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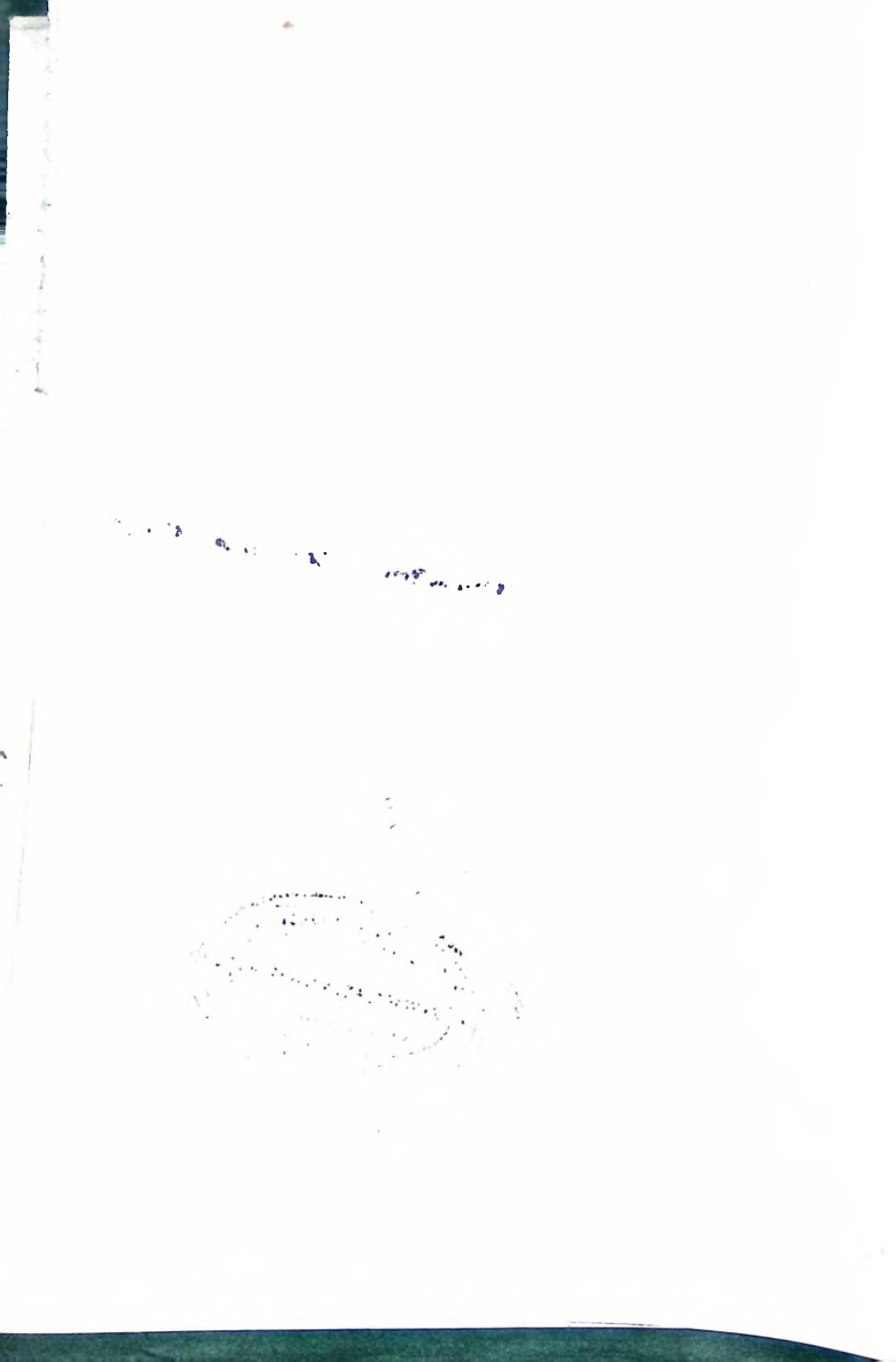

Reports

of Cases decided in

THE SUPREME COURT OF NIGERIA

(on appeal from the High Court of Western Nigeria)

and

THE HIGH COURT OF WESTERN NIGERIA

1959 and 1960

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THE COMMITTEE FOR LAW REPORTING
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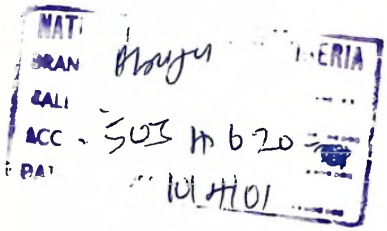

Part I

1959

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CORRIGENDUM

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For "Rewane for petitioner"
read "Odiete for petitioner".

AKENZUA II, OBA OF BENIN ... ... *Plaintiff*

v.

BENIN DIVISIONAL COUNCIL ... ... *Defendant*

[HIGH COURT OF JUSTICE: Thomas, J., 1st September, 1958.]

Contract—claim for damages for breach of concession to exploit timber—no consideration—sufficiency of council minutes as memorandum—Statute of Frauds, 1677—Mercantile Law (Amendment) Act, 1856, section 3—equitable relief—revocation of resolution of council.

The plaintiff, the Oba of Benin and President of the defendant Council, sought to recover damages for breach of contract in that the Council, having granted to him in consideration of services rendered a concessionary right to exploit timber exclusively in a certain area, withdrew the right without cause and without notice. In the alternative the plaintiff claimed a declaration of his rights, an injunction and damages. The consideration was founded in services alleged to have been rendered by the plaintiff to the Council by using his influence as Oba to secure the abandonment by the holder of certain rights of exclusive exploitation of a larger area including that in respect of which the present action was brought.

It was contended on behalf of the defendant Council that there was no consideration; that there was no sufficient memorandum of the terms of the contract to satisfy the Statute of Frauds; that the plaintiff could not be granted equitable relief in that he was a "volunteer" and not a purchaser for value; and that by virtue of the Standing Rules of the Council of which the plaintiff, as President, was well aware, any resolution of the Council could be negatived after the expiration of six months from the passing thereof.

Held: (1) that, as a finding of fact, the plaintiff had rendered no such services as was alleged;

(2) that the minutes of the Council did not contain sufficiently the terms of the agreement;

(3) that the plaintiff was a volunteer and the principle of equitable relief is applicable only to a purchaser for value;

(4) that by accepting a grant by resolution of the Council *simpliciter* the plaintiff took the risk of its revocation and cannot now complain that it has been revoked;

(5) that the plaintiff was not therefore entitled either to damages, injunction or specific performance.

Action dismissed.

Cases cited:

Jones v. *Victoria Graving Dock Co.*, (1877) 2 Q.B.D. 314.

Re Alexander's Timber Co., (1901) 70 L.J., Ch. 767.

Elliot v. *Roberts*, (1921) 107 L.T. 18.

Laythoarp v. *Bryant*, (1836) 2 Bing. (N.C.) 735; (1836) 3 Sc. 238

Walsh v. *Londsdale*, (1882) 21 Ch.D. 9

Groves v. *Groves*, (1829) 3 Y. and J. 163.

Jones and Sons Ltd. v. *Earl of Tankerville*, (1909) 2 Ch. 440.

Benin Civil Suit No. B/16/1956.

Lambo and Akenzua for plaintiff.

Idigbe with Longe and Amu for defendant.

Thomas, J.: The plaintiff's claim against the defendant is for the sum of £20,000 being special and general damages for breach of contract in that in consideration of the services rendered by the plaintiff to the benefit of the defendant then known as the Benin Divisional Native Authority, the said defendant on the 9th November, 1954 granted to the plaintiff concessionary right to exploit timber exclusively on a tract of land known as area B.C.21/2 and without any cause and without notice the defendant withdrew the above mentioned right.

In consequence of the withdrawal of the concessionary right by the said defendant, the plaintiff has suffered heavy financial loss and substantial damage to his established business. And the plaintiff claims damages.

Particulars of Damages

(1) Special Damages—

	£	s	d
(*a*) Loss on Sale of Tractors	2,400	0	0
(*b*) Maintenance of Tractors	96	5	11
(*c*) Cash advance by Flionis and Co. Ltd.	1,876	19	1
(*d*) Cash advance by Agbontaen Brothers for supply of timber	400	0	0
	4,773	5	0
(2) General Damages	15,226	15	0
Total	£ 20,000	0	0

In the alternative the plaintiff claims—

(*a*) A declaration that the plaintiff has the exclusive right to cut timber in area B.C. 21/2 which right is—

(1) perpetual; or

(2) will continue till all the timber in the area is cut; or

(3) will continue till determined by a notice specifying a reasonable future date for the determination and that no notice has been given.

(*b*) An injunction restraining the defendants by themselves or their agents or servants from interfering with the enjoyment by the plaintiff of his rights as declared by the Court in whichever of the aforementioned declarations is adopted by it.

(*c*) Damages for past interference or breach of contract.

(*d*) By way of alternative £20,000 damages for total repudiation of the contract.

The plaintiff's case is that certain areas including area P C. 21/2 had been granted to the United African Co. Ltd. for exclusive exploitation of their timber. From the year 1950, the people of Benin had protested against these grants and when all the agitation failed all sections and persons interested in processing timber approached him and prayed that he should use his high office and influence to secure the release of the five forests and also make the same free areas wherein any Bini contractor could fell and exploit timber.

The Council also approached the plaintiff and promised that in the event of the five forest areas being released by the United Africa Co. Ltd. as a result of his intervention, the Council, Benin Divisional Native Authority, *i.e.*, the predecessor of the defendant, will grant the plaintiff a licence to exploit timber in this forest area B.C.21/2 exclusively.

That the plaintiff intervened because of this promise and that after several negotiations, the Company finally agreed to release the areas and that the plaintiff relying on the said grant and/or licence to exploit timber exclusively in area B.C.21/2 invested substantial sums of money in the business.

That on the 16th November, 1955, the defendant at a meeting of the Council passed a resolution whereby the Council terminated and/or determined the licence and/or right of the plaintiff to exploit timber in the said area B.C.21/2 as he was prevented from obtaining Forestry Department permits to fell timber in the area.

The defendant on its part denies any promise of the area B.C.21/2 as alleged by the plaintiff and say that the Council was approached by the Benin Timber Contractors Association to secure the release of the five areas. That this duty of approaching the African Timber and Plywood Company Limited, was left in the hands of the Council and the plaintiff as the President of the Council and the Oba of Benin at the material time.

That the Company was duly approached at various times by the plaintiff as President and other members of the Council and that in consequence the five areas were released in October 1954.

That at the meeting of the Benin Divisional Native Authority of the 9th November, 1954, the plaintiff pleaded with the defendant that he be allowed to work exclusively on area B.C.21/2 and that after pleading that his income and salary were meagre and that several attempts by the defendant to get the Regional Government to increase his salary had been unsuccessful, the defendant resolved that he be given the exclusive right to work area B.C.21/2.

The defendant says that in consequence of a member's motion debating the need to re-allocate area B.C.21/2 to other indigenes of Benin and as further and recent prayers had been made to the Council by the Benin people, a resolution of the Council was passed on the 16th December, 1955 that permits to fell timber in area B.C.21/2 be no longer given out by the Forest Officer, Benin until further notice.

That due notice of the meeting was sent to the plaintiff, that he failed to attend on the 15th and 16th December, 1955, that he had obtained permits to fell over forty trees in the area B.C.21/2 and that he was still working in the area.

Having listened to the evidence and examined the various documents exhibited in this case, I have first to decide whether in truth and in fact the Benin Divisional Council did request the plaintiff, solely, to approach the African Timber and Plywood Company Limited to release the five areas including B.C.21/2 to the plaintiff and that at the same time they promised him that in consideration of his services he would be granted the sole right of exploiting timber in area B.C.21/2 in perpetuity.

Hereunder are extracts from the exhibits. Exhibit 16, an extract from the minutes of the Administrative Committee meeting held on the 7th October, 1954:

"Item 661. Matters arising from the minutes. Petition by the Benin Timber Contractors Association, B.D.N.A. File 303.

The Chairman, Oba Akenzua II on introducing Mr J. A. Sterling, Chairman of Directors, A.T. and P. Limited; said that the Native Authority was appealing to him to use his good office to consider the request of releasing five of his forest licensed areas B.C. Nos 16/2; 20/2; 21/1; 21/2 and 32/2/2 to the Benin Timber Contractors Association not as a demand of legal right but merely on friendly negotiations".

Mr Sterling agreed to consider the request and on the following day, the 8th October, 1954 he wrote to the Council as follows:—

"Gentlemen,

Agreement dated 30th August, 1948

We refer to the meeting between members of your Council and representatives of this Company on the 7th instant and confirm our Agreement to the deletion of exclusive permission under clause (*i*) of sub-clause B to enter the following forest areas only". (Exhibit 7).

He then listed all the five areas.

On the 16th October, 1954, the Executive Officer of the Council Administration wrote to the Forestry Officer forwarding a letter of the Benin Timber Contractors of the 14th October and the names of the members to whom the various areas had been apportioned. In that list it is significant to note that area B.C.21/2 had been included and allotted for exploitation, not exclusively by the plaintiff, but by the following individuals:—

(1) Agidigbi Uwagboe;

(2) Omɔsede Akenzua;

(3) Sunday Asagbonbu;

(4) Ogbefun Osazuwa.

A copy of this letter was endorsed to the plaintiff on the 16th October, 1954, for his information—exhibits 8A, 8B, 10A and 10B.

On the 24th October, 1954, the minutes of the Administrative Committee show that the plaintiff presided when the following resolutions were passed:—

(1) "That the Forest Officer be informed to set aside the decision of the Native Authority in letter No. B.D.N.A. 303/32 of the 16th October, 1954.

(2) That further decision of the Native Authority on the said matter will be communicated to the Forest Officer in due course." (Exhibit 14).

Exhibit 2 contains the minutes of the meeting of the 9th November, 1954, when the grant was made as alleged by the plaintiff.

Plaintiff as President opened the proceedings.

"Item 4: Five U.A.C. (A.T. and P.) timber areas released for local contractors operation and the allocation of.

"President: Under section 4B of the standing rules of the Benin Divisional Native Authority Council this extraordinary meeting was convened to discuss the question of the five released timber areas by the A.T. and P. Limited. I have

done my best to see that A.T. and P. Limited released five of their licensed timber areas by friendly negotiations. Before you discuss the matter I wish to request you to allow me to work area B.C.21/2 exclusively out of the five released areas.

"The Council had made efforts to increase my reduced salary and entertainment allowance. The Council had made several recommendations to Regional Government in this respect but unfortunately it failed. The Council did its best which I appreciated. My financial position is still as before. No improvement, I should be grateful if the Council would allow me to work, therefore, area B.C.21/2 exclusively. Thank you".

The matter was debated and a unanimous resolution was passed.

"Resolved that His Highness Akenzua II, C.M.G., the Oba of Benin be given exclusive right to work area B.C.21/2".

It is quite clear from all the above extracts that the resolution was never made before the areas were released or as a promise for the plaintiff's to get the areas released.

I am of the opinion that there was no consideration whatsoever given, by the plaintiff.

The weight of evidence in my opinion favours the contention of the defendant Council rather than that of the plaintiff and I accept the defendant's version of the circumstances in which the resolution was made allocating area B.C.21/2 to the plaintiff exclusively on the 9th November, 1954.

Were it otherwise, plaintiff would have protested immediately against the letter of the 16th October, 1954, written to the Forestry Department by the Executive Officer of the Council and which was endorsed to him for his information, stating that three other individuals were entitled to share in the exploitation of area B.C.21/2 with one O. Akenzua.

(2) Plaintiff on the 9th of November, 1954, would have had no necessity to plead with the Council and discuss his financial position urging them to allocate the area to him so that he might have a means of supplementing his income. Because if his version was correct, he had already received the Council's promise for his promise to help release the five areas.

(3) Exhibit 17 tendered by the defendant is an agreement between the plaintiff as licensee and the Benin Native Authority as licensor in respect of another Forest area made in 1952 to take effect as from 1950 and to run for twenty years. This was a grant made by deed and for which the plaintiff agreed to give the Council very valuable consideration.

It is rather odd, in these circumstances, that the plaintiff could imagine that he could become the licensee in perpetuity of a very vast area of land within which to exploit timber by the passing of the Council's resolution, *simpliciter*, and without giving any valuable consideration whatsoever.

It was urged by Counsel for the plaintiff that a Company's minute book had been accepted as satisfying "some memorandum or note thereof in writing", citing *Jones* v. *Victoria Graving Dock Co.*, (1877) 2 Q.B.D. 314.

The Statute of Frauds, 1677, requires that the defendant or "some other person thereunto by him lawfully authorised" should have signed the memorandum.

Now the minutes of the defendant Council were signed by the plaintiff as Chairman. There is no argument that he had lawful authority to sign the minutes. Though this point was not raised at the trial, it is debatable whether he could lawfully bind the Council when the latter had denied the existence of a contract in a matter in which his personal interests are involved.

In any case however, the learned author of Chitty's "Contracts", 20th edition, at page 128, states the law as follows:—

"The Statute of Frauds does not require a formal contract drawn up with technical precision. The requirement is of either "the agreement" sued upon, "or some memorandum or note thereof", in writing signed by the party to be charged. Any memorandum signed by the party and in existence at the time when the action is brought, which names, or so describes as to identify, the contracting parties, and which contains either expressly or by reference to other written papers, the terms of the agreement, is sufficient, although it be merely a recognition or adoption of a prior written statement of such terms not signed by the party".

In the following cases *Re Alexander's Timber Co.* (1901) 70 L.J.Ch. 767; *Elliot* v. *Roberts*, (1921) 107 L.T. 18; 28 T.L.R. 436, it was decided that an agreement of service for five years which does not state the date when the service is to begin does not sufficiently contain the terms of the agreement.

In the instant case I am of the opinion that the minutes of the meeting of the 9th November, 1954, do not sufficiently contain the terms of the agreement.

Moreover the Mercantile Law (Amendment) Act, 1856, 19 and 20 Vict. c. 97, section 3, requires that the consideration should appear upon the face of the document by which it is to be proved, because the intention of that Statute was that the agreement should be signed by the party chargeable therewith: *per* TINDAL, C.J., *Laythoarp* v. *Bryant* (1836) 2 Bing. (N.C.) 735; (1836) 3 Sc. 238.

The right to extract timber, as in this case, is known as *profits a prendre* and is always created by deed.

I have taken into consideration the equitable principle laid down in *Walsh* v. *Londsdale* (1882) 21 Ch. D. 9. It is inapplicable in this case as the plaintiff is a volunteer and equity will not assist a volunteer but a purchaser for value. *Groves* v. *Groves* (1829) 3 Y. & J. 163 Digest, Volume 42, art. 42, page 431.

It was argued by the plaintiff's Counsel that the purported grant to the plaintiff was in perpetuity.

This contention is in my view not well founded in that the plaintiff as President of the Council is well aware that by the standing rules of the Council, No. 17, any resolution can be negatived at the expiration of six months after the passing thereof and the plaintiff by accepting a grant by a resolution of the Council (*simpliciter*) took the risk of such a resolution being negatived at any time after the expiration of six months or at any time thereafter.

He cannot, now, in my view complain in this respect because it appears to me that the Council could by resolution unmake what it had made by resolution.

Moreover, the Council's resolution was to stop the Forestry Department from issuing further permits to fell timber in the area concerned. The plaintiff testified

that he was still in April 1956, abstracting timber in the area for which permits had been issued to him, prior to the adverse resolution. It is obvious therefore that as a licensee he has not been prevented from going into the area.

No evidence has been tendered that plaintiff had been prevented from extracting timber for which permits had already been issued to him in that area.

He cannot however enforce any action against the defendants for breach of contract or for specific performance.

The case of *Jones and Sons Ltd.* v. *The Earl of Tankerville* (1909) 2 Ch. 440 must be distinguished. The plaintiffs in that case had an enforceable contract, and had given valuable consideration as distinguished from a volunteer.

I regret that I am unable to find any merit in the plaintiff's case and that I am unable to find for him in respect of any of his claims or grant him any of the reliefs he seeks.

Action dismissed.

MOSES OBANOR ... ... *Appellant*

v.

CHIEF CONSERVATOR OF FORESTS ... ... *Respondent*

[FEDERAL SUPREME COURT: Ademola, F.C.J., Brett and Mbanefo; F.JJ., 22nd September, 1958.]

Appeal from Magistrate's Court—dismissal—power of High Court thereafter to order new trial—section 109, Magistrate's Court Law, 1954.

A charge against the appellant was dismissed by the magistrate and an appeal by the present respondent was dismissed by the High Court. After the order of dismissal had been made the appellate judge heard further argument and thereafter remitted the case to the court below for retrial. On appeal to the Federal Supreme Court.

Held: that the appellate court had no power after making an order of dismissal to review this order and remit the case for retrial.

Appeal allowed.

[*Note.*—The decision of the High Court in this case was reported in 1958 W.R.N.L.R. 43].

Appeal from High Court, Benin, No. F.S.C.126/1958.

Mtake for appellant.

Oki, Acting Legal Draftsman (*Odutola, Crown Counsel*, with him) for respondent.

Ademola, F.C.J.: This is an appeal from an order made by the Judge, High Court, Benin, after a judgment dismissing an appeal by the Conservator of Forests, Western Region, from a judgment by the Chief Magistrate, Benin. The learned Magistrate dismissed a charge against the present appellant. The Conservator of Forests appealed to the High Court against that order of dismissal. The learned Judge, after hearing the appeal, dismissed it. After his order for dismissal, he was persuaded by the learned Crown Counsel who argued the case of the Conservator of Forests to listen to arguments by him that the case should be sent back to the court below for retrial. After a lengthy argument, the learned Judge adjourned the matter for a few days. He then wrote a judgment allowing the application of the learned Crown Counsel and remitted the case to the court below for a retrial.

It is against that order that an appeal is now before us.

The learned Acting Legal Draftsman, rightly in our view, pointed out that he could not support the order made by the learned trial Judge.

Section 109 of the Magistrates' Courts (Western Region), No. 5 of 1955 is the law on the point. It does not provide for a judge, when hearing appeals, after he has delivered his judgment to review that judgment. Section 109 reads—

"The Court shall not review any judgment or order once made and delivered by it save where and in such cases similar review might be made by Her Majesty's Court in England".

In the present case, the learned trial Judge became *functus officio* once he had delivered his judgment dismissing the appeal. There is no power of review given to him by section 109 except in cases of correction of mistakes and the like which power of review Her Majesty's Judges in England do exercise.

To rehear a case is beyond the exercise of the power of review.

In the circumstances, this appeal will be allowed. The judgment of the learned Judge dismissing the appeal before him stands. His subsequent order is hereby annulled.

Appeal allowed and order for retrial annuled.

COMMISSIONER OF POLICE ... ... *Respondent*

v.

S. F. FAGBOHUN ... ... *Appellant*

[HIGH COURT OF JUSTICE: Quashie-Idun, Ag.J., 7th October, 1958.]

Criminal Law and Procedure—using motor vehicle not insured against "third party" risks—disqualification from driving—section 3, Motor Vehicles (Third Party Insurance) Ordinance, Cap. 139—no "special reasons" recorded—affidavit on motion to suspend disqualification.

