatised as such – it is unnecessary to enquire, because, for the purpose of the present application, it is admitted that the defence will lead evidence that authorship of this technique, the method of its employment and the manner in which it is advertised, does in fact stamp the plaintiff, in the eyes of orthodox medical men, both as charlatan and as a quack.

It will be seen therefore, that the action is of very vital importance to the plaintiff and of considerable importance to the medical profession and particularly to that portion of it which interests itself in physical education and training, and that the issues involved are wide enough to cover the whole of this technique of psychophysical education.

The defendants, I take it, represent the orthodox medical view, or, at any rate, their own view which is that the plaintiff's technique is nothing but quackery. In the circumstances it will be understood that a mass of scientific evidence will have to be received, weighed and sifted by the Court which tries the action.

The plaintiff, so far as I can see, has never carried on his technique or cult in this country. It is said that there was a lady; who, for a period not specified, did carry on the plaintiff's training in this country, but she is not now, and has not for a long time been in this country or practised here. The plaintiff began his teaching more than fifty years ago in Australia, but practically the whole of his professional life he has practised either in England or America in which countries he has conducted schools in which he trained persons in his technique, because he says that his technique is something which cannot be absorbed from books but is to be obtained only from persons trained by him. It is therefore said that witnesses available in this country, who can give evidence upon which it will be possible to arrive at any worthwhile evaluation of this technique, are practically non-existent. On the other hand, if, as the plaintiff says, he has been carrying on in England for many years and actually ran a school to inculcate his training, then there must be quite a considerable volume of data available in England, and also in parts of America, from which medical practitioners can evaluate and criticise his methods and its results.

That appears to be the true position, because the plaintiff himself had to apply to this Court for the evidence to be taken on commission of such witnesses in England. Two of them are eminent laymen who, he says, can testify to the benefits obtained by them in following his course of treatment. The next one is a lady who was a pupil of the plaintiff's and who, as I have indicated practised for an unspecified period in this country. The other three are medical men who are apparently of some standing and who have become interested in the plaintiff's methods and who are sympathetically inclined towards them. These gentlemen will give factual evidence of their own observations of the results of his training, and the basis of their evidence, if my reading of the plaintiff's petition is correct, will be their own scientific, assessment of the value of the plaintiff's training. And so the plaintiff himself has been forced to apply to this Court for leave to take on commission in England a very considerable body of evidence, both scientific and factual. No opposition was made by the defendants to his petition to take this evidence on commission in England, and that evidence will therefore be taken in due course. I am bound to say that I think it will be unfortunate if, as a result of the tolerant attitude adopted

by the defendants, the plaintiff should be allowed to take on commission in England all the evidence he desires to have while the defendants, when they in turn come to Court and ask for the same indulgence, should be refused the relief asked for.

The applicants, in their petition, set out with considerable detail the names of the witnesses they ask to be allowed to call and the nature of the evidence which they will give, and I think at this stage it will be convenient for the Court briefly to summarise the nature of that evidence. I need not deal with the three witnesses I have already mentioned, because they are conceded by the respondent, but I will deal with the other witnesses whose evidence is challenged.

The first witness is Sir Henry Dale. Judging by the letters after his name – O.M., C.B.E., F.R.S.; President of the Royal Institute and recipient of the Nobel Prize for physiology – he is one of the foremost exponents of medical science in Great Britain. He will give evidence in general terms, condemning the claims of the respondent. Mr Hanson, who appears for the respondent, is probably correct when he says that the first four paragraphs of the summary of Sir Henry Dale's evidence can probably be contradicted by experts in this country, but Sir Henry Dale will, it is said, state further that 'there is no evidence, and the respondent does not advance any evidence acceptable according to scientific standards, for his claims that, in regard to cancer, appendicitis, bronchitis and tuberculosis, the real cause of the development of such diseases is to be found in the erroneous preconceived ideas of the persons immediately concerned'. I pause there to say that a statement, if it comes from a world-wide authority, that there is no evidence to support a certain kind of training, will normally carry great weight in the eyes of the Court and might conceivably be accepted in preference to the evidence of a local specialist however well trained he may be, and I go further and say that when this comes from a gentleman at the head of the medical profession in Great Britain, I have to remind myself, as I do, that this cult or technique has been practised mainly in Great Britain, and that such evidence, in my opinion, might be more helpful to the trial Court than the evidence of any local professor or specialist however eminent he may be.