The appellant was convicted under sub-section (2) of section 3 of the Motor Vehicle (Third Party Insurance) Ordinance, Cap. 139, and was disqualified from holding or obtaining a driving licence. No statement was made to the Magistrate by way of giving reasons why he should not be so disqualified, but the appellant filed an affidavit in the High Court on a motion to suspend the disqualification.

Held: that the contents of the affidavit cannot be said to be facts brought to the notice of the Magistrate at the hearing and cannot be accepted by the High Court as special reasons why the Magistrate should not have made the order of disqualification.

Appeal dismissed.

Criminal Appeal from Magistrate's Court, Ibadan, No. I/28CA/58.

Chukura for appellant.

Odutola, Crown Counsel, for respondent.

Quashie-Idun, Ag. J.: I do not call upon the respondent. Section 3, sub-section (2) of Cap. 139, makes it imperative on a magistrate to disqualify from driving a person convicted of using a vehicle not insured against "Third Party" risks.

The appellant pleaded guilty to the charge and did not make any statement to the Magistrate as an *allocutus* by way of giving reasons why he should not be disqualified from driving. The affidavit supporting a motion *ex-parte* was filed by the appellant asking for a suspension of the order of disqualification.

In my view the contents of the affidavit cannot be accepted by this Court as special reasons why the Magistrate should not have made the order of disqualification.

The contents cannot be said to be facts brought to the notice of the Magistrate at the hearing of the case.

Appeal dismissed.

RAYMOND C. I. OGBOLUMANI ... ... *Petitioner*

v.

S. B. K. OKOBI AND MICHAEL OYANA ... *Respondents*

[HIGH COURT OF JUSTICE: Thomas, J., 25th October, 1958.]

Election Petition—time of presentation of petition—date upon which fees paid—presentation of petition and payment of fees to be contemporaneous—Supreme Court (Election Petition) Rules, 1951, rule 5 (4)—Parliamentary and Local Government Electoral Regulations, 1955, regulation 108 (4)—Matrimonial Causes Act, 1937, section 2 as analogy.

On a motion to add a third respondent to an election petition presented by the unsuccessful candidate it was objected that the petition having been filed out of time was not before the court. The election had been held on 12th April, 1958, and the petition was prepared and signed on 8th May, 1958. The fees were not paid however until 9th June, and the petition not filed by the Registrar until then, although it was stated that the petition had been handed to him on 8th May.

Held: that the presentation of the petition and the payment of fees must be contemporaneous and that the fees not having been paid until after the time within which the petition must be presented, the petition was out of time.

Petition struck out.

Case cited:

Alston v. *Alston* (1946) P., page 203.

Benin Civil Suit No. W/43/1958.

Balonwu for petitioner.

Oki, Senior Crown Counsel with *Fasinro, Crown Counsel,* for first respondent.

Akinloye for second respondent.

Thomas, J.: The petitioner and the second respondent Michael Oyana were both candidates at an election held at Asaba on the 12th day of April when the latter was declared the successful candidate.

A petition was prepared by the petitioner and signed at Asaba, it appears on the 8th day of May, 1958. This was at page 2 of the petition. Page 3 of the petition which gave the address for service and the occupier of the house and the name of the petitioner's solicitor had the date left blank.

The petition on the face of it shows that it was filed with all the necessary documents on the 9th June, 1958.

The petitioner's security similarly executed his recognisance on the 9th day of June, 1958. The affidavit of sufficiency was also dated the 9th day of June, 1958.

The petitioner's next step was to file a motion for a third respondent to appear and be joined in the suit.

On this motion coming up for hearing, Counsel for the respondents opposed the motion in that it was submitted that there was no petition before the Court in that the petition was not filed within one month as required by the Regulations 108 (4) which enacts—

"The petition shall be presented within one month after the date on which the election was held".

Counsel for the petitioner informed the Court that the documents were all handed into the Registrar on the 8th May and he failed to issue receipts for payment then, but did so on the 9th June and that his action should not prejudice the petitioner.

Counsel for petitioner was afforded the opportunity of filing an affidavit.

On the resumption of the argument he argued that presentation of the petition and payment of fees in respect thereof were two separate aspects. That in this case presentation was within the prescribed one month and that the fact that the payment was not made till June did not invalidate the petition.

But Counsel for the respondents opposed this view and argued that presentation of the petition and payment in respect thereof must be contemporaneous.

I think the latter view is a correct statement of the law in view of the enactment in Rule 5 (4) of the Supreme Court (Election Petition) Rules, 1951.

"5. (4) The petitioner or Solicitor shall, at the time of presenting the petition, pay the fees for the service and publication thereof, and for certifying the copies. He shall also deposit in court, pending the direction of the Court under sub-paragraph (*d*) of paragraph (1) of Rule 15, an amount sufficient to defray the expenses of publishing the petition in a local newspaper. In default of such payment and deposit the petition shall not be received unless the Court otherwise ordered".

This petition had been received by the Registrar without the order that might have saved it.

I might be permitted to refer to the Matrimonial Causes Act, 1937, section 2.

"A petition for divorce may be presented to the High Court.....on the ground that the respondent.....(*b*) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition".

This enactment was silent about payment but I will refer to passages in the judgment of Willmer, J., in *Alston* v. *Alston* (1946) P. 203, at page 204.

"I think it right that I should say in a few words what I think of this case, because I believe it to raise a novel point. According to section 2 of the Matrimonial Causes Act, 1937, the petitioner, if he is to succeed, must establish a period of desertion of at least three years immediately preceding the presentation of the petition. It therefore becomes obvious that it is vital to decide at what stage a petition is presented. If the words the "presentation of the petition" refer to the date when the petitioner signs it and swears his affidavit, in this case the three years had not elapsed. If, on the other hand, the words refer to the date when it is filed in Court, then the three years have elapsed and the case having otherwise been completely proved, the petitioner is entitled to his decree.

"There appears strangely enough to be no authority which Counsel has been able to find as to what presentation of the petition means..... It has been argued with some considerable force that a petition can only be said to be presented when it actually reaches the Court. That must be, and can only be, on the day when the petition is filed..... I think both on the merits of the case and also on the technical ground, I must decide that a petition is presented when it is filed with the Court, that is to say, in this case on 31st October, 1945".

I must therefore hold that the petition was filed out of time and that therefore this Court cannot entertain it.

Petition struck out.

BENSON OKOEBOR ... ... *Petitioner*

v.

PATRICK BARE
THE ELECTORAL OFFICER
THE RETURNING OFFICER ... ... *Respondents*

[HIGH COURT OF JUSTICE: Thomas, J., 25th October, 1958.]

Election Petition—non-compliance with rules—Supreme Court (Election Petitions) Rules, 1951, rules 6 and 58—power of court to rectify—provisions of rule mandatory—time within which petition to be presented—Parliamentary and Local Government Electoral Regulations, 1955—regulation 108 (4).

On a petition to determine that the petitioner was duly nominated as a candidate for election under the Parliamentary and Local Government Electoral Regulations, 1955, and that the first respondent was not duly returned, objection was taken that the petitioner had not complied with rule 6 of the Supreme Court (Election Petitions) Rules, 1951, in regard to particulars as to address for service to be stated at the foot of the petition.

Held: that there had been non-compliance with the rule, which, the rule being mandatory, the court was not in a position to rectify and that an attempt to cure the defect would be acting counter to the spirit of regulation 108 (4) of the Electoral Regulations which requires the petition to be presented within one month.

Per curiam: It might have been otherwise if the petition having been filed in error in the first instance, the petitioner had applied, within the period of thirty days, for an amendment.

Petition dismissed.

Case cited:

The Shrewsbury Petition, Young and another v. *Figgins* (1868) 19 L.T. 499.

Benin Civil Suit No. B/44/1958.

Aghahowa for petitioner.

Boyo for respondent.

Thomas, J.: The nominations for election for a candidate for Eroh Ward in Uromi-Uzea, under the Parliamentary and Local Government Electoral Regulations, 1955, closed on the 26th April, 1958, when the petitioner and the first respondent were alleged to have been duly nominated.

It is also alleged that the Electoral Officer said that Patrick Bare, only, was nominated and that he was duly returned unopposed.

On the 3rd day of June, therefore, the petitioner filed a petition praying this Court to determine that petitioner stood duly nominated and that the first respondent Patrick Bare was not duly returned and that his return was void.

On the petition coming up for trial, Boyo for the first respondent objected that the petitioner had not complied with the following provisons of rule 6 of the Supreme Court (Election Petitions) Rules, 1951:—

"6. (4) At the foot of the petition there shall be stated an address for service within three miles of a Post Office in the Judicial Division, and the name of its occupier, at which address documents intended for the petition may be left. If an address for service and its occupier are not stated, the petition shall not be filed unless the Court otherwise orders".

"6. (5) At the foot of the petition there shall be added a note signed by the petitioner giving the name of the Solicitor, if any, or stating that he acts for himself, as the case may be,".

The original copy of the petition indicated the name of the petitioner's Solicitor and was signed by the petitioner, but it appeared that the copy served on first respondent was not so signed by the petitioner.

Aghahowa for the petitioner did not dispute these omissions but urged that they are formal defects and prayed in aid rule 58 (5) which states—

"An election petition shall not be defeated by any formal objection".

I have now to determine whether these objections are formal or not.

Rule 6 (1) provides for the contents of an election petition and states—"An election petition shall contain the following"—and then goes on to list the requirements as to contents including the two omitted statements of facts to which Counsel for the first respondent has taken exception.

There is a similar provision in the English Rules as we have in Rule 58 (5) and in the single case reported in the English and Empire Digest, Vol. 20, at page 154, article 1280, the principle is stated thus:—

"No technical or formal objections will be allowed to prevail where the matters objected to can be rectified by the Judge without prejudice to either side"—

The Shrewsbury Petition, Young and another v. *Figgins* (1868) 19 L.T. 499.

I certainly am of the opinion that the defects could be cured without prejudice to either side. But I do not think that I am in a position to rectify what is lacking here in view of the mandatory nature of the provisions of Rule 6.

It does not appear that the contents were fully set out as required by Rule 6 of the Supreme Court (Election Petitions) Rules, 1951. The practice of the Courts must be exactly what the Rules provide for.

Moreover the Parliamentary and Local Government Regulations by Regulation 108 (4) enacted as follows:—

"The petition shall be presented within one month after the date on which the election was held".

It appears to me that this Court, were it to attempt to cure these defects would be acting counter to the spirit of the above Regulation.

It might have been otherwise if the petition, having been filed in error in the first instance, the petitioner had applied within the period of thirty days provided, for an amendment.

I regret therefore that it is not within my province to cure the defects and I must uphold the contention. The defects are therefore not merely formal and the petitioners suit therefore fails.

Petition dismissed.

CHIEF D. T. AKINBIYI ... ... *Appellant*

v.

RALIATU ANIKE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Jibowu, C.J., 27th October, 1958.]

Detinue—particulars and value of goods detained—proof—nature of relief claimed—return of goods wrongfully detained—power of court to order payment of value—Order 13, rule 6 of the English Rules of the Supreme Court as analogy—

Evidence—admissibility of list of goods—production by party claiming—no objection made at trial.

The appellant sued to recover a sum alleged to have been paid by him on behalf of the respondent who counterclaimed for the return of goods wrongfully detained. The magistrate dismissed the appellant's claim and entered judgment for the respondent on her counterclaim for the return of the goods or their value. In support of her claim the respondent had tendered in evidence a list of the goods which she alleged the appellant had detained, which contained also the value of the goods. This list was admitted in evidence by the magistrate without objection by the appellant, who also tendered a list of goods belonging to the respondent which he admitted having in his possession. On appeal to the High Court it was contended that the respondent's list was wrongly admitted in evidence and that the magistrate erred in awarding the full value claimed in the absence of proof. It was further contended that the magistrate erred in giving judgment for the value of the goods as an alternative to the order for their return in the absence of an alternative claim.

Held: (1) that Counsel for the appellant having taken no objection to the admissibility of the list at the trial the appellant could not be heard to raise such objection on appeal;

(2) that failure to cross-examine the respondent as to the accuracy of the list produced by her amounted to an admission that it was correct;

(3) that judgment may be entered for the value of the goods although not claimed in the writ.

[*Note.*—The appeal against the dismissal of the appellant's claim was dismissed on grounds which do not call for report].

Appeal dismissed.

Cases cited:

Akunne v. *Ekwuno and others*, 14 W.A.C.A. 59.

Pawly v. *Holly*, 96 E.R. 504; 2 Black. W. 853.

Armory v. *Delamirie*, (1721) 1 Stra. 505.

Bailey v. *Gill*, (1919) 1 K.B. 41.

Ibadan Civil Appeal No. I/38A/58.

Agbaje for appellant.

Craig for respondent.

Jibowu, C.J.: This is an appeal by the appellant against the judgment of Mr Olayinka Odumosu, Senior Magistrate, dated the 9th January, 1958, whereby he (*a*) dismissed the appellant's claim for £25 13*s* 6*d* being money paid by him on behalf of the respondent to one Rayimi A. Asuni and (*b*) gave judgment for the respondent on her

counter-claim for the return of the respondent's goods in the appellant's possession or their value, £200, with costs of £5 5*s* 0*d* on the appellant's claim and £15 15*s* 0*d* on the respondent's counter-claim.

Mr Agbaje, Counsel for the appellant, first argued together the 2nd and 3rd grounds of appeal, which read:

"2. The learned trial Magistrate erred in admitting in evidence exhibit G being particulars of counter-claim prepared by the defendant's Solicitor and he therefore erred in basing his judgment on the counter-claim on it.

3. The learned trial Magistrate erred in giving judgment for the defendant on her counter-claim particulars of which have neither been proved nor evidence led on it".

Exhibit G is a list of the goods which the respondent stated that the appellant had detained and refused to deliver up in spite of several demands, and the list contains the value of the goods.

The respondent's evidence on the point was:

"I am claiming all my properties in his house. I have taken action in respect of the properties up to £200 so as to keep within the jurisdiction of this Court. The properties I have in his house are worth more than £200. I have made a list of those I am now claiming. I have served a list on the plaintiff: I hereby tender a copy of the list. No objection. Admitted and marked exhibit G".

It is to be observed that when the list was tendered in evidence, the appellant's Counsel said he had no objection to the inventory being admitted in evidence, and it was accordingly admitted, and marked as an exhibit. I accept the submission of Mr Craig for the respondent that the appellant cannot now be heard to raise an objection against the admissibility of the exhibit. Similar objection was raised, but was not entertained by W.A.C.A., in *Chukwura Akunne* v. *Matthias Ekwuno and two others*, 14 W.A.C.A. 59, page 60.

The respondent made the list, exhibit G, part of her case by producing it, and getting it marked as an exhibit. There is, therefore, no substance in these grounds of appeal, which therefore fail.

The next ground of appeal argued by Mr Agbaje was the 4th ground, which reads:

"The learned trial Magistrate misdirected himself as to the onus of proof with regard to the articles and the prices or value attached by the defendant to the articles as contained in exhibit G and he therefore erred in awarding the full value claimed in the absence of proof or evidence".

On this point Mr Craig rightly pointed out that the appellant had relied on exhibit F which is a list of goods belonging to the respondent which the appellant admitted he had in his possession. The respondent testified that the list, exhibit F, did not contain all her goods, and she produced exhibit G which, she testified, contained a list of her goods in the appellant's house. The learned Magistrate went to the appellant's house to see the goods in exhibit F. The appellant could not produce all the goods, and the Magistrate discovered that some items on exhibit F were not correct. He found eight earrings where only seven were recorded in exhibit F; he found ten bangles instead of eight recorded and six beads instead of one recorded in exhibit F.

The inventory, exhibit F, was said to have been taken in the absence of the respondent, but in the presence of three witnesses, who did not sign it nor was any of them called as a witness. The learned Magistrate is, in my view, right in rejecting exhibit F as a correct inventory of respondent's goods, and in accepting respondent's list, exhibit G, as showing her goods in appellant's house.

Now although the appellant was served with a counter-claim on which the respondent claimed the return of her goods valued at £200, and though she further served a copy of exhibit G again on the appellant, and though she tendered exhibit G in evidence, she was not cross-examined as to the goods on exhibit G nor as to the prices listed against the separate articles. It was the duty of appellant's Counsel at the trial to cross-examine the respondent as regards the goods she claimed on exhibit G and to cross-examine as to their value. His failure to do so amounted to an admission of their correctness.

The learned Magistrate has, therefore, done nothing wrong in assessing the value of the goods at the unchallenged value placed on them by the respondent.

It seems to me that the principal enunciated in *Armory* v. *Delamirie* (1721) 1 Stra. 505, can be invoked in support of the Magistrate's acceptance of the value placed on the detained goods by the respondent.

Mr Agbaje submitted that the price of each item should have been listed, and cited *Pawly* v. *Holly*, 96 E.R. 504. This case, however, does not support his contention. The head note of the case reads:

"In detinue, the values of the several parcels need not be laid seperately in the declaration".

In that case, there was a claim for return of two books of entries of admissions and surrenders in a copyhold manor, two other books belonging to the said manor, and divers court rolls and writings to the value of £500. A verdict was found for the plaintiff as to the two books of entries of admissions valued £100 each with £20 damages and 40*s* costs.

In this case, there was a price given for each set of articles claimed, and the value of each can be determined, should some of the articles be returned and others not.

The 4th ground of appeal therefore fails.

In arguing the 4th ground, Mr Agbaje pointed out that the counter-claim was only a claim for the return of goods wrongfully detained by the appellant and did not include a claim for the value of the goods so detained. He therefore argued that the learned Magistrate was wrong in giving judgment for the value of the goods as an alternative to the order for the return of the goods. He asked the Court to send the counter-claim back to the Magistrate, and Mr Craig asked the Court to amend the writ to include a claim for the value of the goods.

There is no point in sending the counter-claim back to the Magistrate as he has not got the power to amend the writ at this stage. Besides, the respondent had made out a case to justify the verdict for the return of the goods.

This is a case of detinue, the gist of which is the wrongful detention of goods. In an action for detinue the practice has been for the value of the goods to be included in the claim for their return, but it would appear that it is not necessary to include the

alternative claim as judgment in an action of detinue is at the discretion of the Court. The Court usually includes the alternative order in case the defendant is unwilling or not in a position to return the specific goods claimed. If the order for the return of the goods or their value is not obeyed within the specified time, the plaintiff may apply for a warrant of delivery to enforce the order for delivery of the specific goods: *see Bailey* v. *Gill*, (1919) 1 K.B. 41.

In that case the claim was for the return of a sewing machine belonging to the plaintiff and wrongfully detained by the defendant. It did not include a claim for its value, but judgment was given for the plaintiff and the County Court ordered the defendant to return the sewing machine or pay its value assessed at £6 10*s* 0*d* within a specified time. That case seems to me to be on all fours with this present case.

The provisions of Order 13, Rule 6 (1) and (2), R.S.C. in England, in my view, support the proposition that the power of the Court to order as an alternative the payment of the value of the goods detained does not depend on such a claim being made on the writ of summons.

Order 13, Rule 6 (1) reads:

"If the claim endorsed on the writ is, as against any defendant, for the detention of goods only, and the defendant fails to appear, the plaintiff may enter interlocutory judgment against him for the return of the goods or their value to be assessed and costs, and at the option of the plaintiff, interlocutory judgment for the value of the goods to be assessed and costs".

Order 13, Rule 6 (2) relates to a case where the endorsement on the writ is for detention of goods and also for unliquidated damages but no other claim, and yet "the plaintiff may enter judgment for the return of the goods or their value to be assessed, damages to be assessed and costs" *or* at the option of the plaintiff "for value of the goods to be assessed, damages to be assessed and costs".

Under this Rule judgment may be entered for the value of the goods to be assessed, although not claimed on the writ of summons.

I therefore hold that the order made by the learned Magistrate was in order and that no amendment to the writ is required or necessary.

The 5th ground of appeal was struck out for vagueness.

Coming now to the 1st ground of appeal which reads:

"The judgment on both the plaintiff's claim and the defendant's counter-claim is against the weight of evidence,"

there is no substance in this ground of appeal.

With regard to the respondent's counter-claim, the appellant himself admitted he had detained respondent's goods, and he could not justify the detention in spite of repeated demands for their return. The respondent was therefore entitled to the verdict which she got.

Appeal dismissed with costs.

OBADIAH KURRAH ... ... *Petitioner*

v.

IYODO ... ... *Respondent*

[HIGH COURT OF JUSTICE: Morgan, J., 28th October, 1958.]

Election Petition—application for enlargement of time within which to present petition—Supreme Court Rules, Order XI, Rule 3—court has no power to enlarge time—Regulations 172 (3) of the Western House of Assembly (Elected Members) Electoral Regulations, 1951, revoked by Regulation 125 of the Parliamentary and Local Government Electoral Regulations, 1955—Regulation 108 (4) thereof.

On an application made under the Supreme Court Rules, Order XI, rule 3 for an enlargement of time within which to present an election petition.

Held: (1) that the rule under which the application was made applies only to time fixed by the Supreme Court Rules, or any judgement, order or rule of the court and does not apply to time fixed by the Electoral Regulations;

(2) that the provision of the relevant Electoral Regulations as to the time within which a petition shall be presented is imperative and there being no regulation enabling the court to enlarge the time, the court has no such power.

Application refused.

Akure Civil Suit No. AK/73/58.

Fagbemi for petitioner.

Oki, Senior Crown Counsel, for respondent.

Morgan, J.: On the 14th October, 1958 I ruled that there was no power in the Court, under Order XI, rule 3 of the Supreme Court Rules, to enlarge the time within which to present an election petition because the rule only enabled the Court to enlarge the time fixed by "these rules, or by any judgment, order, or rule of the Court" for doing any act or taking any proceeding.

I adjourned to see what provision if any was made by the Parliamentary and Local Government Electoral Regulations, 1955, and since then I have had the opportunity of going through not only the 1955 Regulations but also the Western House of Assembly (Elected Members) Electoral Regulations, 1951, which they revoked by Regulation 125.

It will be observed that Regulation 172 (3) of the 1951 Regulations contains a similar provision to Regulation 108 (4) of the 1955 Regulations and that neither the 1951 Regulations nor the 1955 Regulations gave any power to the Court to enlarge the time within which to present an election petition. Regulation 108 (4) of the 1955 Regulations provides—

"The petition shall be presented within one month after the date on which the election was held".

In my view the interpretation of the word "shall" in the regulation is "must" because *prima facie* "shall" is imperative or peremptory not permissive. Therefore unless another section of the regulations makes a provision for enlargement of time within which to present an election petition, either expressly or by giving to the Court a discretion to extend the time, then the Court has, in my view, no authority to grant such an extension. I think that this is the view to take, after due consideration of the

Regulations as a whole, because of the peculiar nature of an election petition and the importance in the public interest of an early determination of all disputes relating to the results of an election.

In this case what the petitioner has filed was a copy of his intended petition which he filed along with the motion praying the Court to make the order for security for costs. There is therefore no petition before the Court, and in my view the Court has no power to enlarge the time within which the petition should be filed. Application for extension of time is therefore refused.

Application refused with costs.

COMMISSIONER OF POLICE ... ... *Respondent*

v.

TIJANI OLAOPA AND OTHERS ... ... *Appellants*

[HIGH COURT OF JUSTICE: Quashie-Idun, Ag.J., 28th October, 1958.]

Criminal Law and Procedure—inspection of locus in quo—note of proceedings entered on record—witnesses not re-called on resumption of trial in Court—duty of magistrate—irregularities not involving miscarriage of justice.

After the case for the prosecution had been closed on the hearing of charges against the appellants for causing damage to property the court went to the village where the offences were alleged to have taken place. Certain witnesses, in the presence of the appellants and their Counsel, showed certain spots to the magistrate, who noted what was stated by the witnesses, and that Counsel was given an opportunity to question the witnesses, but did not do so. On the resumption of the trial in court the witnesses were not re-called to give evidence.

Held: that non-compliance with the procedure laid down in *Rex* v. *Dogbe* was not an irregularity having regard to the manner in which the magistrate conducted the inspection and that even if it was an irregularity it led to no miscarriage of justice.

Appeal dismissed.

Cases cited:

R. v. *Dogbe*, 12 W.A.C.A. 184.

I.G.P. v. *Adekunle and others*, 1955-56 W.R.N.L.R. 16.

I.G.P. v. *Adunfe*, 1957 W.R.N.L.R. 179.

I.G.P. v. *Bello and others*, 1957 W.R.N.L.R. 83.

Criminal Appeal from Magistrate Court, Ibadan No. I/20CA/58.

Akinjide for appellants.

Mrs Balogun, Crown Counsel, for respondent.

Quashie-Idun, Ag.J.: The appellants were convicted on charges of causing damage to property.

The main ground of appeal urged on behalf of the appellants is that the learned Magistrate erred in law by failure to comply with the procedure laid down in the case of *Rex* v. *Dogbe*, 12 W.A.C.A., at page 185.

It is submitted in support of this ground that after the inspection of the *locus in quo* the Magistrate should have recalled the witnesses for them to give evidence of what they pointed out at the inspection and for them to be cross-examined.

It is submitted that that would have been in conformity with the procedure laid down in the case of *Rex* v. *Dogbe* and that the non-compliance with that procedure renders the trial of the appellants null and void.

It appears from the record of proceedings that after the case for the prosecution had been closed, the Court went to Ikereku Village on the 23rd April, 1958, where the offences were alleged to have taken place. In the presence of the appellants (except the 6th appellant) and their Counsel, 1st witness for the prosecution showed the Court where he said he hid and watched what the appellants did. At the request of Counsel

for the accused the first witness for the prosecution again showed the same positions to the Court. On the way back to Ibadan the 5th prosecution witness also pointed out to the Court in the presence of the accused and their Counsel where he had said he hid and saw the persons who caused damage to his house.

The Magistrate then made a note on the record that Counsel for the defence put no question to the witness. The Court then resumed at Ibadan and adjourned the hearing.

After a number of adjournments hearing was resumed on the 28th April, 1958, when the accused persons began their defence. This Court is asked to say that because the witnesses were not recalled to give evidence at the resumption of the hearing at Ibadan, the trial is therefore vitiated.

The procedure adopted by the trial Judge in the case of *Rex* v. *Dogbe* was entirely different from the procedure which was adopted by the Magistrate in the present case. In the case cited the presiding Judge, (Quashie-Idun then Acting Judge) visited the *locus in quo* where the alleged murder took place. He made no notes on the Record Book. He only made notes on a piece of paper at the inspection. When the trial was resumed at the Court in Keta, the trial Judge recorded in his Record Book the notes he had made at the inspection and read them out in Court. No opportunity was given to the accused or his Counsel to examine any of the witnesses who attended the inspection, neither was there any opportunity given to Counsel for the accused to challenge the correctness of the notes recorded by the trial Judge. The Appeal Court therefore held that the witnesses who took part in the inspection should have been put into the witness box to state on oath what part they took in the inspection and then cross-examined.

In the present case, it appears that there was not merely an inspection of the *locus in quo* but that the Court moved to the scene and the Magistrate made notes of what was stated by the prosecution witnesses on the spot. It was not a question of transcribing on the record notes which the Magistrate had made at the inspection. There is also the fact that opportunity was given to Counsel for the accused to put questions to the witnesses at the inspection. Although there is nothing on record to show that the witnesses were reminded of their oath, it is my view that as they had previously given evidence and attended the inspection for the purpose of pointing out to the Magistrate where they said they had hidden, the omission to remind them of their oath cannot be regarded as a miscarriage of justice in the circumstances of the present case.

Learned Crown Counsel has referred the Court to the cases of *I.G.P.* v. *Adekunle and others*, 1955-56 W.R.N.L.R. 16; *I.G.P.* v. *Adunfe and others*, 1957 W.R.N.L.R. 179; and *I.G.P.* v. *Bello and others*, 1957 W.R.N.L.R. 83.

In the case of *I.G.P.* v. *Adekunle and others*, Ademola, C.J., held that as the visit to the *locus in quo* was not recorded by the Magistrate who also omitted to record the persons who were present, the trial was unsatisfactory, and that the irregularity was so grave as to amount to a substantial miscarriage of justice. In the case of *I.G.P.* v. *Adunfe and others*, it was held by the Federal Supreme Court (Jibowu, de Lestang and Abbott) that an inspection held in the absence of the accused which was only to assist the trial Magistrate to understand and follow the evidence given on both sides did not lead to a miscarriage of justice. In the case of *I.G.P.* v. *Bello and others*, Ademola, C.J., held that where the Magistrate omitted to make notes on his record of the object of the visit and what transpired at the inspection, the conviction could not be vitiated if the Appeal Court was satisfied that there has been no substantial miscarriage of justice.

It is clear from the authorities referred to above that what the Appeal Court must be concerned with is whether an irregularity such as the one complained of has led to a miscarriage of justice.

It is perhaps necessary to mention here that the case of *Rex* v. *Dogbe*, relied upon by Counsel for the appellants in the present case was tried with a jury while the present case was tried by a Magistrate who was a judge of the facts as well as of the law.

For the reasons I have stated I am of the opinion that the non-compliance with the procedure laid down in *Rex* v. *Dogbe*, is not an irregularity having regard to the manner in which the Magistrate conducted the inspection and that even if it was an irregularity it has led to no miscarriage of justice having regard to the evidence led before the Magistrate.

Appeal dismissed.

REGINA

v.

MUDASHIRU SULE

[HIGH COURT OF JUSTICE: Charles, J., 29th October, 1958.]

Criminal Law and Procedure—obtaining money by false pretences, sections 418 and 419, Criminal Code, Cap. 42—money obtained on false pretence that accused sent by judge to seek bribe—complainants defrauded in pursuance of attempt to commit offence—legality of prosecution.

The accused falsely represented to the complainants, who were parties to a civil suit pending in the High Court, that he had been sent by the judge to obtain from them a sum of money in order that the judge might give judgment in their favour in the pending suit. The complainants paid the money to the accused and after judgment had been given against them reported the matter to the police. The accused was charged with obtaining money by false pretences. The trial Judge found that the pretence was false to the knowledge of the accused, that the money had been paid to the accused by reason thereof, and that the accused had made the false representations with the intention of obtaining the money by deceit and with knowledge that he had no right to it. The trial Judge considered moreover the question as to whether the charge disclosed an offence in law in that it was based upon a complaint by individuals that the accused had defrauded them by falsely pretending as to his capacity to assist them in committing a crime.

Held: (1) that there is no specific provision in the section under which the accused was charged limiting the nature of the pretence;

(2) that the legislature may well have intended to leave the choice between prosecuting the would-be criminal who had been duped or the person duping him, to the Director of Public Prosecutions who would have regard to the best interests of the community in all the circumstances.

Accused convicted.

[*Note.*—the case is reported on the above point only. *Quaere:* whether the complainants might not also be prosecuted for an offence in relation to the transaction].

Cases cited:

R. v. *Lipsham and another*, (1848) 12 J.P. 839.

R. v. *Hunt*, (1838) 8 C. and P. 692.

Ibadan Criminal Case No. I/50c/58.

Obisesan, Crown Counsel, for the Crown.

Alakija for the accused.

Charles, J.: (*Having reviewed the evidence and found thereon that the necessary elements of the offence had been proved proceeded*):

The result is that the accused is guilty of the offence charged unless, as I raised with Counsel, the charge does not disclose an offence in law. While it is true that the maxim that a person cannot found a cause of action on his own wrong cannot apply in a prosecution by the Crown for an offence against an individual, since any wrong by the

latter is not the wrong of the prosecutor, it may at first sight seem startling that the criminal law can be set in motion on the complaint of an individual that another person has defrauded him by falsely pretending as to his capacity to assist him in committing a crime. Logically, of course, there would be no limitation upon such complaints admitting of prosecution—a potential murderer could complain against, and have prosecuted, his intended agent if that latter had obtained money by falsely pretending that he had the capacity or will to carry out the other's murderous intention or plan. It, therefore, seemed to me that a qualification might have to be implied into section 418 of the Criminal Code so as to confine the representations which constituted false pretences to representations of "lawful" facts. Such a limitation has been accepted in *obiter dicta*, by one Judge of the Supreme Court of New South Wales, and dissented from, again in *obiter dicta*, by another Judge of that Court.

After considering the matter I do not think that any such qualification is justified. The only authority which seems to lend support to it is *R.* v. *Hunt*, (1838) 8 C. and P. 692 where it was held that the funds of an unlawful society cannot be embezzled. As was stated by Mr Justice Stephen (Dig. Criminal Law, 8th Ed., P. 341 *n*) that decision was only at *nisi prius*, and as suggested by him, it is contrary to Hale's statement that property may be stolen from the thief who stole it. (Hale Pleas of the Crown 507). The decision also seems contrary to *R.* v. *Lipsham and Worster*, (1848) 12 J.P. 839, 15 E. and E. Dig. 1165, where a person was convicted of obtaining by false pretences the proceeds of an illegal lottery. In any case, the real objection to implying the suggested qualification is, in my opinion, that it is not necessary in order to give effect to the words of sections 418 and 419 of the Criminal Code and to do so would be based upon a mere speculation as to the intention of the Legislature. After all, it may well be that the Legislature intended to leave the choice between prosecuting a would-be criminal who had been duped and prosecuting the person duping him to the discretion of the Director of Public Prosecutions who would have regard to the best interests of the community in all the circumstances.

Accused convicted and sentenced.

REGINA

v.

ADEREBOYE OGUNBODEDE ... ... *Appellant*

[HIGH COURT OF JUSTICE: Morgan, J., 31st October, 1958.]

Criminal Law and Procedure—manslaughter, contra section 317 of Criminal Code, Cap. 42—suspected thief shot by "night guard"—power of arrest for misdemeanour, contra section 250 (6)—section 12, Criminal Procedure Ordinance, Cap.43—right to shoot or injure—self defence.

The accused was a "night guard" who with others was patrolling a town at night. As a result of receiving certain information he and another, both armed with guns, went towards a certain quarter of the town where a man was seen naked and crouching behind a house. The accused asked who it was but the man made no answer and ran away. The accused pursued him and eventually fired at him inflicting injuries from which the man died. The accused alleged that in the course of the pursuit the man twice stopped and "challenged him" and then come towards him when he fired. This the trial judge did not believe.

Held that while there was a *prima facie* case of a misdemeanour which gave the accused power to arrest the man, the facts did not justify in law the use of a lethal weapon to prevent the man's escape.

Convicted of manslaughter.

Cases cited:

R. v. *Aniogo*, 9 W.A.C.A. 62.

R. v. *Scully*, (1824) 1 C. and P. 319.

R. v. *Dakin*, (1828) 1 Lew. 166.

Akure Criminal Case No. AK/23C/58.

Akinloye for the accused.

Adekunbi for the Crown.

Morgan, J.: The accused stands charged with manslaughter contrary to section 317 of the Criminal Code. The particulars of the offence are that on or about the 19th day of February, 1958, at Ijebu Quarters, Owo, in the Akure Judicial Division, he unlawfully killed Patrick Uguku.

The facts adduced in evidence by the prosectuion are as follows:—

The accused was a night guard. In the evening of the 18th February, 1958, he and other night guards, including the second prosecution witness, James Ajia, and the ninth prosecution witness, Awoloto Joshua, assembled at their usual meeting place at about 8.00 p.m. and dispersed on their several patrols at about 11.00 p.m The accused and the ninth prosecution witness were detailed to patrol the Iloro Quarter of Owo. During the night the accused told the ninth prosecution witness that he was informed that a thief was causing trouble in Ogbon Isonmo Quarter and asked the ninth prosecution witness to go with him to the place. Both of them carried guns.

The ninth prosecution witness said that as both of them were going towards Ogbon Isonmo the accused asked him to stop and told him that he had seen the thief. The suspected thief fled and the accused began to pursue him. After some time the ninth prosecution witness heard a gun report. He went up to the place where the accused was and saw a man lying on the ground, injured. The accused blew his whistle and other night guards went to him. He also went to some houses in the neighbourhood and called out some people living there to help him to remove the injured man. Among the persons he called were the fourth, seventh and eighth prosecution witnesses. They all saw an injured man lying on the ground. The man was later carried away into a bush called Ojomo Bush. In the morning the first prosecution witness, Lance Corporal Morford Myiekpen, went to Ojomo Bush as a result of a report made to him by Chief Ojomo. The witness found an injured man in the bush inside an eight-foot deep ditch. The injured man was removed in a comatose condition to St. Louis Combined Hospital, Owo, where he died five days later. The tenth prosecution witness, Dr Michael Costello, saw the injured man when he was admitted to the hospital. After the man died the witness performed post mortem examination on the body which was identified to him by the third prosecution witness, John Umeze, as the body of Patrick Uguku, the witness's half-brother. Dr Costello found and took out many lead pellets from the skull bone of the deceased and formed the opinion that the cause of death was brain damage due to shot-gun injury.

The accused has given evidence in his defence. He said that when the ninth prosecution witness and himself were on patrol he saw a person whom he suspected to be a thief at the back of a house and that he asked him who he was. He said that the man did not answer. He said further that both the ninth prosecution witness and himself pursued the man and shone their torchlights on him, and that the man suddenly turned round and challenged them to come to him. That at that point he took the ninth prosecution witness's gun from him. He said that he pursued the man for some distance and that again the man stopped and challenged him to come to him. He said that the man then came towards him and that he fired the gun without aiming it at anything in particular.

The accused made a statement to the police which was recorded by the eleventh prosecution witness, police constable Joseph Adebayo. Before the statement was admitted in evidence the accused said that it was correct as far as it went but that it was incomplete. He said that he told the witness that he shot the thief when the thief turned round to fight him and also that he told the witness that he did not aim the gun at the thief. The statement and its translation were admitted in evidence as being full and correct and marked exhibits "A" and "A1". In the statement the accused said, "When this thief did not answer self and my partner Awoloto pursued the thief. As we were pursuing the thief, I got a gun from my partner Awoloto and fired the gun at the thief. After I have fired the gun, both of us waited, and I later heard somebody crying".

It must be said that the deceased person was not found actually committing any felony. In fact under cross-examination the accused said "I formed the view that he was a thief from his appearance". This was because the deceased was found to be naked and crouching behind a house.

Counsel for the accused has asked the Court to hold that the deceased was a thief and that he was committing a felony. That when he was pursued he attempted to attack the accused in order to resist lawful arrest. Counsel further asked the Court to

hold that the accused fired his gun into the air in the panic of the moment and, by inference, that he did not aim it at the deceased. He cited the case of *Rex* v. *Peter Aniogo*, 9 W.A.C.A. 62 in which the appellant, awakened by the hue and cry of the villagers pursuing a suspected thief, fired at and killed an innocent man who was lawfully abroad. It was held on appeal that conviction should have been for manslaughter and not murder.

It is, I think a matter of general acceptance that night guards serve the community by helping to patrol the townships during the hours of darkness. There can be no doubt that they have the power of arrest of a private person as laid down in section 12 of the Criminal Procedure Ordinance, Cap. 43 of the Laws of Nigeria, to wit: "Any private person may arrest any person who in his own view commits an indictable offence, or whom he reasonably suspected of having committed a felony or by night a misdemeanour". In my view the power of arrest possessed by night guards is not more than this.

There is no evidence that the deceased had committed any indictable offence but as he was found crouching behind a house at about 2 a.m. in a state of nakedness a night guard would be justified in entertaining strong suspicions about his intention and would be entitled to question him and arrest him. This however does not make the suspect an object of indiscriminate and reckless attack.

In the case of *Scully*, (1824) 1 C. and P. 319, Carrow, B., said—

> "Any person, set by his master to watch a garden or yard, is not at all justified in shooting at or injuring in any way, persons who may come into those premises even at night, and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But where the life of the prisoner is threatened, and if he considered his life in actual danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he will be guilty of manslaughter".

I disbelieve the accused's evidence that the deceased attempted to attack him.

There is no evidence that the deceased was armed and no evidence that any burglarious instrument or any instrument of attack was found at the place where he fell after he was shot.

According to the ninth prosecution witness, whose evidence I believe, the accused left his own area of patrol and went to Ogbon Isonmo because he was told that a thief was giving trouble there. The accused himself said in his statement: "As we were pursuing the thief I got a gun from my partner and fired the gun at the thief".

I think that on the facts there was a *prima facie* case of a misdemeanour against the deceased under section 250 (6) of the Criminal Code which gave the accused power under section 12 of the Criminal Procedure Ordinance to arrest the deceased. However, even if the deceased turned round upon the accused and challenged him to come up to him, the use of a lethal weapon to prevent the escape of the deceased in the circumstance, the deceased being unarmed and the accused's companion, the ninth prosecution witness, being so near, is unreasonable and unjustified. For, according to the direction of Bayley, J., in *Dakin*, (1828) 1 Lew. 166 "The law says a man must not make an attack upon others unless he can justify a full conviction in his own mind that if he does not do so his own life will be in more danger". The accused shot the deceased at what must

have been point blank range and in my view it is because he knows that he cannot justify a full conviction in his own mind that his life was in danger when he fired at the man that he has fabricated the untrue story that the deceased wanted to fight with him.

I reject his story of the attack as being completely untrue and find him guilty.

Convicted of manslaughter.

CHIEF SAM WARRI ESI ... ... } ... *Plaintiff*
(for himself and on behalf of the Igbudu people) }

v.

SHELL B.P. PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED ... ... *Defendants*

and

OLU OF WARRI ... ... *Plaintiff*

v.

SHELL B.P. PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED ... ... *Defendants*
(*Consolidated*)

[FEDERAL SUPREME COURT: Ademola, F.C.J.; Abbott and Mbanefo, F.JJ., 3rd November, 1958.]

Practice—consolidation of suits where issues primarily between two plaintiffs—misnomer—amendment of writ—cause struck out—applicantion to relist—scope of Order XL, rule 6, Supreme Court Rules.

In separate actions the plaintiffs sued the defendant company for specific performance of a lease and for an amount due for use and occupation of land respectively. The actions were by consent consolidated. In the second suit objection was raised that the plaintiff was not a legal person or an existing person known to law and the court struck out the suit for want of plaintiff. A subsequent application to relist this suit and for leave to amend the writ therein was refused. The plaintiff appealed against the order of refusal.

Held: (1) that when objection was raised on misnomer the plaintiff should then have applied to amend the writ;

(2) that where the pleadings disclose that the issue was primarily between the two plaintiffs it was unfortunate that an order for consolidation was made;

(3) that the scope of Order XL, rule 6 of the Supreme Court Rules is not limited to cases which have been struck out for non-appearance and that the Court below could have re-listed the case and thereafter have amended the writ;

(4) Further that the power of a Judge to re-list a case is discretionary, and this notwithstanding the provisions of Order XL, rule 6;

(5) that in the circumstances which arose no useful purpose would be served by the court of appeal now re-listing the case.

Per curiam: It would still be open to the appellant to bring the proper action by which the issues involved could be thrashed out.

Appeal dismissed generally.

[*Note.*—Power to re-list a case struck out is now contained in Order 26, rule 9 of the High Court (Civil Procedure) Rules which is substantially in the same terms as the Rule referred to in the judgment here reported].

Cases cited:

Etablissement Baudelot v. *R. S. Graham and Company Limited*, (1953) 1 All E.R. 149.

Alexander Mountain and Company v. Rumere Limited, (1948) 2 All E.R. 482.

R. v. *Surrey Assessment Committee*, (1948) 1 K.B. 29.

32 CHIEF SAM WARRI ESI FOR HIMSELF AND ON BEHALF OF THE IGBUDU PEOPLE
v.
SHELL B.P. PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED
AND
OLU OF WARRI
v.
SHELL B.P. PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED

Prest for appellant.

No appearance for respondent.

Ademola, F.C.J.: This appeal against two Orders made by Onyeama, Acting Judge at the time, arose in the following circumstance:—

In the High Court, Warri, in the Western Region, the two suits mentioned above were, by order of Court, consolidated by the Judge before pleadings had been filed in each, Counsel on either side having agreed to the consolidation.

The claim in Suit No. W/56/1956 is for specific performance of a lease and for the sum of £875 being five years rent due on the land at £175 per annum. In Suit No. W/91/1956 the amended claim by the plaintiff is for the sum of £875 being the amount due from the defendants for use and occupation of the land.

The defendants admit being in occupation of the land and claim to be so entitled under an agreement and under an exploration lease granted by Government. Defendants have, however, paid to the Government Treasury, as deposit for whoever is entitled, the said sum of £875.

From the pleadings filed it was clear that the two plaintiffs were each claiming the payment to him by the defendant of the amount of £875 rent; the plaintiff in Suit No. W/56/1956 under a claim of right that he entered into an agreement with the defendants to lease the land to them and that he has possessory title to the land under native law and custom as portion of Agbassa land, whilst the plaintiff in Suit No. W/91/1956 as titular head of all Itsekiri people, claims to be the owner of all Agbassa land, and the proper persons to grant the lease of the land.

In the present appeal it is enough to say that the issue between the two plaintiffs is not our present concern. The claim as to the ownership of the land or the possessory right was never tried. Objection was raised at the trial to the plaintiff in Suit No. W/91/1956 that he is not a legal person or an existing person known to law. The learned Judge heard arguments on this point and gave his ruling in the matter upholding the submission that there was a misnomer. He therefore struck out Suit No. W/91/1956 for want of plaintiff and in Suit No. W/56/56 he entered judgment for the plaintiff for the amount of £875 with costs assessed at 30 guineas, which amount he ordered the plaintiff in Suit No. W/91/56 to pay to the plaintiff in Suit No. W/56/56 because he had prevented payment of the amount to the first plaintiff by the defendant by making a claim to the amount.

After this judgment, the plaintiff in Suit No. W/91/56 moved the Court to set aside the judgment in the consolidated suit and to grant leave to the plaintiff in that Suit No. W/91/56 to amend his Writ of Summons and the Statement of Claim. The learned Judge refused the application. The present application is against this order of refusal. It is an appeal on an interlocutory matter as well as an appeal on the final judgment in Suit No. W/56/56. Six grounds of appeal were filed, but four were argued. Grounds 1 and 2, which were abandoned, dealt with the main objection whether or not the plaintiff was a non-existent person.