In the respondent's petition for leave to take the evidence of his own witnesses on commission he says this: 'In Great Britain and in the United States of America there are a number of persons, specialists in other fields of knowledge, who, having been trained by your petitioner in his technique and having made a study of the theoretical principles thereof, can testify as to their personal experience of the benefits to be derived from,

and the scientific value of the application of the said technique, both generally and in their particular fields of work. In South Africa there is today no person trained by your petitioner and as far as your petitioner is aware there are no professional persons such as medical doctors, scientists or educationists who can apply your petitioner's technique'. Having regard to that statement, it seems to me to be arguable that the best available evidence to put before the Court will be the evidence of doctors in Great Britain. A doctor in South Africa might have to come into the witness box and begin by saying. 'I do not know Mr Alexander. I do not know his technique, have never seen any patients treated under his technique. All I know about him is what I have got from books'. A doctor from Great Britain will very likely be able to say, 'From my personal observation it has come to my notice', or, 'From cases I have seen I have come to know a good deal of Mr Alexander, his technique and his methods'.

I continue now with my reference to Sir Henry Dale. It is alleged that he will say further: 'The respondent is a lay healer whose promises of therapeutic results can, on the grounds of established scientific knowledge, not be accepted, that the respondent has no medical or scientific knowledge and that his claims for the therapeutic effects of his technique are fantastic; that the respondent is a quack, that is to say, 'an ignorant pretender to medical or surgical skill, one who boasts to have knowledge of wonderful remedies; an empiric or impostor in medicine'; that, were the respondent a qualified medical doctor, his colleagues would, his claims and conduct, be entitled to accuse him of quackery that it is the duty of persons in the position occupied by your petitioners to challenge fantastic claims like those put forward by the respondent.'

The next gentleman whose evidence is desired by the applicants is that of Sir Alfred Webb-Johnson, Bt., K.C.V.O., C.V.E., D.S.O., T.D., President of the Royal College of Surgeons of England. It is said that he will say that he has studied the respondent's books and claims, and also the contentions of the applicants as against those of the respondent. He will say that the respondent's views are unsupported by scientific observations and in many cases quite inconsistent with known facts. Now, a South African expert might say the same, but I am inclined to think that a world-wide authority such as Sir Alfred Webb-Johnson can speak from a wider field of knowledge and his evidence is likely to he of very great assistance to the Court. It would be very wrong indeed if I were to shut out from the trial Court in a case of this importance the advantage of hearing the evidence of an authority like Sir Alfred Webb-Johnson.

I do not think it is necessary for me to go into the details of the evi-

dence of the other gentlemen mentioned, namely, Prof E. D. Adrian, O.M., F.R.S., M.A., M.D., F.R.C.O., and recipient of the Nobel Prize in physiology for his work on neurophysiology; Dr F. Himmelweit, M.D., Ph.D., M.R.C.P., Head of the Virus Department, Inoculation Department, St. Mary's Hospital, London; Dr Paul Wood, M.D., M.B., B.Sc., F.R.C.P., Honorary Physician, London Heart Hospital; and Prof Samson Wright, M.D., Head of the Department of Physiology, Middlesex Hospital, London; and others, all gentlemen put forward as experts of world-wide reputation in their own particular line. It is said that not only will they refute the particular claims made by the plaintiff, but they will also correlate their evidence on his claims in the sphere of psychophysical education.

The answer of the respondent in the present proceedings is presented by Prof Dart, who says in his affidavit that in this country there are established schools of medicine at Cape Town, the Witwatersrand and Pretoria, that these are good schools where there are teachers and professors of great eminence and men of science, that, in addition; there are recognised specialists in all branches of medical science, and he claims that each one of those gentlemen in England has his counterpart in South Africa, perhaps not so widely known and perhaps not of so high degree, but entirely competent to come before the Court and give expert evidence. That may be so, and if I were to take a narrow view of the matter put before me, then I might, on that simple ground alone, be disposed to say that experts are available in this country and that the applicants are not obliged to go beyond the boundaries of South Africa to get the expert evidence required. But I do not propose to take that course, and I will give my reasons.

The matter is governed by Rule 60 of the Rules of Court, which reads as follows:

> Where it appears convenient or necessary for the purposes of justice in any matter or cause, the Court or a Judge in Chambers may order the examination at any place, under oath, of a witness or witnesses by means of interrogatories or otherwise before a Commissioner of the Court, and may order any deposition so taken to be filed in the Court, and may empower any party to any such matter or cause to use such deposition in evidence on such terms as the Court or Judge may direct.