Of the four grounds argued I do not propose to deal with ground 6. The other three grounds argued together, are as follows:—

"(*iii*) The learned trial Judge erred in law in entering judgment for the plaintiff in Suit No. W/56/56 without giving the plaintiff in Suit No. W/91/56 an opportunity of amending his Writ of Summons, both suits having been consolidated by Order of Court.

(*iv*) The learned trial Judge erred in law in refusing to relist Suit No. W/91/56 which was struck out for non-compliance with the Rules of Court.

(*v*) The learned trial Judge erred in law in refusing the plaintiff in Suit No. W/91/56 leave to amend the title of the Writ of Summons, and his refusal amounted to failure to do justice".

The whole argument centred round Order 40, rule 6. The learned Judge is of the view that rule 6 of this Order applies only in cases where judgments have been obtained in default and not in any other.

Order 40, rule 6 reads—

"Any cause struck out may, by leave of the Court, be replaced on the cause list in such terms as to the Court may seem fit".

The learned Judge was in a dilemma; he wished, he stated, to put the case back on the list, but he felt he could not do it. Mr Prest, Counsel for the plaintiff in Suit No. W/91/56 did not at the outset ask for an amendment to regularise his mistake by putting the proper name of the plaintiff; thus the case was struck out. At the same time this was struck out judgment was pronounced in the other Suit No. W/56/56. There was nothing more, he said, he (the Judge) could do in the matter.

The learned Judge said further that there is no rule of court under which he could relist the case struck out under such circumstances.

It apears to me that two mistakes were made at the beginning of the trial of the case. The first mistake was by Counsel for the plaintiff in Suit No. W/91/56. When the objection was raised about a misnomer, he had the opportunity of asking the Court for leave to amend, especially when the Judge ruled there was a misnomer.

The cases *Etablissement Baudelot* v. *R. S. Graham* and *Co. Ltd.*, (1953) 1 All E.R. 149 and *Alexander Mountain* and *Co.* v. *Rumere Ltd.*, (1948) 2 All E.R. 482 cited by Counsel are authorities to show that in a case of misnomer, if application is made to amend the writ by substituting the proper names, it should be granted.

The second mistake was by the Judge himself. The issues before him were on the pleadings and he had knowledge of them before he ordered a consolidation of the two actions*. It was clear that the real issues between the two plaintiffs are one of ownership of land; and possessory right; also which of the two plaintiffs is entitled to grant a lease of the land to the defendants and is entitled to the rents.

* It is to be observed that it is stated in the first paragraph of the judgment reported that the order for consolidation was made before pleadings had been filed.

On these issues about which the defendant was not concerned, but primarily a matter between the two plaintiffs, it was unfortunate that an order for consolidation was made. It is correct to say that subsequent difficulties were caused by the order for consolidation. However that may be, the refusal of the Judge to relist the case Suit No. W/91/56 struck out did not help matters.

The learned Judge's refusal of the application to relist was based on his interpretation of Order 40, rule 6; he did not think he had power under that rule or any other rule.

Now, rules 1 to 5 of Order 40 deal with powers of the Judge to strike out a case in the absence of parties as well as powers of setting aside judgments obtained in the absence of one party. I have set out above rule 6 of the Order. The learned Judge's interpretation of the rule is that it is limited in its application to cases struck out under rules 1 to 5. It is not unlikely that the learned Judge considered the heading of this Order. Order 40 is headed "Non-appearance of parties at hearing". On this point, I do not think it was intended to limit the operation of rule 6 to cases of non-appearance of parties. The wording of the rule itself is clear and unambiguous. There is nothing restrictive about the words. It states: "*Any* cause struck out....." It does not say "In any cause struck out under the preceding rules....." It is a cardinal rule of interpretation of statutes that the heading cannot control the plain words of the statute. The rule was expressed in *R.* v. *Surrey Assessment Committee*, (1948) 1 K.B. 29, at page 32 by Lord Goddard, C.J., in these words—

> "But while the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words the law is quite clear that you cannot use such headings to give a different effect to clear words in the section where there cannot be any doubt as to the ordinary meaning".

Further, it is, in my view, within the power of a Judge to relist a case if he thought fit. Power to relist a case by a Judge is discretionary and this, notwithstanding the provisions of Order XL, rule 6 I have dealt with above. The learned Judge, therefore, in this case, to my mind, made much ado about nothing and could have relisted the case and so save all the difficulties which have arisen.

With regard to the appeal in Suit No. W/56/56 in which the learned Judge gave judgment for the plaintiff in that case for the amount of £875 for which the two plaintiffs were contesting, it is in my view, difficult for this Court to interfere with that judgment. In the first place, the defendant in the case did not resist the claim; secondly, the present appellant was no party to the claim except in so far as the learned Judge made an Order of thirty guineas costs specifically against him. The appellant is not prejudiced by the judgment and, in my view, the judgment does not prejudice any action he may wish to bring in future against the plaintiff in that case in respect of the land and/or rents collected. I would, however, annul the Order made against the appellant by the learned Judge as to costs of thirty guineas in that matter. Thus far, to my mind, and no further can this court interfere in that case.

Coming back to Suit No. W/91/56 I have pointed out that the Judge had power to relist the case and should have done so. This Court has been asked to exercise that

power. A careful examination of the writ in the case with subsequent amendments and comparing these with all the amended pleadings show, as I have mentioned earlier in this judgment, that the real issue is between the present appellant and plaintiff in Suit No. W/56/56. To continue the case in the present form would, in my view, necessitate more and more amendments if the real issues are to be brought up and fought out. In the circumstances, it appears to me, that no useful purpose will be served in relisting the case. It is still open to the appellant to bring the proper action by which the issues involved could be thrashed out.

Appeal dismissed generally; order for costs in the court below as against the appellant set aside; no order as to costs of appeal.

SAMUEL OGEDEMGBE... ... ... *Petitioner*

v.

EMANUEL ADESEITAN FAJEMISIN ... ...
E. A. ADESUYI (Electoral Officer for Ilesha Southern District Council) } *Respondents*

[HIGH COURT OF JUSTICE: Hedges, J., 3rd November, 1958.]

Election Petition—Supreme Court (Election Petition) Rules, 1951, rules 6 and 58—power of Chief Justice to make rules—section 56, Supreme Court Ordinance, Cap. 211—section 55 (3), High Court Law, 1954—Parliamentary and Local Government Electoral Regulations, 1955—Regulation 115 ultra vires enabling laws: section 37, Nigeria Constitution Order in Council, 1954, made under the Foreign Jurisdiction Act, 1890 and section 33 of Western Region Local Government Law, 1952, now section 27, Local Government Law, 1957. Form of election petition—departure from Rules—particulars inadequate—petition neither in prescribed form nor to like effect.

The petitioner filed an election petition and at the hearing it was objected that the petition was out of time and that it failed to comply with the Supreme Court (Election Petition) Rules, 1951, rule 6. The first objection which arose from an error in a certificate issued by the Registrar of the High Court was not pursued. In dealing with the second objection the court considered the question as to whether the Supreme Court (Election Petition) Rules, 1951, (referred to as "the Rules") remained in force. The Rules were made by the Chief Justice of the old Supreme Court of Nigeria under section 56 of the Supreme Court Ordinance. By the Parliamentary and Local Government Electoral Regulations, 1955, (referred to as "the Regulations") the Governor, purporting to exercise powers conferred by section 37 of the Nigeria (Constitution) Order in Council, 1954 and section 33 of the Western Region Local Government Law, 1952, (replaced by section 27 of the Local Government Law, 1957) provided by Regulation 115 that the Chief Justice may make rules regulating the practice to be observed at the trial of an election petition and further that the Rules of 1951 shall have effect as if made under this Regulation. By rule 6 (6) of the Rules it is provided that the form and content of an election petition shall be as set out in Form B in the Schedule to the Rules or to the like effect. The petition did not correctly state the enactment which conferred the right to present the petition nor did it state the name of the occupier of the address given for service. The body of the petition did not moreover show where or when the election was held in relation to which the petition was presented.

Held: (1) that neither the Statutory Instrument under the Foreign Jurisdiction Act, 1890, nor the enactment of the Regional Legislature empowered the Governor by Regulations to confer on the Chief Justice power to make rules and that the portions of Regulation 115 relating to the power of the Chief Justice to make rules and paragraph (2) thereof relating to the Rules of 1951 are *ultra vires;*

(2) that the Rules of 1951 are in force, not by virtue of the Regulations, but by virtue of section 55 (3) of the High Court Law, 1954;

(3) that the body of the petition does not give the information the law requires and is neither in the prescribed form nor to the like effect.

Petition struck out.

[*Note.*—In *D. A. Mietehe* v. *John Belefia*, 1958 W.R.N.L.R. 224, where the Supreme Court (Election Petition) Rules, 1951 were applied by virtue of Regulation 115 of the Parliamentary and Local Government Electoral Regulations, 1955, the point whether or not the said regulation was *ultra vires* as to any of its provisions was not argued].

Ibadan Civil Suit No. I/155/58.

Akinloye, *Ayoola* with him, for petitioner.

Ogunbiyi for first respondent.

Ademola for second respondent.

Hedges, J.: This is an election petition said to concern a recent election for the Ilesha Southern District Council.

Two preliminary objections were raised. In the first place, it was said that the petition was presented out of time. Secondly, it was said that the petition failed to comply with rule 6 of the Supreme Court (Election Petition) Rules, 1951.

I asked Counsel to give me some authority for saying that the Supreme Court (Election Petition) Rules, 1951, are still in force in the Western Region, but unfortunately I received little help. The law in this Region is contained in the Parliamentary and Local Government Electoral Regulations, 1955. For convenience, I shall refer to these Regulations as "the Regulations", and to the Supreme Court (Election Petition) Rules, 1951, as "the Rules".

The Regulations were made by the Governor, after consultation with the Executive Council, in exercise of the power conferred upon him by section 37 of the Nigeria (Constitution) Order in Council, 1954, and section 33 of the Western Region Local Government Law, 1952. The latter has since been replaced by section 27 of the Local Government Law, 1957.

Regulation 115 of the Regulations provides *inter alia* that the Chief Justice may from time to time make, amend, or revoke rules for regulating the practice or procedure to be observed at the trial of an election petition. It is difficult to see how the Governor, who derives his power to make regulations from a statutory instrument under the Foreign Jurisdiction Act, 1890, and an enactment of the Western Region Legislature, can confer on the Chief Justice a power to make rules. In my opinion that portion of Regulation 115 which I have quoted is *ultra vires*. Sub-regulation (2) of that regulation goes on to provide that the Supreme Court (Election Petition) Rules, 1951, shall have effect as if they had been made under this regulation. If no rule-making power is conferred by the first part of the regulation, it follows that this provision is also *ultra vires*. It may well be that the intention of the regulations was to adopt and incorporate the rules. For instance, Regulation 108 (3) provides that the petition shall be in the form prescribed by Rules of Court. Be that as it may, that is not what the draftsman has done, and in my view Regulation 115 goes beyond the Governor's powers.

The rules were made by the Chief Justice of the old Supreme Court of Nigeria by virtue of section 56 of the Supreme Court Ordinance. They are in force in the Western Region, not by virtue of the Electoral Regulations, 1955, but by virtue of section 55 (3) of the Western Region High Court Law, 1954. Where, however, there is a conflict between the Rules and the Regulations—and I have observed several such conflicts—the Regulations must prevail.

I now turn to the preliminary objections. First, it is said that the petition is out of time. The election took place on 14th June, 1958. A certificate signed by the Registrar of the High Court dated 8th August, 1958, states that the petition "has this day been presented". The certificate of the Registrar was in fact erroneous and it might have been necessary to invoke section 131 (1) (*a*) of the Evidence Ordinance. Counsel for the Electoral Officer, however, did not wish to press this objection when he became aware of the true position. The petition was in fact presented on 11th July, 1958, and not on the date specified in the Registrar's certificate. Presentation and filing are synonymous.

The second objection is more serious and relates to the form and content of the petition. Rule 6 (6) provides that the form set out in Form B in the Schedule, or one to the like effect, shall be sufficient. Counsel for the petitioner said that he did not think it was necessary slavishly to follow the form contained in the Schedule. With that submission I agree, and I certainly would not wish to give any ruling which would deprive a draftsman of an opportunity to exercise his art and skill. In the petition now before me, however, I see no sign of either art or skill, and it is quite clear that the draftsman did not have before him, as he should have done, a copy of Form B when he prepared the petition. Indeed the petition bears little resemblance to Form B.

Rule 6 (1) provides as follows:—

"An election petition shall contain the following statements (*a*) it shall state the right of the petitioner to present the petition within the provisions of the enactment which confers such right;

(*b*) it shall state the holding and result of the election and shall briefly state the facts and grounds relied upon to sustain the prayer of the petition".

Rule 6 (4) provides as follows:—

"At the foot of the petition there shall be stated an address for service within three miles of a post office in the Judicial Division, and the name of its occupier, at which address documents.....may be left.....".

In the present case the heading to the petition quotes the Order in Council and the Regulations. It has been represented to me that the enactment which confers the right is the Local Government Law, 1957. It has also been pointed out that in the subscription to the petition the name of the occupier is not given as required by rule 6 (4). I think these objections are sound, but if they stood alone I should be inclined to treat them as purely formal objections which could be cured by rule 58 which gives wide powers to the Court.

But there is a more serious objection. There is nothing whatever in the body of the petition to show where or when the election was held. There are some details in the heading it is true. Surely the purpose of the law in requiring the petitioner to sign the petition is that he is subscribing his name to the truth of certain facts. The petition before me is woefully inadequate. The body of the petition does not give the information which the law requires and the petition is neither in Form B nor "to the like effect". This is a fatal error and in my view it cannot be cured by rule 58.

Petition struck out.

COMMISSIONER OF POLICE ... ... *Respondent*

v.

TIJANI ALAO
BAKARE AYANSOLA } ... ... *Appellants*

[HIGH COURT OF JUSTICE: Quashie-Idun, Ag.J., 4th November, 1958.]

Criminal Law and Procedure—omission by witness to name accused in statements to police—whether evidence at trial in such case satisfactory—failure of magistrate to record nature of amendments to charge—duty of magistrate—section 164 (4) Criminal Procedure Ordinance, Cap. 43—question of miscarriage of justice.

On the trial of criminal charges against the appellants it appeared that a witness for the prosecution did not mention the names of the appellants when he made a statement to the police during the investigation of the charges. During the trial amendments to the charge were made on two occasions but the nature of the amendments were not recorded.

Held: (1) that when an eye-witness omits to mention at the earliest opportunity the names of persons whom he said he saw committing the offence, a court must be careful in accepting his evidence given later and implicating the persons charged, unless a satisfactory explanation is given.

(2) that although section 164 (4) of the Criminal Procedure Ordinance does not say that an amendment shall be recorded it is essential to do so as omission might vitiate the proceedings.

(3) that in the present case the omission to record the nature of the amendments did not occasion any miscarriage of justice no objection having been taken by Counsel, but that the evidence of the witness who had omitted to name the accused at the earliest opportunity was unsatisfactory and it was not safe to convict.

Appeal allowed.

Criminal Appeal from Magistrate Court, Ibadan No. I/51CA/58.

Ademola (*Akinjide* with him) for appellants.

Odutola, *Crown Counsel*, for respondent.

Quashi-Idun, Ag.J.: Two grounds have been argued in this appeal. They are (1) that the decision is unreasonable and cannot be supported having regard to the weight of evidence and (2) that the trial is vitiated by illegality by the Magistrate omitting to make a note of the nature of the amendments to the charge.

In respect of the first ground it is submitted that the evidence led by the prosecution against the appellants was unsatisfactory in that although a witness who said he saw the appellants commit the offence and knew their names did not mention the names of the appellants to the police when he made a statement implicating people he said he saw. This witness had previously made a report to the owner of the house which was alleged to have been damaged by the appellants. The owner of the house in his statement did not mention the names of the appellants to the police. The Senior Magistrate held the view that although the names of the appellants were not mentioned to the police, the third witness for the prosecution who was an eye-witness included the names of the appellants while she was giving evidence in Court.

It is not for this Court to speculate as to what happened between the date on which the statements were made and the date on which evidence was given in Court, but, it is my view that when an eye-witness omits to mention at the earliest opportunity the names of persons he said he saw committing an offence a Court must be careful in accepting his evidence given later and implicating other persons, unless a satisfactory explanation is given as to why the names were not mentioned before. One of the witnesses for the prosecution Adediran admitted under cross-examination that he mentioned no names to the police, but, later he said that he did so at the Police Station where the appellants were and when the police asked him whether the two accused persons were among the people who damaged the house.

It is my view that the evidence led by the prosecution against the appellants was unsatisfactory and that it was not safe to have convicted them on the evidence.

As to the 2nd ground alleging illegality on the part of the trial Magistrate, it is observed that the nature of the amendments made on two occasions during the trial was not recorded. Section 164, sub-section (4) of the Criminal Procedure Ordinance Cap. 43 reads—

> "Where a charge is amended a note of the order for amendment shall be endorsed on the charge and the charge shall be treated for the purpose of the proceedings in connection therewith as having been filed in the amended form".

Although this section does not say that the nature of the amendment should be recorded by the Court, I am of the opinion that it is essential to do so. An omission to make a record of the nature of an amendment may lead to consequences which might vitiate the whole proceedings, for the nature of an amendment or alteration in the charge may determine whether it is a material one which may necessitate the compliance with the provisions of section 164, sub-sections (1), (2) and (3) and also as to whether the accused would still elect to be tried summarily.

In this case, however, the appellants were represented by Counsel and no objection appears to have been taken against the procedure adopted by the Magistrate. It is my view therefore that no miscarriage of justice has occurred.

The first ground of appeal, however is sustained and for the reasons stated I allow the appeal.

Appeal allowed; convictions quashed; appellant acquitted and discharged.

COMMISSIONER OF POLICE ... ... *Respondent*

v.

JOHN OLAPADE
DANIEL AYODEJI } ... ... *Appellants*
SALAWU AKANNI

[HIGH COURT OF JUSTICE: Quashie-Idun, Ag.J., 5th November, 1958.]

Criminal Law and Procedure—indictable offence contra section 451 of Criminal Code, Cap. 42, tried before magistrate—accused's consent not obtained—trial a nullity—course to be followed if accused's consent not obtained before evidence heard—section 304, Criminal Procedure Ordinance, Cap. 43.

Where the consent of the accused to the trial by the magistrate of a charge for an indictable offence is not obtained before the magistrate proceeds to hear evidence nor before the accused is called upon to make his defence the trial is a nullity.

Trial declared null and void.

Case cited:

Inspector General of Police v. *Adeyemo and others*, 1955-1956 W.R.N.L.R. 85.

Criminal Appeal from Magistrate Court Ibadan No. I/43CA/58.

Akinjide for appellants.

Odutola, Crown Counsel, for respondents.

Quashie-Idun, Ag.J.: The appellants were tried summarily by the Senior Magistrate on a charge of wilfully and unlawfully causing damage to a house under section 451 of the Criminal Code. The offence is an indictable offence. (*See* the case of *Inspector-General of Police* v. *Lawani Adeyemo and others*, 1955-1956 W.R.N.L.R. 85, where Taylor, J., held that the accused persons charged under section 451 of Cap. 42 in that case could have raised the point of law on appeal that they were not asked to elect their mode of trial). In the present case the Senior Magistrate did not comply with the provisions of section 304 of the Criminal Procedure Ordinance. Sub-section (3) of section 304, Cap. 43 clearly states—

"If the Magistrate shall not inform the accused of his right to be tried by a Judge of the Supreme Court.....the trial shall be null and void *ab initio* unless the accused consents at any time before being called upon to make his defence to be tried summarily by a Magistrate in which case the trial shall proceed as if the accused had consented to being tried summarily by a Magistrate before the Magistrate proceeded to hear the evidence in the case".

In my view the section empowers a Magistrate who has omitted to ask the accused person to elect his mode of trial at the beginning of a trial, to cure the illegality by asking the accused if he would consent to the summary trial proceeding.

In the present case there is nothing on the record to show that after the close of the case for the prosecution the consent of the accused to be tried summarily was obtained by the Magistrate. The reasonableness of the provision quoted above is appreciated when one considers that an accused person not having been asked to elect the mode of his trial may well assume, up to the time he is asked to begin his defence, that his case is going to be committed to the Assizes for trial at the High Court.

The trial of the appellants is declared null and void. In view of the fact that the appellants have not served the sentences imposed on them by the Magistrate I order a retrial of the appellants before another Magistrate.

Appea allowed. Trial declared a nullity and retrial ordered.

REGINA

v.

ERARUWOMI OTEDIA ... ... *Appellant*

[HIGH COURT OF JUSTICE: Morgan, J., 14th November, 1958.]

Evidence—charge of murder—statement made by accused to police—confessions of other and similar offences—only that portion of statement relating to charge admissible—section 47, Evidence Ordinance, Cap. 63.

At the trial of a charge of murder a statement made by the accused to the police was tendered in evidence. The statement contained confessions of other and similar offences.

Held: that only that portion of the statement which dealt with the death of the person to which the charge related should be tendered and admitted in evidence.

Statement rejected.

[*Note.*—This case is reported on the above point only].

Cases cited:

R. v. *Esologba*, 17 N.L.R. 24.

R. v. *Knight and Thompson*, 31 C.A.R. 52.

Akure Criminal Case No. AK/12C/58.

Fagbemi for the Crown.

Accused in person.

Morgan, J.: (*After stating the facts*): The accused made a statement to the police which he confirmed in the presence of a Divisional Adviser. The statement contains confessions of other similar offences and I marked it "X" for identification reserving my ruling on the question of its admissibility. In *R.* v. *Esologba*, 17 N.L.R. 24 the learned Judge refused to admit a similar statement in evidence on the ground that if admitted in evidence in the form in which it was it would prejudice the mind of the trial Judge; that it might lead to the conclusion that the accused was likely to have committed the particular offence in respect of which he stood charged. In *R.* v. *Knight and Thompson*, 31 C.A.R. 52, it was stated that where a prisoner has made a voluntary statement amounting to a confession both of the offence charged in the indictment and of other offences, the portion of the statement relating to the other offences should generally not be put in evidence by the prosecution. In my view a provision which meets the situation will be found in section 47 of the Evidence Ordinance, Cap. 63 of the Laws of Nigeria to wit:

"When any statement of which evidence is given forms part of a longer statement .....evidence shall be given of so much and no more of the statement as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances in which it was made".

In my judgment only that portion of the accused's statement dealing with the death of Onogho Umunuefe should have been tendered and admitted in evidence. It was not so tendered before the close of the case for the prosecution as I had not then given this ruling and I think that it is late to do so now.

Statement rejected.

THE QUEEN
v.
THE GOVERNOR, WESTERN REGION
EX PARTE ALASAN BABATUNDE, AJAGUNA II OF IKARE

[HIGH COURT OF JUSTICE: Jibowu, C.J., 24th November, 1958.]

Certiorari—order of approval and recognition of Chief—jurisdiction of court—Western Region Appointment and Recognition of Chiefs Law, 1954, sections 19 and 34—"civil cause"—meaning of—Chiefs Law, 1957, sections 16 and 24—retrospective effect of—jurisdiction of court to issue prerogative writs.