As I read those words it seems to me that a Judge who has to deal with an application for the appointment of a commission must ask himself

whether he is satisfied that the evidence asked for is reasonably necessary for the purpose of justice. I would say this for myself, that if a litigant comes before me and says that he is a party to an action and that he considers such and such witnesses to be necessary for his case, then, if I accept his statement, I would ay that justice demands that those witnesses be heard. Courts of justice, as I view the matter, are to give full opportunity to the parties to call such relevant evidence as in the opinion of the Judge is necessary for the purpose of establishing their case, and so, in a matter like the present, where the defendants themselves are men of science, who come before this Court and say, 'We think that in order to establish our case that the plaintiff is a charlatan and a quack we should have the evidence of certain heads of the medical profession in Great Britain', then I think the Court should be slow to refuse their application.

I come now to deal with the case which has been quoted to me on behalf of the respondent, *Carnes v. Maeder* (1939, W.L.D. 207). There Schreiner, J., had occasion to consider Rule 60 as applicable to the matter before him. He says:

> The cases must be rare where particular expert witnesses are of such importance to the proper decision of an issue that it can be said to be convenient or necessary for the purposes of justice that their evidence should be taken on commission. On very special subjects where experts are rare this may be the case – it may happen that no experts on such subjects are available in this country, but where the subject is one on which, so far as appears, sufficient expert evidence is available here, I do not think that a commission should issue to take the evidence of persons abroad simply because they may be more expert than those in the Union.

I pause there to say at once that I think that each case must be decided on its own merits and that a general statement made in this way must be read as applying to the case before the Judge who hears the matter. In general I have no quarrel with that statement, and if this were a case relating only to the question of damages, then I would be reluctant to go beyond this country for an expert unless it were very clear that the expert would speak with knowledge possessed by no one in this country. But in the present case the matter is very much wider; it concerns the whole of the plaintiff's contentions and claims, and when it comes to an issue as wide as that, as important as that, then I think this case comes within the unusual class of case which Schreiner, J., had in mind. In the present case it is conceded by Mr *Hanson* that the application in regard to the other three persons is

well-founded, that their evidence is necessary for the defendants' case – it is conceded that their evidence is material and that the only dispute in this matter is created by the contentions put forward by Prof Dart, who says that the professional evidence to be sought overseas can be obtained in this country. Even if that were the case, I still would be prepared to issue this commission. I go further and say that I am inclined to agree with the defendants that they cannot properly place their case before the Court unless they go beyond this country and call the heads of the medical profession in England.

The application is granted. Costs to be costs in the cause.

On the application of Mr *Hanson* the Court granted leave to appeal. [The application was not proceeded with. *Editors*.]

Applicant's Attorneys: *Government Attorney.* Respondent's Attorneys: *Berrange & Wasserzug.*

Part Two
Evidence on Commisssion, Alexander v. Jokl And Others
15th April 1947

First published in [unknown], pp. 542–49.

Witwatersrand Local Division. 1947. April 15. Price, J.

Evidence – Commission de bene esse *Granting of – Defendants' broadening issue by calling expert witnesses – Right of plaintiff to apply for further evidence on commission.*

In an ordinary action, if one of the litigants ascertains or receives information from subpoenaes issued that his opponent is about to call a number of expert witnesses with differing scientific qualifications, there is no reason why he should not in his turn elect to broaden the scope of his evidence and to call witnesses with additional qualifications to the qualifications to

those witnesses whom he had previously made up his mind to call and had subpoenaed.

Where it appeared from an application brought by the defendants in an action for defamation arising out of an article published in a journal of which the defendants were the co-editors, and in which the technique as practised by plaintiff in regard to psychophysical education was attacked, that the issues in the action were being broadened by the calling of certain expert witnesses, the Court allowed a further application by the plaintiff for leave to take the evidence on commission of certain experts of whom the plaintiff had only become aware after his first application for leave to take evidence on commission had been granted.

Application for leave to take evidence on commission. The facts appear from the reasons for judgement.

H. J. Hanson, K.C. (with him *A. Fischer*), for the applicant. *O. Pirow, K.C.* (with him *M. van Hulsteyn*), for the respondents.