On the hearing of an order *nisi* to show cause why a writ of *certiorari* should not issue to remove into court for quashing an order of approval and recognition of a chief made by the Governor, a preliminary objection was taken to the jurisdiction of the court on the ground that such jurisdiction was excluded by reason of sections 19 and 34 (1) (*c*) of the Western Region Appointment and Recognition of Chiefs Law, 1954. On behalf of the applicant it was submitted that though the proceedings were commenced while the aforesaid Law was still in force, the Chiefs Law, 1957, which replaced that Law, is the proper Law to be applied. It was further submitted on behalf of the applicant that the omission from the Law of 1957 of express words taking away the power of the court to issue prerogative writs, enables the court to issue such writs notwithstanding the general terms thereof excluding the jurisdiction of the court in "any civil cause or matter" calling in question anything done by the Governor with respect to a chief or chieftaincy. By section 34 (2) of the Law of 1954, "civil cause" was defined to include proceedings by way of prerogative writs, while the Law of 1957 contains no such definition. It was contended on behalf of the respondent that the definition in the Law of 1954 was a surplusage and that the words "any civil cause or matter" in section 24 of the Law of 1957 in themselves include proceedings for prerogative writs.

Held: (1) that the Western Region Appointment and Recognition of Chiefs Law, 1954, is applicable in these proceedings with regard to the rights of the parties; but

(2) that the Chiefs Law, 1957, applies with regard to whether or not the applicant could properly bring these proceedings for *certiorari* and be heard;

(3) that section 24 of the Chiefs Law, 1957, has not excluded *certiorari* as it does not contain any express negative words excluding prerogative writs.

(4) that the Court has therefore jurisdiction to entertain the application.

Per curiam: "There can be no doubt that the Legislature has signified an intention to keep all disputes about chieftaincies out of Court. It is the duty of the Court to give effect to enactments of the Legislature, but the Court, which now represents the Sovereign in issuing prerogative writs, will not give effect to an enactment which seeks to deprive it of its right to see that justice is administered impartially to all manner of people according to law. The Court has always jealously guarded against encroachment by the Executive on its power and right to supervise inferior courts including bodies entrusted with judicial functions, and to see that the inferior courts and bodies entrusted with judicial functions are kept within their bounds and that they discharge their duties according to and within the law.

"Hence, in spite of legislative enactments to the contrary, the High Court would still issue prerogative writs in appropriate cases.

"Subject to this exception, the Court will give effect to enactments of the Legislature. The Court will, therefore, not entertain any action, suit, or other proceeding as between a plaintiff and a defendant if it relates to the matters referred to in section 24 (*a*), (*b*), (*c*) or (*d*) of the Chiefs Law, 1957."

Preliminary objection overruled.

Cases cited.

Hutchinson v. *Jauncey*, (1950) 1 K.B. 574.

Leman v. *Housley*, 31 L.J. 833.

Young v. *Hughes*, 4 H. *and* N. 76; 28 L.J. Ex. 161.

R. v. *Plowright and others*, 3 Mod. 94.

R. v. *Moreley and others*, 2 Burr. 1040.

The King v. *Hanson*, 4 B. *and* Ald. 519.

Colonial Bank of Australia v. *Willan*, 30 L.T. 237.

The King v. *Minister of Health*, (1939) 1 K.B. 232.

The King v. *Minister of Health*, (1920) 1 K.B. 619.

The King v. *Minister of Health: Ex parte Davies*, (1929) 1 K.B. 619.

Welby v. *Parker*, (1916) 2 K.B. 1.

Wright v. *Hale*, 3 L.J. 444.

Singer v. *Hasson*, 50 L.T. 326.

Warne v. *Beresford*, (1837) 6 L.J. Ex. 192.

Ibadan Civil Suit No. I/42/57.

Ayoola for applicant.

Oki, Senior Crown Counsel, for respondent.

Jibowu, C.J.: The applicant had obtained an order *nisi* for the respondent to show cause why a writ of *certiorari* should not issue to remove to this Court for quashing the order of approval and recognition of the appointment of Amusa Momoh as the Olukare of Ikare, dated the 19th December, 1956, and published as Western Regional Notice No. 14 in the *Western Region of Nigeria Gazette* No. 2 of 3rd January, 1957.

Mr Oki, Senior Crown Counsel, raised a preliminary objection that this Court has no jurisdiction to entertain these proceedings. He submitted that the proceedings having been started when the Western Region Appointment and Recognition of Chiefs Law, 1954, was still in force must be dealt with under the provisions of that Law. He referred to sections 19 and 34 (1) (*c*) of the Law, which read as follows:—

"19. The approval and recognition by the Governor of a chief declared to be appointed under the provisions of this Part shall be final as to such appointment, approval and recognition, and not subject to question in any court of law and no petition relating to such appointment shall be entertained by any authority."

"34. (1) Notwithstanding anything in any written law whereby or whereunder jurisdiction is conferred upon any Court, whether such jurisdiction is original, appellate or by way of transfer, no Court shall have jurisdiction to entertain any civil cause or matter—

"(*c*) calling in question anything done in the execution of any of the provisions of this Law or in respect of any neglect or default in the execution of any such provisions by the Governor, a local government council, a council, a committee, a ruling house or a king-maker."

He referred also to the definition of "civil cause" in section 34 (2) of the same Law, which reads:—

"34 (2) .....'civil cause' includes proceedings by way of a prerogative writ of *mandamus*, prohibition, *certiorari* or *quo warranto*."

He then submitted that the jurisdiction of the Court has been taken away by the above provisions.

Mr Ayoola, for the applicant, submitted that, though the proceedings were commenced while the Western Region Appointment and Recognition of Chiefs Law, 1954, was still in force, the Western Region Chiefs Law No. 20 of 1957, is the proper law to be applied in order to see whether the Court could or could not entertain these proceedings. He submitted further that *certiorari* can only be taken away by express negative words, and that the omission in the 1957 Chiefs Law of a section similar to sub-section (2) of section 34 of the 1954 Western Region Appointment and Recognition of Chiefs Law removed the express negative words which can take away *certiorari*.

He further submitted that *certiorari* will lie in spite of the privative section in the 1954 Western Region Appointment and Recognition of Chiefs Law if there is evidence that the Governor had exceeded his jurisdiction or had acted without jurisdiction, or if the proceedings before him were tainted with fraud.

In reply, Mr Oki submitted that section 34 (2) of the 1954 Western Region Appointment and Recognition of Chiefs Law, which defines "civil cause" as including proceedings for the issue of prerogative writs, was a surplusage, as "cause" in the definition of that word in the Supreme Court Ordinance, in the High Court Law and in Stroud's Judicial Dictionary includes proceedings for *certiorari* and other prerogative writs. He submitted that this was the reason why a similar provision to section 34 (2) was omitted in the 1957 Chiefs Law. He submitted further that sections 16 (1) and (6) and 24 (*d*) of the 1957 Chiefs Law, if that Law applied, effectively ousted the jurisdiction of the Court. Sections 16 (1) and (6) and 24 (*d*) of the Chiefs Law, 1957, read as follows:—

"16. (1) Subject to the provisions of this section, the Governor in Council may approve or set aside an appointment of a recognised chief".

"(6) The decision of the Governor in Council under this section shall be final and shall not be questioned in any Court".

"24. Notwithstanding anything in any written law whereby or whereunder jurisdiction is conferred upon any Court, whether such jurisdiction is original, appellate or by way of transfer, no Court shall have jurisdiction to entertain any civil cause or matter—

"(*d*) calling in question anything done by the Governor with respect to a chief or chieftaincy (whether before or after the application of this Law to such chief or chieftaincy) under the provisions of the Appointment and Deposition of Chiefs Ordinance".

The arguments on this preliminary objection have raised points of law which are as interesting as they are difficult. I shall proceed to deal with the points raised.

It is common ground that these proceedings were commenced on the 18th February, 1957, when the application for order *nisi* was filed, and while the 1954 Appointment and Recognition of Chiefs Law was still in operation. The 1957 Chiefs Law did not come into operation until the 20th June, 1957. If the matter had been dealt with by the Court before the 20th June, 1957, there would have been no controversy or argument as to which law was applicable, but the introduction of the new Chiefs Law in 1957 has given occasion for these arguments.

The general principle of law is, that when the law is altered while an action is pending, the rights of the parties should be decided according to the law existing when the action was commenced, unless the new law shows a clear intention to vary such rights.

In the case of *Hutchinson* v. *Jauncey*, (1950) 1 K.B. 574, there was a clear intention to vary the rights of the parties in the new statute which applied to lettings before or after the commencement of the Act.

In *Leman* v. *Housley*, 31 L.J. 833, the plaintiff was the trustee in liquidation of the estate of a surgeon, who had no medical qualification, and was therefore debarred from recovering his charges for medical services rendered. The plaintiff sued for charges for medical services rendered by the surgeon when he was unqualified as a medical practitioner. While the action was pending, the Medical Act of 1858 was passed providing that any medical practitioner suing for his charges for medical services rendered must prove that he has been registered as a medical practitioner. The surgeon got his medical qualification and was registered before the case was heard. It was held that the plaintiff could not recover charges for medical services rendered as the surgeon was unqualified at the time the action was taken. In that case there was no indication that the Medical Act was intended to be retrospective in its operation.

The same principle was applied in *Young* v. *Hughes*, 4 H. and N. 76; 28 L.J. Ex. 161, in which an assignee of a bond, which was not assignable before the passing of the Court of Probate Act, 1858, made it assignable, took action on the bond before the Act was passed. It was held that the action could not be maintained in spite of the new Act.

Section 34 of the 1954 Appointment and Recognition of Chiefs Law and section 24 of the 1957 Chiefs Law contain provisions precluding the Courts from entertaining chieftaincy cases, and the only difference between them is that the provision of section 34 (2) of the 1954 Law is not repeated in the 1957 Chiefs Law.

I am, however, unable to accept the learned Crown Counsel's submission that the definition of "civil cause" in section 34 (2) of the 1954 Law is a surplusage in view of the definition of the word in the Supreme Court Ordinance which was in force when the 1954 Appointment and Recognition of Chiefs Law was passed.

The Supreme Court Ordinance defines "cause" as "including action, suit, or other original proceeding between a plaintiff and defendant, and any criminal proceeding". This definition of "cause" was adopted in the Western Region High Court Law, No. 3 of 1955.

I should here observe that the definition of "cause" in Stroud's Judicial Dictionary becomes inapplicable as the word hsa been assigned a meaning in our own legislation, and the maening so assigned, and no other, can therefore be attached to it.

The word "cause" in both the Supreme Court Ordinance and the Western Region High Court Law only refers to action, suit, or other original proceeding between a plaintiff and a defendant. Proceedings by way of *certiorari*, in fact, all other proceedings for the issue of prerogative writs, are not proceedings between a plaintiff and a defendant. The argument of the learned Crown Counsel about the meaning of "cause" therefore breaks down.

It, however, appears to me that the word "matter", which is defined in the Supreme Court Ordinance and in the Western Region High Court Law as "including every proceeding in court not in a cause", may include proceedings for the issue of prerogative writs. It is probable, on the one hand, that this might have been the view of the draftsman of the 1957 Chiefs Law in dropping the extended meaning given to the word "cause" in section 34 (2) of the 1954 Appointment and Recognition of Chiefs Law. On the other hand, it is probable that the draftsman of the Appointment and Recognition of Chiefs Law, 1954, bore in mind, or realised that the Law has long been settled that the prerogative writ of *certiorari* can only be taken away by express negative words, when the right to apply for the writ is a common law right.

It has not been suggested in this case that the right to apply for *certiorari* is other than a common law right.

In *R.* v. *Plowright and others*, 3 Mod. 94, the Court dealt with the case of a statute which imposed a duty to be levied by distress, and provided:

"and if any dispute arise about taking the distress, the same to be finally determined by two justices of the peace".

It was held that the provision meant only that the decision of the justices shall be final as to matter of facts, and did not take away *certiorari*. The Court, at page 95, said—

"The statute doth not mention any *certiorari* which shows that the intention of the law-makers was, that a *certiorari* might be brought, otherwise they would have enacted, as they have done by several other statutes, that no *certiorari* shall lie".

In *R.* v. *Moreley and others*, 2 Burr. 1040, it was held that "*certiorari* cannot be taken by any general, but only by express negative words".

In *The King* v. *John Hanson*, 4 B. and Ald. 519, at page 521, Abbott, C.J., observed:

"For the rule of law is, that although a *certiorari* lies, unless expressly taken away, yet an appeal does not lie, unless expressly given by statute".

It follows, therefore, that the Chiefs Law, 1957, which does not contain any express mention or reference to *certiorari* does not exclude *certiorari* proceedings, which the Appointment and Recognition of Chiefs Law, 1954, expressly excluded.

The question then is, what is the effect of section 34 (2) of the Appointment and Recognition of Chiefs Law, 1954?

In my view, the effct is as admirably summed up by the Priviy Council in *Colonial Bank of Australia* v. *Willan*, 30 L.T. 237, at the middle of the second column of page 238 in the following words:—

"Their Lordships are, therefore, of opinion that winding up orders must be taken to be within the scope of the 244th section of the Act, and that the power to remove the proceedings relating to them into the Supreme Court has been taken away by

statute. It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of *certiorari* to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the book which establish that, notwithstanding the privative clause in the statute, the Court of Queen's Bench will grant a *certiorari;* but some of those authorities establish, and none are inconsistent with the proposition that, in any such case, that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it".

The principle enunciated by the Privy Council in the above passage is borne out by the decision of the Court of Appeal in *The King* v. *Minister of Health*, (1939) 1 K.B. 232, in which the appeal against the order of the Divisional Court discharging a rule *nisi* for *certiorari* was dismissed on the ground that it was not shown that the Minister made the order the subject matter of the application for *certiorari* without jurisdiction or that he had exceeded his jurisdiction.

The King v. *Minister of Health*, (1920) 1.K.B. 619, is a case in which an order *nisi* was made absolute on the ground that the Minister had no jurisdiction to make the scheme complained of. For the same reason the Minister of Health, in *The King* v. *Minister of Health, Ex parte Davies* (1929) 1 K.B. 619, was prohibited from going on with a scheme which was not within the provisions of the Housing Act, 1925.

I do not consider it necessary to refer to more authorities on the point. On the authorities already cited, and considered, I hold that *certiorari* still lies in spite of section 34 (2) of the Appointment and Recognition of Chiefs Law, 1954; and with regard to section 24 of the Chiefs Law, 1957, I hold that the section has not, in any way, excluded *certiorari* as the section does not contain any express negative words excluding *certiorari.*

It is on the effect of the omission in section 24 of the Chiefs Law, 1957, to exclude *certiorari* by express negative words that Mr Ayoola based his submission that these proceedings for *certiorari* might be brought and entertained since the law prohibiting it has been repealed by section 24 of the Chiefs Law, 1957. He supported his contention by referring to the case of *Welby* v. *Parker*, (1916) 2 K.B. 1, and submitted that the 1957 Chiefs Law is procedural. To describe the Chiefs Law, 1957, as being procedural is, in my view, not correct. However, Mr Ayoola obviously intended to confine his remark to section 24 of the Chiefs Law which is the relevant section. In *Welby* v. *Parker*, the Court of Appeal, in affirming the judgment of Eve, J., held that section 1, sub-section 4 of the Increase of Rent and Mortgage Interest (War Restriction) Act, 1915, was procedural, and therefore applied to the mortgage in question which was created about five years before the 1915 Act was passed, in spite of the fact that the action taken on the mortgage was pending when the Act came into operation.

It is a settled principle of law that an enactment relating to the practice or procedure of the Court applies to all actions whether pending or otherwise when the enactment comes into force. In *Wright* v. *Hale*, 3 L.T. 444, Wilde, B., observed:

"but when you are construing an Act of Parliament referring to the procedure and practice of the Courts, the words of the statute then apply to all cases, whether arising before or after its passing".

This principle was applied to the case and the plaintiff, whose action was pending when the Common Law Procedure Act, 1860, was passed, was deprived of his costs as he got judgment for less than £5 in a superior Court for wrong or injury alleged to have been done to his property.

In *Singer* v. *Hasson*, 50 L.T. 326, section 19 of the Patents, Design, and Trade Marks Act, 1883, enacted after the plaintiff had taken action, was held to be applicable to plaintiff's pending action for infringement of patent, when it came up for trial, to enable the plaintiff to amend his specification by way of disclaimer. In this case, Day, J., held the section of the Act to be "a mere matter of procedure".

The important question now to be determined in these proceedings is whether section 24 of the Chiefs Law, 1957, can be considered as relating to procedure or not. The applicant, no doubt, felt aggrieved by the order of the Governor which he is now challenging. Section 34 of the Appointment and Recognition of Chiefs Law, 1954, purported to take away his right to apply to Court by action, suit or other original proceedings as between a plaintiff and a defendant or by proceedings for a prerogative writ to have his grievance looked into.

The Chiefs Law of 1957, by section 24, still retains the prohibition against the applicant's coming to Court by action, suit, or other original proceedings as between a plaintiff and a defendant, but removes the prohibition against his applying to the Court by way of proceedings for *certiorari*. The question as to what way a person can or cannot seek his legal remedy and the form that the remedy is to take appears to me to relate to a matter of procedure. I am, therefore, inclined to think that the applicant's Counsel is right in his contention that section 24 of the Chiefs Law deals with procedure, and that it therefore applies to the pending proceedings in this matter.

Should this view be wrong, I still think that these proceedings might be brought and entertained by this Court after considering the decision in *Warne* v. *Beresford*, (1837) 6 L.J., Ex. 192 or 150 E.R., 1002. In that case the plaintiff sued the defendant for forty shillings, and the defendant pleaded that the jurisdiction of the Court had been taken away by the Westminster Court of Request Act, 23 Geo. 2, Cap. 27. Before trial, the Act was repealed by 6 and 7 William 4, Cap. 137. It was held that the plaintiff was entitled to judgment. The repeal of the Westminster Court of Request Act obviously deprived the defendant of his defence and the plaintiff was entitled to succeed.

In this case, the prohibition against the application for *certiorari* having been removed, the applicant's application for *certiorari* is, therefore, in my view, entitled to proceed. I, therefore, hold that the Western Region Appointment and Recognition of Chiefs Law, 1954, is applicable to these proceedings with regard to the rights of the parties, but that the Chiefs Law, 1957, applies with regard to the question whether or not the applicant could properly bring these proceedings for *certiorari* and be heard.

Before closing this decision, I would like to express my view on the effect of sections 16 (1) and (6) and 24 of the Chiefs Law, 1957, which, in my opinion, are not meaningless and ineffective. There can be no doubt that the Legislature has signified an intention to keep all disputes about chieftaincies out of Court. It is the duty of the Court to give effect to enactments of the Legislature, but the Court which now represents the Sovereign in issuing prerogative writs, will not give effect to an enactment which seeks to deprive it of its right to see that justice is administered impartially to all manner of people according to law. The Court has always jealously guarded against encroachment by the

Executive on its power and right to supervise inferior Courts, including bodies entrusted with judicial functions, and to see that the inferior Courts and bodies entrusted with judicial functions are kept within their bounds, and that they discharge their duties according to, and within, the law.

Hence, in spite of legislative enactments to the contrary, the High Court would still issue prerogative writs in appropriate cases.

Subject to this exception, the Court will give effect to all enactments of the Legislature. The Court will, therefore, not entertain any action, suit, or other proceeding as between a plaintiff and a defendant if it relates to the matters referred to in section 24 (*a*), (*b*), (*c*) or (*d*) of the Chiefs Law, 1957.

In view of my ruling above, I overrule the learned Crown Counsel's objection, and order these proceedings to go on.

Preliminary objection overruled.

THE QUEEN
v.
ONDO DIVISIONAL COUNCIL
EX PARTE JOSEPH AKINBOTE

[HIGH COURT OF JUSTICE: Morgan, J., 12th December, 1958.]

Certiorari—when writ lies—resolution of Divisional Council—reinstatement of employees previously dismissed—termination of appointment of persons appointed in interim—alleged non-compliance with Local Government Staff Regulations, 1955—delegation of Council's powers—consent of Minister to reinstatement—bias.

The applicant was employed by a Divisional Council as a Forest Guard following a resolution of the Establishment and General Purposes Committee of the Council by which certain of the Forest Guards were dismissed for alleged misconduct. Some five months later his appointment was terminated by a letter from the Council which stated that the decision to terminate the appointment was taken as a result of the reinstatement of the Forest Guards previously dismissed. The applicant applied for and was granted an order *nisi* for the removal into Court of the resolution of reinstatement for the purpose of being quashed. This resolution had been adopted by a majority of fifty-nine to five, the majority including the vote of one of the Forest Guards who had been dismissed. The original resolution of the Committee by which the Forest Guards were dismissed had not been ratified by the Council. It was submitted on behalf of the applicant that although not a judicial body the Council exercised judicial functions in considering the report of the Committee; that the Council having delegated its powers to the Committee it was not necessary for the Council to ratify the dismissals; that the persons dismissed could not be re-employed without the consent of the Minister; and that the resolution of reinstatement was vitiated by the vote of an interested party. On behalf of the Council it was submitted that the resolutions of the Council are not judicial decisions; that the applicant being no longer an employee of the Council but a mere member of the public the grant of the Order is discretionary; that delegation did not preclude the Council from supervising the actions of the Committee and that even though it was wrong for an interested party to vote on the resolution this did not, in the circumstances vitiate the resolutions.

Held: (1) that the Council acted judicially in respect of the resolution in question which determined the rights of subjects;

(2) that the applicant upon whose prospects the resolution has a direct effect is an aggrieved party;

(3) that the Committee of the Council was empowered by the Council to take disciplinary action in the matter of the alleged misconduct of the Forest Guards and that, having dismissed them, the consent of the Minister must be obtained before they are re-employed;

(4) that the resolution does not violate the provisions of the Western Region (Local Government) Staff Regulations, 1955, but cannot be given effect until the consent of the Minister has been obtained;

(5) that in the particular circumstance of the case the vote of an interested party does not vitiate the resolution.

Order nisi discharged.

Cases cited:

Amaka v. *Lieutenant-Governor, Western Region and another*, (1956) F.S.C. 57.

R. v. *Electricity Commissioners ex parte London Electricity Joint Committee Co.* Ltd., (1920) 1 K.B. 171 (C.A.).

Nakhuda Ali v. *Jayaratne*, (1951) A.C. 66 (P.C.).

R. v. *Manchester Legal Aid Committee, ex parte R. A. Brand Co. Ltd.*, (1952) 2 Q.B. 413.

R. v. *North Worcestershire Assessment Committee, ex parte Hadley*, (1929) 2 K.B. 397.

Batteley v. *Finsbury Borough Council*, (1958) 122 J.P. 169.

Huth v. *Clarke*, 25 Q.B.D. 391.

R. v. *Bedfordshire County Council, ex parte Sear*, (1920) 2 K.B. 465.

Dimes v. *Proprietors of Grand Junction Canal*, (1852) 3 H.L.C. 759.

R. v. *Hertfordshire Justices*, 6 Q.B. 753.

R. v. *Sussex Justices, ex parte McCarty*, (1924) 1 K.B. 256.

Akure Civil Suit No. AK/92/58.

Agbaje for applicant.

Soetan, Onojobi with him, for respondents.

Morgan, J.: On the 2nd October, 1958 an order *nisi* was granted to remove into this Court for the purpose of being quashed a resolution of the Ondo Divisional Council passed on the 25th day of July, 1958.

The resolution in question reads as follows:—

(*i*) That the recommendation of the Forestry, Agricultural and Veterinary Committee to the Establishment and General Purposes Committee for reinstatement of all the Forest Guards already dismissed and suspended with the exception of those three dismissed as recommended by the Provincial Forest Officer, be adopted.

(*ii*) That the Minutes of the Forestry, Agricultural and Veterinary Committee Meeting of No. 3/58 of 27th June, 1958 be accepted.

The grounds upon which the application was made were—

"1. That the said resolution is *ultra vires* the Ondo Divisional Council as section 16 (7), Part E of the Western Region Local Government Staff Regulations, 1955 has not been complied with.

"2. Bias by interest in that the persons who have a direct interest in the said resolution took part in taking a decision upon it."

The case for the applicant as disclosed in the affidavit filed in support of his application is briefly as follows:—

On the 29th March, 1958, he was appointed as a Forest Guard into the service of the Ondo Divisional Council (*see* exhibit "A"). He was appointed following a resolution of the Establishment and General Purposes Committee on the 15th February, 1958, which reads thus (*see* exhibit "D"): "On a majority vote of seven against three, the Committee resolved—that the following Forest Staff who were involved in the illegal felling be dismissed in accordance with regulation 16 (1), Part E of the Western Region (Local Government) Staff Regulations:

No.	*Name*	*Effective Date*
1.	I. O. Akinnibosin	15-2-58
2.	S. R. Akinmuko...	15-2-58
3.	J. B. Akinmboni	15-2-58
4.	D. B. Otugalu	15-2-58
5.	F. A. Akinshade	15-2-58
6.	S. A. Akinmarin	15-2-58
7.	F. A. Akintomide	15-2-58
8.	I. O. Faturoti	15-2-58

Section 16 (1) of the Western Region (Local Government) Staff Regulations empowers a Council, without prejudice to its powers under regulations E.13 and E.15, to dismiss for misconduct an employee who is confirmed in his appointment.

On the 18th August, the Council addressed a letter to the applicant (exhibit "B") terminating his appointment with effect from the 20th August. Part of the letter reads thus: "This decision was taken as a result of the re-instatement of the Forest Guards whose places you are now occupying in the Council's Establishment".

The decision to reinstate the dismissed Forest Guards was the result of the resolution which the applicant now asks this Court to remove to this Court for the purpose of quashing it. The resolution was adopted by a majority of fifty-nine to five and one of the dismissed Forest Guards, Mr S. A. Akinmarin, was one of those who voted in favour of the resolution.

The Secretary of the Ondo Divisional Council, Mr Robert Orimolade James, has sworn to a counter-affidavit. In paragraphs three to five of the counter-affidavit he states that as a consequence of certain allegations made against eleven Forest Guards an advertisement was placarded for the employment of temporary Forest Guards pending the final determination of the complaint against eleven Forest Guards and that as a consequence of the advertisement eleven new Forest Guards including the applicant were engaged. The appointment was on three years probation and was determinable within that period without the giving of any reasons.

The counter-affidavit states further that "the interdicted Forest Guards upon the receipt of the resolution of the Establishment and General Purposes Committee of the 15th February, 1958, before its ratification protested to the Ondo Divisional Council against the resolution and gave notice of their intention to sue the Ondo Divisional Council" and that the Council passed a resolution for further and exhaustive investigation into the allegations. Paragraph nine of the counter-affidavit states that the investigation ordered by the Council exonerated eight of the eleven guards.

The argument advanced by Mr A. G. O. Agbaje, Counsel for the applicant, may be summarised as follows:—

1. Although the Council is not a judicial body in the ordinary sense it exercised judicial functions when, in considering the report of its Committee, it passed the resolution in question.

2. That decisions of administrative bodies may be quashed by an order of *certiorari.*

3. That the applicant is an aggrieved party and entitled to the order *ex debito justitiae.*

4. That the power for the discipline of Council staff having been delegated to the Establishment and General Purposes Committee it was not necessary for the Council to ratify the dismissal of the eleven Forest Guards.

5. That the guards having been dismissed could not be re-engaged without the approval of the Minister (of Local Government).

6. That the resolution of the Council in question is vitiated because Mr A. S. Akinmarin voted upon the resolution.

Chief Soetan, Counsel for the Council, submitted—

1. That the order does not lie to remove a resolution of an administrative body; that the Council is an administrative body and that its resolutions are not judicial decisions.

2. That the applicant was no longer in the employment of the Council at the time of his application, that he is a mere member of the public and therefore that the grant of the order is discretionary.

3. That although the Council delegated certain functions to its Committees it is not thereby precluded from supervising the work of the Committees.

4. That even though it is wrong for Mr Akinmarin to vote on the resolution that in the circumstances of this case his vote did not vitiate the resolution.

In respect of the first point I think that it is clear law that an order of *certiorari* will not lie except to Courts and to other persons and bodies having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially; (Halsbury's Laws of England, 3rd edition, Vol. II, article 112). It does not lie to remove mere ministerial, administrative or executive acts. *Ojo Amaka* v. *Lieutenant-Governor, Western Region, and Owo District Native Authority*, (1956) F.S.C. 57.

The question whether or not the duty to act judicially exists must be decided in the the light of the circumstances of the particular case: *R.* v. *Electricity Commissioners,— ex parte London Electricity Joint Committee Company (1920) Limited*, (1924) 1 K.B. 171 (C.A.). In *Nakhuda Ali* v. *M. F. de S. Jayaratne*, (1951) A.C. 66 (P.C.), it was decided that "the only relevant criterion by English Law is not the general status of the person or body of persons by whom the impugned decision is made, but the nature of the process by which he or they are empowered to arrive at their decision". Again in R. v. *Manchester Legal Aid Committee ex parte R. A. Brand and Company Limited*, (1952) 2 Q.B. 413, 429, it was said that an administrative body in ascertaining facts may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of and are not in accordance with the practice of a Court of Law. In *R.* v. *North Worcestershire Assessment Committee ex parte Hadley*, (1929) 2 K.B. 397, 406 Lord Hewart, C.J., said—

> "It is in my opinion a body of persons having legal authority to determine questions affecting the rights of subjects and secondly, to the extent to which it has and is performing that duty, it has, I think the duty to act judicially.....it is not correct to say that by its very nature, position and scope, an assessment committee is outside the area of bodies to whom a writ of (Prohibition) may properly be directed".

Applying the foregoing to the present case I hold that the Council is a body of persons having legal authority to determine questions affecting the rights of subjects, that in respect of the resolution in question it determined questions affecting the right of subjects and to that extent that it has a duty to act judicially. It is therefore a case to which the order will apply.

I now come to the question of the delegation of authority by a Council. Mr Agbaje has cited a very recent case in support of his argument that once authority has been delegated without reservation the donee of the power could act without the need for a subsequent ratification of such act by the Council. The case is *Batteley* v. *Finsbury Borough Council*, (1958) 122 J.P. 169. In that case section 58 of the London Government Act, 1939 provided that a local authority may appoint a committee for any purpose which in the opinion of the authority would be better managed by a Committee. By section 67 it is provided that the local authority may delegate to the Committee any functions relating to a matter referred to it. A local authority appointed a Works Committee and by its standing orders it was provided: "The Works Committee shall be responsible for appointment and management". The plaintiff applied for the post of Assistant Road Superintendent, was interviewed by the Works Committee which resolved that the plaintiff be appointed to the post. He was notified by the Town Clerk that he had been selected "subject to confirmation". Subsequently the Committee appointed someone else. Plaintiff sued for breach of contract and Salmon, J., held that on the true construction of the standing orders the local authority had delegated to the Works Committee the power to appoint the plaintiff to the post and the Committee having entered into a contract to that end were in breach.

I have quoted from a summary of the judgment and I have not the opportunity of reading the whole judgment. In my own view it would appear, and I say this with respect, that if the offer was made "subject to confirmation" it was a conditional offer and the authority of the local authority to engage someone else would not appear to have been ousted or exhausted.

In *Huth* v. *Clarke*, 25 Q.B.D. 391, 394, 395, Lord Coleridge, C.J., said: "Delegation does not imply a denudation of power and authority", and Wills, J., said "'Delegation', as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself". ".....The word is never used by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights.....The word delegate means little more than an agent. The motion, therefore, that the use of the word 'delegate' implies that the executive committee parted with their own authority is misconceived". In my opinion the power delegated by a Council should not be construed too strictly and unless it is clearly shown that the delegating authority expressly parts with its own authority it should be implied that it retains some authority to ratify or reject a recommendation of the delegate.

In this case exhibit "E" relates to the powers delegated by a former Council to its Committees and there is no evidence of the powers delegated by the present Council to its Committees. It is however apparent from the minutes of the emergency meeting of the Council held on 31st March, 1958 (exhibit "F" at page 4) that one Councillor Ojo referred to a resolution of the Council passed unanimously at its meeting of 31st January, 1958.

(*i*) That the Investigating Committee should inspect all the remaining timber areas completely within two weeks and submit their reports to the Establishment and General Purposes Committee for necessary actions and that the Local Government Police Force be requested to make available the services of a competent constable to accompany the Investigating Committee in order to maintain peace.

(*ii*) That all the reports previously submitted by the Commission of Inquiry into illegal felling be adopted *and that disciplinary action be taken forthwith by the* Establishment and General Purposes Committee against any member of the Forest Staff involved.

It will be seen from the foregoing that the Council itself directed the Committee *to take disciplinary action forthwith.* That action was taken by the Committee by its resolution of 15th February, 1958 (exhibit "D") dismissing the Forest Guards. In my judgment the Council's Secretary cannot rightly describe the dismissal of the Forest Guards as interdiction. Further, as the guards were dismissed the approval of the Minister of Local Government is necessary before they could be re-engaged.

But does the resolution violate the provision of the Western Region (Local Government) Staff Regulations, 1955? In my view it does not. A Council is entitled to consider whatever course of action it proposes to take and formulate its resolution to give effect to it. The only difference, in this instance, is that it is necessary, before it gives effect to that resolution to obtain the consent of the Minister of Local Government. In fact, such a resolution would be one of the things which the Minister may wish to consider before giving his decision as to whether or not the dismissed guards should be re-engaged: (*See* the judgment of Avory J. in *R* v. *Bedfordshire County Council*, Ex parte *Sear*, (1920) 2 K.B. 465, at page 481).

The next point I wish to consider is whether or not the applicant is an aggrieved party. Who is an aggrieved party? He is, in my view, a person to whom grief or annoyance or pain is caused or a person against whom some injustice has been perpetrated. In respect of acts by a public body I would therefore say that an aggrieved person is one who is closely and directly affected by the act or decision of the body and against whom the decision results in the perpetration of an injustice or to whom such an act or decision causes personal grief or annoyance or pain not merely as a member of the public but in his own personal capacity.

In this case can the resolution in question be said to have that effect in so far as the applicant is concerned? It should be noted that his appointment resulted from the dismissal of the eleven Forest Guards whom the resolution seeks to reinstate, and that the reason given by the Council for the termination of his appointment is the intention of the Council to re-engage (or reinstate) the dismissed Forest Guards. Counsel for the Council has argued strongly that the applicant's appointment was temporary and that it was determinable without any reason being given. And *ipso facto* that the fact that a reason was in fact given does not result in any injustice to the applicant. In my view once an employer gives a reason for the termination of the service of his servant, even though he is not obliged to give one, having once given it the Court can consider it and decide whether or not the dismissal of the servant is unlawful and in this case whether the dismissal was such as to cause grief or annoyance or perpetrate an injustice to the servant.

The resolution in question, as the Council's letter shows, was responsible for the decision to terminate the applicant's employment. That is the only reason given, and as it has a direct effect on the prospects of the applicant and has caused him some anxiety I do not think that he can be regarded as a mere member of the public. In my judgment he is an aggrieved party.

Finally was there bias by interest? In *Dimes* v. *Proprietors of Grand Junction Canal*, (1852) 3 H.L.C. 759, it was stated that in the absence of statutory authority or consensual agreement no man can be a judge in his own cause. Chief Soetan has argued that even

though Mr Akinmarin voted on the resolution and did so wrongly, that that of itself is not sufficient to vitiate the resolution. Sixty-four persons attended the meeting. Five voted against the resolution and fifty-nine, including Mr Akinmarin voted in favour. In *R.* v. *Hertfordshire Justices*, 6 Q.B. 753, 756, Lord Denman, C.J., said—

"Both these gentlemen had a disqualifying interest.....It is contended that, as the majority, without reckoning his vote, was in favour of the confirmation, the order is not vitiated. But, after making every possible deduction from the strength of my opinion, in deference to that of my brother Patteson, still in my judgment a decision is vitiated by any one interested person taking part in it. We cannot enter into an analysis of the different motives that a single interested person has formed part of the Court".

This view does not appear to allow the exercise of any discretion in the matter. There is however a decision of Lord Hewart, C.J. in *R.* v. *North Worcestershire Assessment Committee ex parte Hadley*, (1929) 2 K.B. 406, which, and I say this with the utmost respect, deserves close attention. He said—

"Now, if that be so, this assessment committee, while it contained as representatives from the Halesowen district these two gentlemen who had been members and, for aught I know, still were members of the sub-committee that went through and fixed the values of the properties at Halesowen, was, it seems to me, to that extent improperly constituted. Of the probable dimesions of the mischief it is not necessary to form even a conjecture, but one would naturally suppose that in such a body, when hereditaments from Halesowen were being considered the natural and ordinary course for the other members of the assessment committee would be to pay great attention to what was said by the representatives from Halesowen itself, who would bring to the committee a particular and, it might be, valuable local knowledge, and if those gentlemen came with their minds already made up, firmly and conscientiously believing that the valuation at which they had arrived as members of the sub-committee was the true valuation, it needs very little imagination to perceive that their weight and influence upon the assessment committee might be great indeed. But it is not necessary to enter into speculations of that character. It seems to me that the committee was in this position: that it had upon it as members persons who for good reason ought not to have been there".

I am therefore of the view that a decision whether there has been a bias by interest does not rest upon any inflexible rule but upon the circumstances of each particular case.

In this case Mr Akinmarin was not a member of the Committee which investigated the complaints and it is not a matter of speculation or conjecture as to what transpired at the meeting at which the resolution in question was passed. There is a record of those who spoke on the resolution and it is not on record that Mr Akinmarin did more than to vote in favour of the resolution when it was put to the vote.

In *R* v. *Sussex Justices*, ex parte *Mc-Carthy*, (1924) 1 K.B. 256, 257, Lord Hewart, C.J., said—

"The Court acts on the fundamental principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

The result of the vote being so overwhelmingly in favour of the resolution and there being ample ground to conclude that Mr Akinmarin did not take any part in the debate on the resolution it is my view that the principle laid down by the Lord Chief Justice is

not violated in the present case and that the resolution in question is not vitiated by the inclusion in the majority vote of 59 of Mr Akinmarin's single vote. I think that the position would have been different if Mr Akinmarin had been a member of the investigating committee which enquired into the matter and if he had joined in taking the decision which the Council debated upon before making the resolution in question in this case.

Order nisi discharged with costs.

EHIGIE AGHO ... ... *Petitioner*

v.

DAVID UWADIA
ELECTORAL OFFICER
(Akugbe District Council Area)
RETURNING OFFICER
(Akugbe District Council Area) } ... ... *Respondents*

[HIGH COURT OF JUSTICE: Morgan, J., 18th December, 1958.]

Election petition—nomination of candidates—statement published under regulation 38 of the Parliamentary and Local Government Electoral Regulations, 1955—"deemed to stand nominated"—Regulation 37 (1)—notice under Regulation 47 (1)—"each candidate remaining nominated"—Regulation 47 (1) (b)—nomination held invalid after publication of statement made under Regulation 38.

The petition was presented on the grounds that the name of the petitioner appeared in the statement of persons nominated published under regulation 38 of the Parliamentary and Local Government Electoral Regulations, 1955, but that no notice of poll was published under regulation 47 and that the first respondent was therefore improperly declared elected as the only person validly nominated. There was dispute at the hearing as to the identity of the nomination paper handed to the second respondent on the day of nomination but it was not contended that the reasons given in the endorsement on the nomination paper found by the court to have been handed in did not sustain the decision that the nomination was invalid. It appeared, however, that a statement published by the second respondent under Regulation 38 included the names of both the petitioner and the first respondent as persons who "stand nominated for election". No subsequent notice was published under Regulation 47 (1) the second respondent having decided in the interim that the nomination paper of the petitioner was invalid and that he did not therefore "remain nominated". No notice of poll was therefore necessary and the first respondent as the only candidate "remaining nominated" was declared elected.

Held: (1) that the statement or notice published under Regulations 37 (1) and 38 did no more than state the names of the persons "deemed to stand nominated" on the date thereof;

(2) that while by Regulation 37 (1) (*a*) the Electoral Officer is required to consider the validity of nomination papers as soon as possible this does not oblige him to do so before publishing the notice under Regulation 38;

(3) that the Electoral Officer having properly held the petitioner's nomination paper to be invalid after the publication of the notice and there being therefore only one person remaining nominated the first respondent was properly declared elected.

Petition dismissed.

Benin Civil Suit No. B/73/58.

Ogunsanya for petitioner.

Akinloye for first respondent.

Oki, Acting Legal Draughtsman, for second and third respondents.

Morgan, J.: (*having disposed of the issue as to the identity of the nomination paper proceeded*): It is clear that exhibit "D" (the petitioner's nomination paper according to my finding) contains an endorsement under the hand of Mr Legemah

that the petitioner's nomination was invalid for the reasons given in the endorsement. Mr Ogunsanya has not argued that the reasons given in the endorsement do not sustain the decision that the nomination was invalid. He has however tendered in evidence a notice under the hand of Mr Legemah and made in pursuance of the provisions of Regulation 38, exhibit "E", which reads as follows:—

"Notice is hereby given that the following persons stand nominated for election to the 32E Ward of the Akugbe District Council elections to which will take place on the 17th of May, 1958.

1. Agho Ehigie
2. Uwadine, David O.".

Mr Ogunsanya contended that following the publication of this notice the Electoral Officer cannot declare the petitioner's nomination to be invalid. This argument is now put forward by Mr Ogunsanya in respect of a notice published under Regulation 38 where as in his petition the argument was put forward in respect of a notice published under Regulation 47. Mr Legemah has stated on oath that his construction of Regulation 38 is that the notice should be published in respect of all persons who have delivered nomination papers.

It will be seen from the schedule to the Electoral Regulations that no form is provided to be used for the notice under regulation 38. The Regulation provides "The Electoral Officer shall.....publish by displaying it or causing it to be displayed.....a statement of the full names of *all persons* nominated and of the persons nominating them with their respective addresses and occupations.". And Regulation 37 (1) provides—

"When a nomination paper is delivered and a deposit is made in accordance with Regulation 36 the candidate *shall be deemed to stand nominated unless and until* the Electoral Officer decided that the nomination paper is invalid.....".

It will be seen that the notice published by the Electoral Officer under Regulation 38—as evidenced by exhibit "E" was "that the following persons stand nominated for election". If by Regulation 37 (1) a candidate who has delivered a nomination paper and made a deposit in accordance with Regulation 36 is deemed to stand nominated and the notice published by the Electoral Officer is of the "persons (who) stand nominated" it is my view that the notice does not purport to be the final notice of persons standing for election who must be voted for. In my view Regulation 47 (1) (*b*) is the notice of poll and provides that "The Electoral Officer shall on or before the sixth day before the day of election cause to be published.....the full names of candidate remaining nominated".

Although Regulation 37 (1) (*a*) provides that the Electoral Officer should as soon as possible consider the validity of nomination papers, this does not oblige him to do so before publishing the notice under Regulation 38.

In my judgment the wording of Regulation 47 (1) (*b*) contemplates the situation when the number of persons remaining nominated is less than the number standing nominated. Further, in my view, the learned Counsel for the petitioner must have held this view when the petition was filed and has merely changed his position when he found that no notice was published under regulation 47.

In conclusion exhibit "D" contains an endorsement by the Electoral Officer to the effect that the petitioner's nomination paper is invalid. He made the endorsement in

compliance with Regulation 37 (4) and in my judgment he was entitled to hold the nomination invalid on the grounds stated in his endorsement. And as the respondent was the only person who remained validly nominated after the latest time for the delivery of nomination papers and for the withdrawal of candidates, he was by virtue of the provisions of Regulation 42 (1) (*b*) properly and legally declared elected.

Petition dismissed.

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CORRIGENDUM

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The correct reference to the report of the case of *Wright* v. *Hale*, is—
"3 L.T. 444".

S. O. ERIAVBE ... ... *Plaintiff*

v.

1. JOHN OKOTIE
2. IREJUWA IRERORO } ... ... *Defendants*
3. ASHEYIUKU

[HIGH COURT OF JUSTICE: Duffus, J., 8th November, 1958.]

Malicious prosecution—duty of defendant to find out true facts before prosecuting—absence of reasonable and probable cause—malice—joint and several liability.

The plaintiff was seeking to recover from the defendants damages for malicious prosecution. The first defendant had reported to the police that the plaintiff and two others had stolen a sum of £400; the plaintiff had been arrested but after a thorough investigation the police had released him as they had found no offence committed for which he could have been prosecuted. The defendants not being satisfied with the action taken by the police especially in returning the £400 alleged to have been stolen to the plaintiff instituted a private prosecution against the plaintiff and two others for having obtained that amount with intent to defraud from the Treasurer of the Western Urhobo District Council by falsely pretending that they had been delegated and authorised by the Community and Elders of Aghalokpe to receive the same which was a Government grant. The trial for this offence in the Magistrate's Court had ended in the plaintiff and the two others being acquitted and discharged.

Held: (1) that there was clearly a duty for the defendants to have found out the true facts before commencing the prosecution having regard to the fact that they knew that the police after thorough investigation had decided not to prosecute and therefore they must have realised that the plaintiff had not stolen the money;

(2) that as there had been want of reasonable care on the part of the first defendant to inform himself of the true facts of the case before prosecuting, then there must also have been want of reasonable and probable cause for the prosecution which had, on the evidence, been instituted not to punish the plaintiff for a crime but as a means for the defendants to obtain and control the Government grant;

(3) that the first defendant had instituted the prosecution maliciously in that he himself had stated that the purpose of the prosecution was really to obtain the money for the community; in that he had sworn to a very inaccurate affidavit in order to get the defendants re-arrested; in that he had failed to make proper enquiries as to the true facts of the case; and in that he had no reasonable and proper cause for the prosecution;

(4) that the first defendant having been expressly authorised by the second and third defendants to prosecute the plaintiff, all the defendants were jointly and severally liable to him for damages.

Plaintiff awarded damages.

Case cited:

Abrath v. *North Eastern Railway Co.*, (1883) 11 Q.B.D. 440; (1886) 11 App Cas. 247.

Warri Suit No. W/155/1956.