Price, J.: This is an application by Frederick Matthias Alexander of London, England, for an order appointing Arthur Hereward Omerod, or, alternatively, any one of certain other persons, to act as a Commissioner of the Court in order to take the evidence of certain witnesses in London in an action pending between the petitioner and the respondents.

The petitioner bases his application upon the provisions of Rule 60 of the Rules of Court, which provides that where it appears convenient or necessary for the purposes of justice the Court may order the examination at any place of witnesses before a Commissioner of the Court and may authorise any depositions taken to be used as evidence in the case.

This is the third application of a similar nature which has been made in these proceedings. An application was first made by the present petitioner on the 2nd of July of last year, when Mr Omerod was appointed a Commissioner to take the evidence of six persons, laymen and medical practitioners, on certain issues which have been raised in the main action. Then followed an application by the defendants in the action for the appointment of a Commissioner to take the evidence of certain witnesses in London. Mr Omerod was again appointed as the Commissioner to take the evidence in London of three physiologists, a surgeon, a bacteriologist and a physician. The petitioner, who is the plaintiff in the main action, has now brought the present application which, as I have said, is the third of this kind, and requests that the evidence of certain other witnesses be taken on commission in London by the Commissioner who has already been appointed in respect of the other two commissions. The three addi-

tional witnesses whose evidence the petitioner now desires to be taken are Dr Dorothy Drew, Dr Duncan Whittaker and Dr James McDonagh.

The petitioner says that he only became aware of the fact that these three witnesses would be able to give valuable evidence in the main action after the conclusion of his first application in July, 1946. He says that his attorney, Mr Berrange of Johannesburg, visited London on the 16th July, 1946, for the purpose of preparing the case for trial and that in the course of his investigations he discovered the three witnesses whose names I have mentioned, and because their evidence, according to the petition, will not only be relevant but extremely important the present petition has been launched.

The petition refers to the pleadings in the main action, and from an examination of these pleadings it appears that the plaintiff's action is against the defendants for the payment of damages for alleged defamation published in the March, 1944, issue of a journal called *Manpower*, which is apparently devoted to physical training and allied matters. It is alleged that the three defendants are concerned in the publication of an article which meant that the plaintiff's claims in respect of a certain technique, to which I shall refer more fully later, are without scientific basis and nonsensical, that the plaintiff is dishonest and untruthful, that he is a charlatan and a quack, that he has given to the public dangerously criminal and irresponsible advice, that he has represented untruthfully and dishonestly in his writings that his technique has been accepted and approved of by members of the medical profession and other scientists, that he has for personal gain and in order to attract students deliberately distorted the truth and held out various promises of benefits to be derived from his technique. These innuendoes are denied, but it is not denied that the three defendants were concerned in the publication of the article as editors of the journal mentioned. I am not concerned with the question as to whether the article complained of is defamatory or not, nor with the question as to whether the innuendoes sought to be drawn are justified, nor indeed with any matter concerning the merits of the main dispute. I must accept the issues as raised on the pleadings and judge of the matter on the basis of those issues.

The petition sets out that the plaintiff in the action is the discoverer of a certain technique which he began to develop in Australia in 1894 and continued to develop and teach in London from 1904 until the present date, save for a short period during which he was in the United States of America in connection with the teaching of his technique. He also alleges that he has published four books for the purpose of expounding his tech-

nique and that those books have had a wide circulation throughout the world. He then says that it is difficult for uninstructed persons to apply his technique because of a certain inter-relationship between the human mind and the human body as a result of which individual human beings function as single psychophysical entities. He explains that his technique is based upon a new scientific principle with respect to the control of human behaviour, which involves the conscious correction, by the student of the technique, of the wrong uses of his psychophysical mechanism. These wrong uses, he explains, must be corrected and right uses must be substituted. But, says the petitioner, his researches and experience have indicated that man's sense of feeling is untrustworthy because his sensory appreciation has grown accustomed to wrong uses making them appear normal and correct, and that therefore his technique can only be applied by those who, through personal instruction, can demonstrate to the student the manner in which he is making incorrect use of his psychophysical mechanism and the manner in which he should correctly use it. As a result of this, the petitioner says, only persons who have studied the technique under himself or under competent teachers trained by him are able to testify as to the full benefits to be derived from a scientific application of the petitioner's technique. Among the benefits to be derived, he states, is a general improvement in the health of persons to practise his technique. He then states that the witnesses whose evidence he desires to be taken on commission possess the requisite experience and have studied, applied and used his technique, and that they are therefore persons who are able to speak with considerable authority as to the value or otherwise of the technique which he claims to have discovered and developed.