Lardner and Ekeruche for Plaintiff.

Atake for Defendants.

Duffus, J.: In this action the plaintiff seeks to recover damages from the three defendants for malicious prosecution. The plaintiff's case is that the first defendant maliciously and without reasonable or probable cause preferred a charge before the Magistrate at Sapele against the plaintiff and two others alleging that with intent to defraud, they obtained £400 from the Treasurer of the Western Urhobo District Council by falsely pretending that they had been delegated and authorised by the entire Community and Elders of Aghalokpe people to receive this amount. As a result of this charge the plaintiff along with two other persons, Isaac Okumakube, and Gbemisheye Orogun, were arrested and the plaintiff's case is that they were then prosecuted by the three defendants before the Magistrate on a trial that was protracted over a period of nearly six months, and that ended with the plaintiff and the other two accused persons being acquitted and discharged.

The plaintiff tendered in evidence a certified copy of the proceedings in the lower Court.

The first defendant admits he prosecuted the plaintiff and that the trial ended in the plaintiff being discharged and acquitted. The second and third defendants deny prosecuting the plaintiff. All the defendants claim that they acted without malice and that there was reasonable or probable cause for the prosecution.

It is an admitted fact that the plaintiff along with Okumakube and Orogun did receive £400 from the Western Urhobo District Council as a Community Development grant for and on behalf of the Ogoni Community of Aghalokpe.

From the record of the criminal case and from the plaintiff's evidence and other documents put in by the plaintiff, the following facts are clearly proved and are not disputed by the defence.

On the 18th December, 1955, the plaintiff along with five others applied to the Finance Committee of the Western Urhobo District Council for a grant. It is to be noted that in this letter (Ex. 3) in which the plaintiff and the other parties stated they acted on behalf of the Ogoni Community, they did not state that they had been authorised to act.

By a letter (Ex. 2) the Treasurer of the Western Urhobo District Council wrote to Gbemisheye Orogun as the President of the Ogoni Community, and who was one of the signatories to the letter and also one of the accused, to say that the Finance Committee had approved that a grant of £629 be made and asking that Mr Orogun along with the Secretary of the Community, and the plaintiff should attend at the Treasury and withdraw the £400. The Secretary was Isaac Okumakube, the second accused. It is also to be noted that the plaintiff was at that time, and still is the duly elected Councillor representing Aghalokpe in the Western Urhobo District Council, and he was also a member of the Finance Committee.

Acting on this letter, the three persons named, that is, the plaintiff and Okumakube and Orogun duly attended at the Treasury and there they were paid the £400 and duly signed the payment voucher. The voucher was payable to the Ogoni Community, but it had endorsed on it the names of these three persons apparently as the persons to whom payment was to be made.

On this evidence it appears clear that the plaintiff and the two other accused persons did not receive this money by false pretences. There was no false pretence or misrepresentation in the original letter (Ex. 3). The decision to pay to the three accused was

made by the District Council, and there was no representation made by the three accused that they had been authorised by Ogoni Community or the Aghalope people to receive this amount. In fact the money was paid to them for the Ogoni Community. The Aghalokpe people are the Ogonis, Aghalokpe being the name of the village which is inhabited by the Ogoni people.

The plaintiff after the money had been received left the money with Gbemisheye Orogun with instructions to report this to the second defendant Irerоro, who is admittedly the head of the Ogoni or Aghalokpe people. The plaintiff then immediately left for Ibadan and only returned on the third March. The plaintiff did not call Orogun, and the second defendant, who is said to be a very old man and now ill, did not attend the trial. There is therefore no evidence before me to show that any report was made to the second defendant that the money was received. According to the record evidence as to this was given at the criminal trial.

I will now state the short facts for the defence. The defendants are all prominent people in Aghalokpe. The second defendant Irejuwa Irerоro, is admittedly the head Chief of the Aghalokpe and accordingly of the Ogoni Community. The third defendant, is a chief in the Community, and a Judge of the Western Urhobo Native Court of Appeal and the spokesman of Aghalokpe, whilst the first defendant appears to be plaintiff's rival for the position of Councillor of Aghalokpe. Apparently, these defendants were under the impression that the Honourable Ometan had obtained a grant of £1,600 for the Aghalokpe people. The defence now agree that this grant was never obtained, but their case is that at the time the first defendant started this prosecution, as he stated in his affidavit, he honestly believed that this grant had been made. The third defendant in his evidence states that in February 1956, the Orodje of Okpe, the President of the Appeal Court, told him that there was some money in the Sub-Treasury for the people of Aghalokpe, and he so informed the second defendant, his Chief, who summoned a town meeting. This meeting appointed the third defendant and five others to go to Ororokpe to collect this money and according to him the second and third accused in the criminal case, Okumakube and Orogun, were present at this meeting but never said that they had received any money. The third defendant and the other persons then went to Ororokpe Treasury to draw this money, but were informed that the plaintiff and the two other co-accused had already claimed this money. They returned and reported and a town meeting was summoned and as a result Okotie, the first defendant, was authorised to take steps to have the plaintiff and the two other accused prosecuted.

The result was that the first defendant reported the matter to the police, and alleged that the plaintiff and the others had stolen £400 on the 4th March, 1956, and the plaintiff was arrested by the police. The result of the police investigation was given by the only witness called by the plaintiff, P.C. John Dibie. According to this constable after a thorough investigation the police found that there was no case against the plaintiff and he was released and not prosecuted by the police.

The defendants were not, however, satisfied with the police not prosecuting the plaintiff, and especially were they not satisfied with the police returning the £400 which had been handed in by the plaintiff back to the plaintiff, and accordingly the first defendant instituted this private prosecution.

The defence maintained that there was reasonable and probable cause for this prosecution, and the main facts on which they rely are that the plaintiff along with the two other persons did in fact receive £400 from the Sub-Treasury at Ororokpe, and

that they had no authority to receive this money, and made no report to the Community of having collected the money on their behalf. The defence also rely on two other facts, one that the plaintiff immediately he had collected the money left the distrct for Ibadan, and secondly that the second and third accused Okumakube and Orogun were present at a meeting before the prosecution was commenced and there denied receiving any money.

The onus is on the plaintiff to prove that this prosecution was commenced maliciously and without reasonable and probable cause.

The plaintiff has proved the correct facts as to this £400, and as I have already stated it is obvious on these facts that he was not guilty of the offence for which he was charged. He made no false pretences and on the evidence he had no intention to defraud. His case is that the defendants brought this prosecution without taking the trouble to find out the true facts. It is clear from the affidavit filed by the first defendant in support of the charge that the prosecution did not take the trouble to find out the true facts of this case. The affidavit on which the defendant's prosecution was based contained a great deal of inaccurate and untrue statements, and the facts therein stated were quite different from the true facts of the case. Reasonable and probable cause depends on the facts which were to the defendant's knowledge at the time of starting the prosecution. I would here set out the following from the text of *Clerk and Lindsell on "Torts"*, 11th ed., p. 864:

> "But neglect to make reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also of malice".

I would also like to refer to this passage taken from the judgment of Brett, M.R. in *Abrath* v. *North Eastern Railway Co.*, (1883) 11 Q.B.D. 440 affirmed in (1886) 11 App. Cas. 247, H.L.; (33 Digest 500):

> "The question, whether reasonable care has or has not been taken by a prosecutor to inform himself of the real state of the case, is not merely a piece of evidence to prove some fact, but it is a question which is itself to be decided by evidence, and upon which evidence to prove or disprove it may be given. It is a necessary part of the question whether there was reasonable and probable cause, because if there has been a want of care on the part of the prosecutor to inform himself of the true state of the case, then there must be a want of reasonable and probable cause".

I am of the opinion that there was clearly a duty in this case for the defendants to have found out the true facts before prosecuting. They had reported the matter to the Police. It was to their knowledge that the police had conducted enquiries into their complaint and had decided that they would not prosecute. It was also to their knowledge that the plaintiff had handed over £400 to the police, and that the police had handed this back to the plaintiff. In my view, the defendants must have then realised that the police had acted as a result of their enquiries, and they should have been all the more careful to verify the facts before proceeding to prosecute and have the plaintiff arrested. They must have then also realised that the plaintiff had not stolen the £400 as they had reported to the police.

The first defendant on the evidence, however, appears to have made no further enquiries, but to have then proceeded to swear to an affidavit which showed clearly his ignorance of the true facts, and had the plaintiff and the others re-arrested and prosecuted in Court.

I must also here point out that I am not satisfied that the second and third accused ever denied having received this money. This is now alleged by the first defendant in his evidence but according to the third defendant and also as stated by the first defendant in the criminal trial, the second and third accused were present at the meeting when the third defendant and others were delegated to go for the money at Ororokpe but said nothing.

It also appears from the evidence of the first defendant at this trial that all he was really concerned with was to get the £400 out of the plaintiff's hands and it does appear that the whole cause of the prosecution was not so much a desire to punish the plaintiff for a crime, but a means of the defendants obtaining and no doubt controlling the Government grant.

On the facts before me I am satisfied and find that this prosecution was instituted without reasonable and probable cause.

On the question of malice, I would first state that the letter (Ex. 5) which was written after the start of this prosecution, and also the fact that the first defendant contested an election after this date with the plaintiff is not evidence of malice in this prosecution.

On all the facts I am satisfied that the first defendant did institute this prosecution maliciously, as he himself states he instituted the prosecution really in order to obtain the £400 for the community, but apart from this, the very inaccurate and to some extent untrue affidavit that he swore to, his failure to make any proper enquiries as to the true facts of the case, and the facts that he had no reasonable and proper cause for this prosecution are all facts which have led me to the conclusion that this prosecution was brought not with a genuine belief in the guilt of the plaintiff, but spitefully and in order to obtain control of the £400.

It appears clear from the evidence in this case and also from the record of the criminal proceedings that the first defendant was expressly authorised by the second and third defendants, amongst others, to prosecute the plaintiff and the other persons in this case. All the defendants are therefore jointly and severally liable in this action.

The plaintiff has proved that these defendants maliciously and without reasonable and probable cause prosecuted him on a criminal case for obtaining money by false pretences, and that he was acquitted and discharged on the trial.

The plaintiff was charged with a criminal offence, for which he was arrested and had to appear numerous times in Court. The charge was a criminal one for which he could have been imprisoned. The law implies that he suffered damages. No special damages were claimed.

I allow the plaintiff £100 general damages. There will be judgment for the plaintiff against all the three defendants for £100 and with costs and solicitor's costs. I will allow thirty guineas solicitor's costs.

Plaintiff awarded damages.

JOHNSON OBI
EKOFODE PATANI ... ... *Accused*

IN RE JOHNSON OBI ... ... *Appellant*

v.

INSPECTOR-GENERAL OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Duffus, J., 29th November, 1958.]

Criminal law and procedure—demanding money with menaces with intent to steal contra section 406 of Criminal Code, Cap. 42—witnesses for prosecution erroneously not regarded as accomplices by trial Magistrate—failure to warn self against accepting their uncorroborated evidence—section 177 of Evidence Ordinance, Cap. 63—effect of misdirection.

The appellant, a police Corporal had been convicted and sentenced by a Chief Magistrate for demanding money with menaces with intent to steal contrary to section 406 of the Criminal Code, Cap. 42. The prosecution's case was that he had threatened to take to Warri a number of persons who had without authority investigated a case of attempted murder. When some of the prosecution witnesses later approached him on the matter it was stated that he demanded to be paid the sum of £60 if he was not to carry out his threat and that these witnesses then suggested the lower sum of £50 which was later collected. In his judgment the trial Chief Magistrate had stated that he did not regard these witnesses as accomplices.

Held: (1) that the trial Court had misdirected itself in deciding not to treat the witnesses in question as accomplices;

(2) that although there was evidence which if accepted would have afforded corroboration of the evidence of the accomplices and under section 177 of the Evidence Ordinance, Cap. 63, the necessity for a Court to warn itself against the danger of convicting on the evidence of an accomplice arises when the only evidence against an accused person is that of an accomplice not corroborated in any material particular, yet in this case the trial Court had found that the witnesses in question were not accomplices and its findings of fact had been made on that basis, including a finding that one of these witnesses had impressed it as a witness of truth;

(3) that in the circumstances it was impossible to say that the trial Court would, if it had properly directed itself as to whether the witnesses were accomplices, have come to the same conclusion as it did and have found the appellant guilty.

Appeal allowed.

Cases cited:

Nweke v. *The Queen*, 15 W.A.C.A. 29.

R. v. *Michael John Davies;* 38 Cr. A.R. 11.

Warri Criminal Appeal No. W/24CA/1958.

Idigbe for Appellant.

Fasinro, Crown Counsel, for Respondent.

Duffus, J.: This is an appeal by the first accused, Johnson Obi, a police Corporal against the conviction and sentence by the Chief Magistrate on a charge of demanding money with menaces with intent to steal contrary to section 406 of the Criminal Code.

There were originally two accused persons on three counts but at the close of the prosecution's case, on submissions that no case was made out, the learned Chief Magistrate discharged the second accused on all counts, and discharged the first accused on counts (1) and (2). The trial proceeded against the appellant on the third count, and he was convicted.

A short summary of the prosecution's case is that both accused are policemen. The appellant, a Corporal, and second accused, who was discharged, a constable, proceeded to Bomadi on police duties. Whilst there they ascertained that the Secretary of the Western Ijaw Divisional Council, Mr Oki, the first prosecution witness, two court messengers, Thomas Lewis, who was called by the Crown, and James Ukoti (the fifth prosecution witness) and Councillor Ogodobri Ugoboh with the third prosecution witness had taken part in investigating a report on a case of attempted murder. The allegation is that the appellant said he would take all the persons mentioned to Warri because the Secretary of the Council had no right to investigate a case of attempted murder and he did not report the matter in time to the police at Warri. According to the prosecution this matter started when the second accused who was discharged told Councillor Ugoboh and Thomas Lewis, the Court Messenger who did not give evidence, that they were to do something "to please the first accused" so that he would not take them to Warri. The second accused was an Ijaw man and this incident happened in Ijaw country.

These two persons, the Councillor and the Court Messenger, then went and reported what happened to Chief Bozimo, the second prosecution witness.

The natural inference here is that they reported the remarks of the second accused which really suggested that some form of bribery be offered to the Corporal (the appellant) to prevent his carrying the four persons to Warri.

Bozimo then acted on this report and at a meeting in his house he called the appellant outside, and in the presence of Aboroson, there followed the conversation which forms the basis of the Crown's case. This is that the first accused said if he was not to take the persons mentioned to Warri he must be paid £60; then both Aboroson and Bozimo suggested a lower sum and eventually £50 was agreed upon and then according to both Bozimo and Aboroson they told the persons concerned what had occurred and the money was collected, and handed to Bozimo although it was eventually returned to Councillor Ogodobri.

In his judgment the learned Chief Magistrate specifically stated that he did not agree that Chief Bozimo, and Councillor Aboroson were accomplices.

Learned Counsel for the appellant submitted that this was an error in law, in that Bozimo and Aboroson were accomplices. Learned Crown Counsel agrees that both Bozimo and Aboroson were accomplices but submits that there was sufficient corroboration of their evidence by other prosecution witnesses not accomplices.

After consideration, I agree that both Bozimo and Aboroson were accomplices and that the Chief Magistrate misdirected himself in law when he held they were not. In the judgment of the West African Court of Appeal, in *Nweke* v. *The Queen*, 15 W.A.C.A. 29 at page 30, Foster Sutton, P. accepted the definition given to accomplices by Lord Simonds, L.C., in his judgment in the case of *Michael John Davies*, 38 C.A.R. 11 from which I set out the following extract at pages 32 to 33:—

"(1) On any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring, or aiding or abetting (in the case of misdemeanours)".

I agree with Counsel for appellant that both Bozimo and Aboroson would by virtue of section 7 of the Criminal Code, have been deemed to have taken part in the offence, and could have been charged with committing it, as they took an active part in assisting the appellant in making his demand. They helped in having the amount reduced and were the persons who conveyed the demand to the complainants, and in the case of Bozimo who collected the amount.

It is to be noted that Bozimo and Aboroson were the persons who approached appellant and said that they had heard certain things, or according to Aboroson he and Bozimo after a preliminary conversation asked first accused what was his opinion about the case—an invitation to appellant to state his demand.

I am therefore of the view that Bozimo and Aboroson were accomplices and should have been so treated by the Chief Magistrate. There clearly was evidence which if accepted would afford corroboration, and under section 177 of the Evidence Ordinance (Cap. 63) the necessity for a Court to warn itself against the danger of convicting on the evidence of an accomplice arises when the only evidence against an accused person is that of an accomplice not corroborated in any material particular. In this case, however, the Magistrate found that these two witnesses were not accomplices, and his findings of fact were made on this basis.

On this point I would again refer to the judgment of Lord Simonds, L.C., in the *Michael John Davies* case where he sets out the true rule as applied to the evidence of accomplices in three propositions of which I set out the second one:

> "When the Judge fails to warn the jury in accordance with this rule the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice unless the appellate Court can apply the proviso of section 4 of the Criminal Appeal Act, 1907".

An earlier extract from this judgment is illustrative of the application of this rule. I quote from page 27:

> "The Judge in his summing up, dealt with Lawson's evidence and did not warn the jury that that evidence was, or should be treated as, the evidence of an accomplice. It is argued for the appellant that this was mis-direction or to use the exact language of section 4 (1) of the Criminal Appeal Act, 1907, a wrong decision on a point of law. It was not, nor could it, in my view, be argued for the Crown that, if these contentions were right, the conviction could, nevertheless, be upheld under the proviso to that sub-section on the ground that no substantial miscarriage of justice had occurred, *viz.*, on the ground that if there has been no such mis-direction, a reasonable jury must equally have convicted. The evidence, if admissible, was not unimportant, and the jury emerged from their retirement to ask the learned Judge some question about it."

In this case the learned Chief Magistrate placed a great deal of importance on the evidence of Bozimo, and to judge from his last paragraph a great deal of his findings depended on the fact that Bozimo impressed him as a witness of truth and that he accepted his evidence. Bozimo was the key witness for the Crown, but he was also the person who collected all the money for the appellant from the complainants and was very much concerned in the demand and it was in my view highly desirable and indeed imperative that in considering his evidence the Chief Magistrate should have warned himself, that this was the evidence of an accomplice.

In this case the Magistrate not only failed to warn himself but as I have said he found and cited in his finding that Bozimo was not an accomplice.

There was as I have said corroboration, but I would point out that of the five prosecution witnesses on the facts, the fifth prosecution witness offered no corroboration on any of the material particulars, the fourth prosecution witness was also an accomplice, and by acquitting the second accused, the Magistrate would not appear to have altogether placed much reliance on the evidence of the third prosecution witness. There would, however, remain the evidence of the first prosecution witness, although on this point I must observe that he completed his evidence at the trial six months before the other witnesses were called. I must also agree that there are in the evidence in this case several not immaterial contradictions.

I am of the opinion that it is impossible for this Court to say, that the learned Chief Magistrate, would, if he had directed himself properly as to whether the witnesses, Bozimo and Aboroson were accomplices, have come to the same conclusion as he did and have found the appellant guilty.

The appellant is entitled to have his appeal allowed. I accordingly quash the conviction and sentence and enter a verdict of acquittal.

Appeal allowed.

ONOYERIRERE EGURIASE ... ... *Plaintiff*

v.

1. UNITED AFRICA COMPANY LIMITED
2. GRACE MEVBERE ... ... } ... *Defendants*

[HIGH COURT OF JUSTICE: Duffus, J., 8th December, 1958.]

Tort—claim under Fatal Accidents Act, 1846—motion to dismiss action as time barred by section 3 of Act—whether section 3 of Torts Law, No. 41 of 1958, extending limitation period prospective or retrospective in effect.

On a motion to dismiss an action commenced on the 6th May, 1958, under the Fatal Accidents Act, 1846, on the ground that it had been brought outside the limitation period of twelve calendar months as laid down by section 3 of that Act, it was argued *inter alia* that section 3 of the Torts Law, No. 41 of 1958, which came into force on the 14th of August, 1958 and which extended the limitation period in fatal accident cases to three years should be construed as being procedural and therefore retrospective in effect and applicable in respect of the death of the deceased which took place on or about the 13th February, 1956.

Held: (1) that the plaintiff's right to bring her action under the Fatal Accidents Act, 1846, expired twelve months after the death of the deceased;

(2) that the whole of Part II of the Torts Law, 1958, dealing with fatal accidents must be construed and given effect to as one law, and as this Part conferred new rights and imposed new obligations the whole of it had a prospective effect and not a retrospective effect as a procedural law;

(3) that therefore the proviso to section 3 of that Law extending the limitation period to three years could not be given a retrospective effect so as to revive a cause of action which had already expired.

Plaintiffs claim dismissed.

Cases cited:

Lauri v. *Renad* [1892] 3 Ch. 402.

The King v. *Chandra Dharma* [1905] 2 K.B. 335.

Warri Suit No. W/42/1958.

Ogbobine for Plaintiff.

Ogbe for *Idigbe* for first Defendant.

Duffus, J.: This is a claim made under the Fatal Accidents Act, 1846. The plaintiff's claim is based on the fact that the Fatal Accidents Act with the amending Acts which were in force in England on the 1st January, 1900, is a statute of general application within the meaning of section 14 of the Western Region High Court Law, 1954, and as such applicable to this Region. This was not questioned by the defence in this case.

The plaintiff discontinued the action against the second defendant. The present matter before the Court is a motion by the first defendant to dismiss this action, as the action was not commenced within twelve calendar months after the death of the person injured as required by section 3 of the Fatal Accidents Act, 1846.

According to the claim and to paragraph 3 of the statement of claim, the deceased, the subject of this action died on or about the 13th February, 1956. This action was commenced on the 6th May, 1958, the date it was filed in Court, and accordingly was commenced well beyond the statutory period of limitation, in fact over two years and two months after the death of the deceased.

This was not disputed by learned Counsel for the plaintiff, and he relied on two submissions. He first argued that the English amending Act made after the 1st January, 1900, would apply to the principal Act, and should be given effect to in Nigeria, so that the amending Act of 1954, extending the period of limitation to three years would also apply out here. Clearly this argument cannot be correct. Section 14 of our High Court Law is explicit. It applies to the Statutes of general application which were in force in England on the 1st January, 1900, and subsequent amendments or repeals of those Statutes in England do not affect the parties out here. The Statute of general application in England on the 1st January, 1900 remains in force out here subject of course to the Laws and Ordinances of this country.

His second submission was that the Torts Law, 1958, No. 41 of 1958, would apply and that by section 3 of that Law the period of limitation in respect of a fatal accident is now three years. He argues that this Law is retrospective and would therefore apply to the death of the deceased in 1956. This Law came into force on the 14th August, 1958.

The general rule of construction is that the effect of a Statute is prospective, but if it is a Statute dealing with procedure only, then, unless the contrary is expressed, it applies to all actions whether commenced before or after the passing of the Statute. Counsel for the respondent made two submissions. First he submitted that the Part of the Torts Law, 1958, applying to fatal accidents did not only deal with procedure but dealt with new rights and remedies, and therefore could not be held to be a Statute dealing only with procedure and as such retrospective, and secondly that this action was statute barred before the Torts Law, 1958, came into effect, and that that Law cannot now revive a right of action already barred.