He says that Dr Drew is a witness who has kept case histories of patients whom she has referred to the petitioner for instruction in his method. She is able to testify generally as to the beneficial results secured to her patients as a result of the adoption by them of the petitioner's technique. The petitioner alleges that Dr Whittaker has himself received lessons in the technique and can testify as to its value as observed in himself and in other people who have received lessons. Dr McDonagh, according to the petition, has been acquainted with the technique for a long period, has studied the petitioner's books, has received lessons himself, and is able to testify to the psychophysical value of the principles developed by the petitioner in his technique. None of these witnesses is able to visit South Africa to give evidence before the trial Court that will hear the main action.

Mr Pirow, who appears for the respondents to oppose the application,

relies upon three main contentions.

He says that the issues as explained in the petition in respect of which the petitioner desires to have evidence taken on commission only relate to the question as to whether the petitioner is the founder of a technique of psychophysical education based upon scientific principles, that it does not show that the witnesses who it is now desired to call are necessary witnesses for the purpose of elucidating this particular issue. He says further that the petitioner when he launched his original application decided to confine himself to the witnesses mentioned in that application and that the witnesses whom he now desires to call will merely add to the evidence on the same points as the evidence to be given by the witnesses originally selected by him, and Mr *Pirow* contends that a litigant ought not to be allowed to add indefinitely to the number of witnesses he wishes to call and merely to accumulate a larger amount of evidence. He adds that the petitioner has shown plainly that he considered the witnesses mentioned in his first petition to be sufficient by the circumstance that when the respondents made a similar application he did not make a counter application for leave to call the witnesses whom he now desires to call, notwithstanding that he already knew that those witnesses were available. Finally, Mr Pirow says that Prof Dart's affidavit which was filed by the present petitioner in the second of the three applications, proves that the evidence now sought to be called is by no means essential because there are numbers of persons in South Africa who would be able to give evidence on the points mentioned.

The leading case in applications of this kind is the case of *Carnes v. Maeder* (1939, W. L. D. 207), where the principles established are that the Court will ordinarily direct a commission de bene esse to issue where the evidence is necessary for the proper trial of the case and ought, if reasonably possible, to be before the Court and is likely to be lost if not taken on commission, but that commissions are usually allowed only to establish facts to which particular witnesses can speak, and that the cases are rare where the evidence of a particular expert is of such importance or of such a character that it is necessary to take his evidence on commission, that the evidence of a foreign expert should not be taken on commission merely because he is more expert than similar persons in the Union. Another principle established by the case is that it is not the convenience of the litigant, which is of primary importance, but that a commission must be convenient for the administration of justice before it can be permitted.

I propose, first of all, to deal with Prof Dart's affidavit which Mr *Pirow* relies on to show that the evidence of the three witnesses whom the peti-

tioner now desires to call should not be taken because similar evidence is available in the Union. Prof Dart's affidavit was filed by the petitioner in the previous application in which the present respondents were the petitioners and the petitioner was the respondent. It is plain from an examination of the papers in that case that, when Prof Dart said that there were witnesses available in South Africa on the point in respect of which the respondents desired to call evidence overseas, he was referring only to persons who had certain medical and scientific qualifications and not to persons who had personal experience of the petitioner's technique. It is abundantly evident that Prof Dart did not say that there were available in South Africa persons who had medical and scientific qualifications and who had at the same time studied and applied the petitioner's technique. The opposition to the application in respect of which Prof Dart's affidavit was filed was based on the circumstance that there were available in South Africa scientific and medical persons who could comment upon and express opinions concerning the petitioner's technique, and this fact was relied upon to persuade the Court not to appoint the commission because the persons whom the respondents desired to call as witnesses in London had no special knowledge of the technique beyond such knowledge as could be obtained by any local expert witness in the course of qualifying to give evidence. Prof Dart's affidavit, therefore, is quite irrelevant to the present application, which is based on the fact that the three witnesses now desired to be called not only have certain medical and scientific qualifications and experience, but that, in addition, they have studied, applied, worked with and tested in the course of their practice the very technique which is the subject of investigation in the case and which the petitioner (plaintiff) says that the defendants have characterised as the technique of a charlatan and a person who is prepared to mislead the public for the sake of gain by persuading them dishonestly to learn, cultivate and practise his technique.

I am unable to accept Mr Pirow's contention that the petitioner in the present case has based his application on a single issue, namely, that the point upon which these witnesses are to be called is as to whether the petitioner is the founder of a technique relating to psychophysical education based upon scientific principles. As I read the petition it seems to me beyond question that the petitioner is basing his application upon all the issues raised in the declaration and in the plea, and among those issues is the question as to whether the comments made in the article complained of are true and whether the publication of the article is for the public benefit. In order to decide whether the criticisms appearing in

the article are well founded or not it will be important for the Court that hears the action to have the opinions, not only of medical and scientific persons who are able to comment theoretically on the value or otherwise of the petitioner's technique, but who have had personal experience of its application. I must therefore reject the argument that the petitioner has based his application on a single issue mentioned by Mr Pirow, because it seems to me that he bases his application upon all the issues which have been raised and contends that the evidence of those witnesses will supply the necessary data and facts to enable the Court to come to a just decision. Even, however, if the evidence were required on the single issue mentioned by Mr Pirow, I still think that it would be both relevant and valuable.

The next point which Mr Pirow made was that when the petitioner made his original application he had decided what witnesses were necessary and that he now wishes merely to add to the number of witnesses on the same points. This circumstance certainly does not appear from the papers before me, but I have examined the original application, and it appears that among the Witnesses whose evidence the petitioner was allowed to take on commission were three medical witnesses, Dr Peter McDonald, Dr Andrew Rugg-Gunn and Dr Mungo Douglas. In respect of these medical witnesses it was alleged in the petitioner's former applicant that each of them had studied the petitioner's technique for a period of several years and had had experience in the application of the technique to various persons. There was, however, no allegation that any of those witnesses had kept case histories of patients who had been referred by the witness to the petitioner for instruction in his technique, and although it appears that each of the three medical witnesses whom the petitioner now desires to call will to some extent be giving evidence of the same character and directed to the same points as the medical evidence referred to in his previous application, I cannot see that this is an argument against the calling of further witnesses. The witnesses the petitioner now desires to call are, judging by the description which he gives of them in his application, persons of some eminence in their particular professions and persons who have had considerable experience in the application of the petitioner's technique, and although other witnesses similarly qualified are to give evidence, It does not seem to me that there is an undue multiplication of witnesses. I agree with Mr Pirow's contention that the petitioner cannot be allowed to call scores or hundreds of his pupils overseas to testify to the same facts again and again, yet in a case of the importance of this case I do not agree that the calling of six witnesses of medical and scientific training,

who have practised and applied the petitioner's technique, is an unreasonable or undue multiplication of witnesses. It must be noted, moreover, that of the three medical witnesses who were mentioned in the petitioner's first application two are general practitioners, and one is a surgeon. Of the three witnesses the petitioner has mentioned in his present application one is a gynaecologist who, in her practice as such has used the petitioner's technique, one holds a diploma in psychological medicine and one is medical consultant engaged upon medical research and the author of several medical and scientific publications. The qualifications, therefore, of the three witnesses mentioned in the present application differ substantially from the qualifications of the medical witnesses referred to in the petitioner's former application. There are further circumstances to which reference can be made. One is that the present petition was signed in August, 1946, but it has not been presented to the Court until today. The explanation of this is that shortly after the return from London of Mr Berrange, petitioner's attorney, he learned that the respondents were about to file an application for the appointment of a commissioner to take evidence of witnesses overseas, and, on the advice of counsel, the present petition was delayed pending the hearing of the respondent's application. That application was granted and the respondents were allowed to call a number of medical witnesses in London. Two are holders of the Nobel Prize for physiology, one is a surgeon, one is an inspector of physical training, one is head of the Virus Inoculation Department of a London hospital and one is head of the Department of Physiology in a London hospital. The respondents, therefore, have considerably broadened the general scope of the expert evidence by electing to call those gentlemen who names are mentioned in their petition, and in an ordinary action, if one of the litigants ascertains or receives information from subpoenaes issued that his opponent is about to call a number of expert witnesses with differing scientific qualifications I can see no reason why he should not in his turn elect to broaden the scope of his evidence and to call witnesses with additional qualifications to the qualifications of those witnesses whom he had previously made up his mind to call and had subpoenaed.

There is a circumstance which, in my opinion, lightens the task of the Court in deciding the present application, and it is that a commissioner has already been appointed to take the evidence of a number of witnesses in London, both for the petitioner and for the respondents, and that that commission has not yet sat and none of the evidence has yet been taken. The present petition adds three names to approximately fifteen names of witnesses whose evidence the parties have already been permitted to take

in London. The calling of these extra witnesses does not necessitate the holding of another commission as would be the case if the commissioner already appointed had concluded his work and had already recorded all the evidence desired. The same commissioner will sit to hear these three witnesses who will sit to hear the other fifteen witnesses and possibly the hearing may be prolonged by a few hours owing to the extra witnesses, but this is a trifling circumstance in view of the apparent importance of the action and in view of the kind of experience which, as has been alleged, the three witnesses who are to be added to the list have had.

Mr Pirow contends that the petitioner is a *peregrinus* who has already been granted the indulgence of a commission and that if he wishes to call any more witnesses they should be brought to South Africa. I cannot see that the mere fact that the petitioner is a *peregrinus* who has already been granted a commission is in any way relevant to the question as to whether he has made out a reasonable case for the calling of the three additional witnesses mentioned in the present petition. It appears that the plaintiff as a *peregrinus* has been required to furnish security in the sum of £2,000 and that one of the grounds on which that security was demanded was the fact that a number of witnesses would be required to give their evidence before a commissioner overseas. While a peregrinus suffers from the disadvantage of being required to give security, it does not seem to me to be just or reasonable that he should be made to suffer additional disadvantages or that his position should in other respects be different from that of a citizen of the country.

A point is made in the replying affidavit, para. 8, to the effect that none of the three witnesses is a scientist of standing in England or elsewhere and that the applicant does not claim that, 'any one of them is a recognised specialist in physical training, neurology, pathology, surgery, internal medicine or bacteriology, i. e., the disciplines of medicine, knowledge of which is essential to evaluate the therapeutic claims of applicant which have been dismissed as baseless by respondents'. I must confess to some difficulty in understanding the contention advanced in this paragraph. I do not see why a gynaecologist, a physician and a medical consultant engaged upon medical research and the author of medical and scientific publications will be unable to give relevant and important evidence, whereas the persons described in para. 8 of the replying affidavit will be able to do so. The technical jargon employed in this paragraph is unimpressive and is more confusing than informative to the lay mind. I am unable to accept the contention set out in para. 7 of the respondents' affidavit that the case histories referred to in the petition are superfluous,

because other witnesses give evidence as to their experience with patients treated by means of the petitioner's technique, nor am I able to accept the contention that the evidence on the psychological aspect of the petitioner's claims to be proved by therapeutic results is irrelevant, because apparently the respondents contend that most of such therapeutic claims are due to psychological influence. These are all questions of fact and cannot be decided on affidavits of this kind. These contentions are mere theory, and it seems to me that the petitioner ought at the least to be allowed to call the witnesses so that the Court, which tries the action will itself be able to determine the value and cogency of such evidence. These points cannot be decided in advance before the witnesses have been called and before their evidence is available.

Mr Pirow contends that the costs of this application should be reserved for decision by the trial Court, or should be given against the petitioner because when the respondents made their application for a commission in March last the petitioner could have made his present application by way of a counter application to the respondents' application. I have considered this point, and it has given me some difficulty, but I have come to the conclusion that very little would have been gained by the filing of a counter application. There is no parallel between this case and the case where a plaintiff sues for a balance owing to him on an account, and the defendants contend that there is a balance in their favour and counterclaim for payment of that balance. Such a case is one single enquiry, and if the defendant failed to make a counterclaim and brought a subsequent action, after the plaintiff's case had been dismissed, he might well find himself penalised in regard to costs, because he would have selected a more expensive way of establishing his claim than he could have done. If the petitioner had presented a counter petition to the respondents' application in March last there would not have been any substantial or material saving of expense. The respondents' application would have been argued and then the petitioner's application would have been argued, and each of these applications would have carried separate costs. The two applications could not have been joined together and argued as one matter. I can find no adequate reason for making a different order as regards costs in this matter from the order usually made.

The application is, therefore, granted in terms of prayers (*a*) and (*b*) .

Applicant's Attorneys: *Berrange & Wasserzug*; Respondents' Attorney: *Government Attorney*.