I agree with both these submissions. I will first deal with the question whether the Torts Law revives the expired right of action.

I would refer to the third edition of *Beal's "Legal Interpretation"* on page 473 and to the following extract therein set out from the judgment of Lindley, L.J. in *Lauri* v. *Renad* [1892] 3 Ch. 402:

> "It certainly requires very clear and unmistakable language in a subsequent Act of Parliament to revive or recreate an expired right. It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

I would also refer here to the case of *The King* v. *Chandra Dharma* [1905] 2 K.B. 335. This is a case which dealt with the limitation of time for bringing a criminal prosecution. The following is an extract from the judgment of Lord Alverstone, C.J.—

> "The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alteration in procedure are retrospective. It has been held that a statute shortening the time within which

proceedings can be taken is retrospective. It seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective. If the case could have been brought within the principle that unless the language is clear a statute ought not to be construed so as to create new disabilities or obligations, or impose new duties in respect of transactions which were complete at the time when the Act came into force, Mr Compton-Smith would have been entitled to succeed; but when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed."

In the same case Channell, J., said:

"In all the cases before the Court the defendants were at the time the Act came into operation liable to prosecution, and an alteration of the time within which they might be prosecuted, whether by extension or diminution, was a matter of procedure only. If the time under the old Act had expired before the new Act came into operation the question would have been entirely different, and in my view it would not have enabled a prosecution to be maintained even within six months of the offence".

This extract is applicable to the present case. The plaintiff's right to bring her action under the Act by which she proceeds, the Fatal Accident Act, 1846, expired twelve months after the death of the deceased, and I am clearly of the view that section 3 of the Torts Law, 1958, was not intended to revive a cause of action which had already expired, and that Act vested in the defendant a right of protection against the action. It follows therefore that this action is statute barred and cannot now be maintained.

I have already stated that I agree with the submission of learned Counsel to the effect that Part II of the Torts Law, 1958, on fatal accidents is prospective and not retrospective.

Sections 3 and 4 of that Law are in effect declaratory of the law already in force in this Region, except as to the period of limitation but sections 5 and 6 both create new rights and obligations. Thus the class of persons who can benefit has been extended and provision has been made for disregarding monies payable under an Assurance Policy and also for the payment of funeral expenses.

In my opinion the whole of Part II of the Torts Law, 1958, which deals with fatal accidents must be construed and given effect to as one law, and as this Part confers new rights and imposes new obligations then the whole of this Part has a prospective and not a retrospective effect, and the proviso to section 3 of the Law which extends the limitation period within which the action is to be brought to three years cannot be construed as having a retrospective effect.

I therefore find that this action was not brought within the statutory period of limitation, and accordingly it must be dismissed.

The claim is dismissed and the plaintiff will pay thirty guineas costs to the first defendant.

Plaintiff's claim dismissed.

JEREMIAH OVIE ... ... *Appellant*

v.

INSPECTOR-GENERAL OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Duffus, J., 9th December, 1958.]

Criminal law and procedure—charge of obtaining by false pretence relating to future conduct—section 419 of Criminal Code, Cap. 42—evidence also showed false pretence as to existing fact—defect not curable by section 166 of Criminal Procedure Ordinance, Cap. 43.

In an appeal against conviction for obtaining money by false pretence with intent to defraud contrary to section 419 of the Criminal Code, Cap. 42, it appeared that the charge was that the appellant falsely pretended that he "would supply" the complainant with 4 tons of grade B2 rubber sheets.

Held : that the charge as laid referred to a mere promise of future conduct and that although the evidence disclosed also a false pretence as to an existing fact, the charge was not amended and the defect could not be cured by invoking section 166 of the Criminal Procedure Ordinance, Cap. 43: it would have been different if the charge had been that the appellant had represented that he then had the rubber in hand and would supply it.

Appeal allowed.

Cases cited:

Police v. *Anchora*, FSC 97/58 (*unreported* decision of Federal Supreme Court).

R. v. *Hughes*, 20 Cr.A.R. 4.

Warri Criminal Appeal No. W/14CA/1958.

Irikefe for Appellant.

Ogbe for Respondent.

Duffus, J.: The appellant was charged and convicted of obtaining money by false pretences. The charge reads as follows:

"That you on the 2nd day of December, 1957, at 11.00 a.m. at Ukpe Quarters, Sapele, in the Sapele Magisterial District, and with intent to defraud, obtained from Daniel Oghene, the sum of £400 by falsely pretending that you would supply the said Daniel Oghene, 4 tons of grade B2 rubber sheets, and thereby committed an offence under section 419 of the Criminal Code".

The only ground of appeal argued is that the charge as laid is bad, as it does not charge a representation of a fact, past or present, but relates to a promise to be carried out in the future in the words "you would supply".

I agree that this is so, the charge as laid refers to a mere promise of future conduct. It is a fact that as submitted by Crown Counsel the evidence also showed a false pretence as to an existing fact, but the charge was not amended, and the charge on which the appellant was convicted is of a false pretence relating to future conduct.

Learned Counsel quoted the recent case of *Police* v. *Anchora*, FSC 97/58, anp the judgment of the Federal Supreme Court given by Abbott, F.J. There was an appeal from this Court, in which Abbott, F.J. said as follows:

"Crown Counsel, replying to these arguments, conceded that the charge alleged a representation in future, but that the defect was curable by applying section 166 of the Criminal Procedure Ordinance. We desire to say at once that, in our view, this section cannot be invoked to sustain a charge which alleges acts not amounting to an offence in law by showing that the evidence disclosed other acts which did constitute the offence sought to be charged."

In the case of *Hughes*, 20 Cr.A.R. 4 the charge was somewhat similar to the charge in this case as there the word "would" was used, and in this respect I would also refer to *Archbold*, 33rd edition, page 722, Art 1250.

It would have been a different matter if the charge had read that the accused had represented that he then had the rubber in hand and would supply it.

As the charge stands it is in my view clearly bad and the conviction for obtaining money by false pretences on this charge cannot be sustained. The matter was not argued before me but I have considered as to whether an alternative verdict of stealing should be entered. I do not however, consider that this could properly be done on these facts; on the evidence the offence here was one for obtaining money by false pretences and not stealing.

The appeal is allowed, and the conviction and sentence quashed, and a verdict of acquittal entered. The appellant is discharged.

Appeal allowed.

JOHNSON EREKU ... ... *Appellant*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Ademola, F.C.J., Brett and Mbanefo, F.JJ., 18th December, 1958.]

Criminal law and procedure—offences under section 116 (1) of Criminal Code, Cap. 42—failure to call material witness fatal to count of corruptly asking—appellants action in stopping prosecution as adequate corroboration of evidence of accomplices—section 159 of Evidence Ordinance, Cap. 63, does not make accomplices incompetent as witnesses —competency covered by section 154 (1).

The appellant, an Inspector of Police, had been convicted on two counts for offences under section 116 (1) of the Criminal Code, Cap. 42. On an appeal the Federal Supreme Court.—

Held: (1) that the failure to call or explain the reasons for not calling as a witness one who had been requested to approach and had acted as intermediary with the appellant prior to the handing over to him of the sum of money the receipt of which formed the subject-matter of the count of corruptly asking was fatal to that count; the person in question would if called have been an accomplice whose evidence would have required corroboration and although the evidence might not have assisted the prosecution's case yet its absence still left that case unproved on the count of corruptly asking;

(2) that as regards the second count the trial Judge could not be said to have erred in having drawn from the reversal by the appellant of his own instruction to a subordinate to prosecute certain persons an inference that his action was the result of the visit and payment of the amount alleged to him by those persons who were regarded as accomplices whose evidence however the trial Judge had in the circumstances and quite rightly regarded as being adequately corroborated by the inference drawn from the appellant's own action;

(3) that as regards the argument that the persons regarded as accomplices were not competent witnesses, section 159 of the Evidence Ordinance, Cap. 63, making a person charged competent only to give evidence for the defence does not prevent a person charged separately from an accused or a person liable to be charged with a completely separate offence from giving evidence for the prosecution and that the competency of such a person to give evidence is covered by section 154 (1) of the same Ordinance.

Appeal allowed on 1st count but dismissed on 2nd count.

Cases cited:

Commissioner of Police v. *Addae*, 11 W.A.C.A. 42.

R. v. *Kuree*, 7 W.A.C.A. 175.

R. v. *Grant and Others.*, 30 Cr.A.R. 99.

R. v. *Sharrok and Others*, 32 Cr.A.R. 124.

R. v. *Norfolk Quarter Sessions*, ex parte *Brunson*, 37 Cr.A.R. 6.

Winsor v. *The Queen* (1866) L.R. 1 Q.B. 289.

FSC.135/1958.

Okorodudu (*Ayoola* and *Ogbobine* with him) for Appellant.

Ademola, Crown Counsel for Respondent.

Mbanefo F.J.: The appellant, an Inspector of Police, was convicted on two counts for offences under section 116 (1) of the Criminal Code, Cap. 42. The facts as found by the trial Judge were that on the 7th March, 1957, an accident occurred at Shagamu involving two motor vehicles. Police Constable Aikhoje was detailed to investigate, and on the 9th March he submitted a report in writing to the appellant who at the time was in charge of the Nigeria Police Station, Shagamu. Aikhoje said in his report that there was insufficient evidence of recklessness on the part of either of the drivers of the vehicles, but recommended that the driver and the owner of one of the vehicle—J1153—should be charged with operating and permitting the vehicle to be operated without a vehicle licence, a certificate of insurance and certificate of roadworthiness. The appellant minuted back to Aikhoje and instructed him to prosecute the driver and the owner as suggested. He said that the case of accident should be referred to the Assistant Superintendent of Police "for closing". The minute by the appellant was dated the 16th March, 1957. Aikhoje then prepared two summonses in duplicate which were signed by the Magistrate. The summonses were served on the driver and the owner of the vehicle. After the summonses were served and before the return date Yesufu Abdulai the driver, and Oloruntogun Abdulai, the owner, sent one Raji, an *Alfa*, to the appellant to beg him on their behalf. Raji was not called as a witness at the trial and failure to call him was one of the grounds of complaint against the conviction. We shall deal with that ground later. In consequence of what Yesufu and Oloruntogun said Raji had told them, they went to meet the appellant at night in his house at the Police Barracks. The appellant asked them if they had received his message sent through Raji and thereupon Oloruntogun produced £10 which he offered to the appellant. The appellant refused to accept it saying that it remained the balance of £2. Yesufu and Oloruntogun retired from the house and after Oloruntogun had gone home and returned with additional £2 they came back to the house and Oloruntogun gave the appellant £12 which he accepted. The appellant then took the summons, examined it and returned it to them and asked them to come back to the Police Station the next morning. On the next day they went and while waiting outside the station, the appellant came and took the summons from them and asked them to go home. They asked him when they would return and he told them there was no need for them to come back. The cases for which the summonses were issued and served on Yesufu and Oloruntogun were not proceeded with. Aikhoje said that he had submitted the case file with the draft charges to the appellant for approval and that the appellant had not returned the file to him, and because of that it was not possible to go on with the case on the 18th March, 1957. In August 1957, during one of the routine visits of the Assistant Superintendent of Police in charge of Ijebu Province the appellant submitted to him the case file with a minute by the appellant himself dated the 20th March, stating that there was no evidence of recklessness and suggesting that the case should be closed. He did not say anything about there being no certificates of roadworthiness and insurance and about the licence having expired. The Assistant Superintendent of Police approved the appellant's suggestion, but later discovered, in another part of the file, that the licence had expired and that there was no certificate of roadworthiness or of insurance. He asked the appellant for an explanation, but he could not give any. The learned Judge found that the minute of the 20th March was calculated to mislead in that it omitted to mention these serious offences for which there was

evidence. The Assistant Superintendent of Police instructed that the question of the certificates and licence should be re-investigated. Police Constable Aikhoje on the 28th August, 1957, and again on the 2nd September, confirmed his previous minute of the 9th March that Yesufu and Oloruntogun should be prosecuted. The appellant on the 3rd September, instructed Aikhoje to put away the file and there the matter rested.

In finding the appellant guilty, the Judge treated Yesufu and Oloruntogun as accomplices. Of Aikhoje and Lance Corporal Akintunde, 6th prosecution witness, he said that although they had not been shown to be accomplices in the offence charged he regarded them as tainted witnesses whose evidence it would be unsafe to accept without corroboration. He, however, found corroboration of the evidence of these witnesses in the report and minutes by the appellant in the file and the appellant's own conduct in stopping, as he found, the prosecution he had ordered as shown in the minute of the 3rd September, referred to above. The minute was written in spite of repeated statements by Aikhoje that the cover note which he saw expired on the 28th October, 1951.

The above findings of fact have been attacked by appellant's Counsel. On ground 7 he submitted that *Alfa* Raji was a relevant and material witness and that failure to call him was an error in law for which the conviction should be quashed. He relied in support of his argument on *Commissioner of Police* v. *Addae*, 11 W.A.C.A. 42 and *R.* v. *Kuree*, 7 W.A.C.A. 175. The principle governing the duty of the prosecution about calling relevant evidence was stated in *R.* v. *Kuree* as follows:

> "It is well established that it is the duty of the prosecution to place before the Court all available relevant evidence. This does not mean, of course, that a whole host of witnesses must be called upon the same point, but it does mean that if there is a vital point in issue and there is one witness whose evidence will settle it one way or the other that witness ought to be called. The trial Judge also has a discretion himself to call a witness in the interest of justice, and we consider it to be his duty to exercise this discretion when by so doing the real truth can be ascertained."

In *R.* v. *Kuree*, the story of the prosecution witness was as the West African Court of Appeal found extremely improbable and the Court felt that if a material witness who was available but not called had been called the trial Judge would have been in the position adequately to gauge the truth and might have come to a different decision. There were in that case circumstances which raised some doubts which could adequately have been dispelled one way or the other if all the available witnesses had been called. In *Addae's* case the Court followed *Kuree*. We approved the statement contained in the passage quoted above from *Kuree's* case as a correct statement of the law. Its application, however, depends on the facts and circumstances of each particular case.

In the present case failure to call Raji and to explain why he was not called is fatal to the prosecution's case but only on the first count in which the appellant was charged with asking. It is true that the appellant's allusion to his message through Raji and his refusal to accept £10 suggest that the message had some connection with the bribe of £12 paid to him, but it was essential in our view to call Raji to say what, in fact, transpired between him and the appellant. The only evidence on the first count is contained in the evidence of Yesufu and Oloruntogun, both of whom the Judge treated as accomplices. In his judgment the learned Judge made no specific finding on the charge of asking and it is not clear on what evidence he relied to find the appellant guilty on that count. It is relevant to state here that if Raji had been called he would in our view have been

an accomplice and his evidence could not have been corroborated by Yesufu and Oloruntogun's account of what they said the appellant had told them they themselves being regarded by the Judge as accomplices. Raji's evidence might not have taken the prosecution's case further than it did, but its absence still leaves the case for the prosecution unproved on the first count.

On the second count the learned Judge found corroboration of the evidence of Yesufu and Oloruntogun in the conduct of the appellant. On the 16th March, the appellant instructed Aikhoje to prosecute the driver and the owner. Subsequently, after, according to the evidence accepted by the Judge, they had been to the appellant and paid him £12 he reversed his instruction and ordered Aikhoje not to prosecute. The appellant admits stopping the prosecution and his reason for doing so was rejected by the learned Judge. The Judge drew the inference that the appellant's action in stopping the prosecution was as a result of the visit and payment to him of £12 by Oloruntogun and Yesufu. That inference is possible on the evidence before him and we are unable to say that he erred by drawing it. The inference having been drawn it is in our view adequate corroboration of the evidence of Yesufu and Oloruntogun.

Another point argued by appellant's Counsel is that Yesufu and Oloruntogun were not competent witnesses. For that proposition he relies on section 159 of the Evidence Ordinance, Cap. 63, and also on two English cases—*Grant and Others*, 30 Cr.A.R. 99 and *Sharrock and Others*, 1947, 32 Cr.A.R. 124. These two cases are not applicable here and in any case were not followed in the latter case of *R.* v. *Norfolk Quarter Sessions* ex parte *Brunson*, 37 Cr.A.R. 6. In *Norfolk Quarter Sessions*, the Court expressly approved the decision of the Exchequer Chamber in *Winsor* v. *The Queen*, (1866) L.R. 1 Q.B. 289, in which it was decided that if two people are indicted together there is nothing in law to prevent the Crown calling one prisoner as a witness for the Crown though the proceedings against him had not been determined. Section 158 of our Evidence Ordinance, Cap. 63, makes an accused person and his wife and any person charged jointly with him and tried at the same time competent witnesses.

Section 159 makes the person charged only competent to give evidence for the defence. It does not prevent a person charged separately from an accused person or a person liable to be charged with a completely separate offence from giving evidence for the prosecution. The competency of such a witness to give evidence is in our view covered by section 154 (1) which says that all persons shall (subject to the exceptions which are not relevant here) be competent to testify. We are unable to agree with appellant's Counsel's submission that Yesufu and Oloruntogun were not competent witnesses. They were in our view quite competent to testify for the prosecution, and we would add that we do not consider that there was anything "undesirable" or "unfair" in their being called to do so.

There is no substance in any of the other grounds argued and the appeal against the conviction on count 2 is accordingly dismissed. As regards count 1 the appeal is allowed, the conviction and sentence are set aside and in respect of that count, it is ordered that the appellant be acquitted and discharged.

Appeal allowed on 1st count but dismissed on 2nd count.

PETER OGIOGUN ... ... *Plaintiff/Respondent*

v.

A. J. IDUKPAYE ... ... *Defendant/Appellant*

[HIGH COURT OF JUSTICE: Morgan, J., 19th December, 1958.]

*Evidence and civil procedure—record of proceedings part-heard by transferred Magistrate admitted as "statement" within section 90 of Evidence Ordinance, Cap. 63, by successor —duty of successor to hear both parties—*audi alteram partem*—trial not one commenced* ab initio *within section 50 of Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955—miscarriage of justice from procedure followed—disposal of appeal under section 74 (a) of that Law—new trial ordered.*

A Senior Magistrate having heard the case for the plaintiff had been transferred from the District and his successor had continued with the hearing by admitting in evidence the record of proceedings before his predecessor—purportedly under the provisions of section 90 of the Evidence Ordinance, Cap. 63—and hearing the case for the defence. On an appeal—

Held: (1) that records of proceedings are generally admissible in evidence but not so as to dispense with the need for a trial Magistrate to hear the two sides to a dispute and to adjudicate upon the evidence adduced before him by both sides and that the duty of *audi alteram partem* was not performed by substituting for the case of one side the record of the evidence given by it before another Magistrate;

(2) that the admission of the record of the proceedings part-heard by the first Magistrate did not constitute the trial before the second Magistrate one commenced *ab initio* as laid down by section 50 of the Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955;

(3) that in the circumstances there was a very strong likelihood of a miscarriage of justice having resulted from the procedure followed and that therefore the appeal should be allowed under the provisions of section 74 (*a*) of that Law and a new trial ordered.

Appeal allowed and new trial ordered.

Benin Suit No. B/3A/1958.

Ihua-Maduenyi for Appellant.

Boyo for Respondent.

Morgan, J.: This is an appeal from the decision of the Senior Magistrate, Benin Magisterial District, given on the 10th August, 1958.

At the lower Court one Senior Magistrate heard the case for the plaintiff and on his being transferred from the District his successor continued with the hearing by admitting in evidence the record of proceedings before his predecessor and hearing the case for the defence. He ruled that section 34 (1) of the Evidence Ordinance, Cap. 63, was not applicable in the circumstance but purported to have acted under the provisions of section 90 (2) of the Evidence Ordinance which reads as follows:

"In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:

(*a*) Notwithstanding that the maker of the statement is available but is not called as a witness.

(*b*) Notwithstanding that the original document is not produced if in lieu thereof a certified true copy of the original document or the material part of it is produced".

Sub-section (1) reads thus:

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish the fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied; that is to say—

(*a*) if the maker of the statement either—

(*i*) had personal knowledge of the matters dealt with by the statement; or

(*ii*) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have personal knowledge of those matters; and

(*b*) if the maker of the statement is called as a witness in the proceedings".

The section deals with the question of the admissibility of documentary evidence and "statement" in so far as this appeal is concerned is the record of proceedings which was put in evidence. In my judgment, and I say this with respect, there is apparent in the judgment of the learned Senior Magistrate a misconception in relation to the provision of section 90 of the Evidence Ordinance. It will be found that the provisions in the section are identical with those in section 1 of the Evidence Act, 1938, and the reason for the rule contained in the section was to avoid certain difficulties created by a strict adherence to the hearsay rule—*see Halsbury's "Laws of England"*, third edition, article 535.

There is no doubt that records of proceedings are generally admissible in evidence but not so as to dispense with the need for a trial Magistrate to hear the two sides to a dispute and to adjudicate upon the evidence adduced before him by both sides. The duty of *audi alteram partem* is not performed by substituting for the case of one side record of the evidence given by it before another Magistrate. I would therefore say that the admission of the record of proceedings before the first Magistrate does not constitute the trial before the second Magistrate one commenced *ab initio* as laid down by section 50 of the Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955. As the second Senior Magistrate did not have the opportunity of seeing all the witnesses who gave evidence for one side he could not be said to be in a position to satisfy himself on the issue as to which of both parties were witnesses of truth or otherwise. In my judgment there is a very strong likelihood of a miscarriage of justice resulting from the procedure followed and for this reason I allow this appeal under the provisions of section 74 (*a*) of the Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955 and set aside the Magistrate's decision. I order a new trial by the Chief Magistrate in charge of the Benin Magisterial Group.

Appeal allowed and new trial ordered.

AKOHWERE OF OKAN ... ... *Plaintiff/Appellant*

v.

1. EMAYABOR
2. ENAYOMA } ... ... *Defendants/Respondents*

[HIGH COURT OF JUSTICE: Duffus, J., 13th January, 1959.]

Civil procedure—form of writ in action transferred from Native Court to Magistrate's Court—non-compliance with sections 3 (a) and 6 (1) (a) of Illiterates Protection Law, 1956, No. 7 of 1957—whether writ bad on face of it.

In an action transferred from a Native Court to the Magistrate's Court, Warri, the Senior Magistrate had upheld counsel's objection and struck out the writ on the ground partly that it was not properly before the Court as it offended against the provisions of sections 3 (*a*) and 6 (1) (*a*) of the Illiterates Protection Law, 1956, No. 7 of 1957. On appeal to the High Court—

Held: (1) that the Illiterates Protection Law, 1956, was, as the title itself stated, a law to protect and not to penalise illiterates and the fact that the writer did not carry out the provisions of that Law could not mean that the document was for that reason alone void and of no effect;

(2) that the writ was on the face of it properly before the Native Court and was transferred to the Magistrate's Court for trial and that the trial Magistrate was wrong in holding that it was bad or not properly before the Court because it offended against the provisions of the Illiterates Protection Law, 1956.

Appeal allowed.

Warri Suit No. W/15A/1958.

Ovie-Whiskey for Respondents.

Akporiaye for *Egbe* for Appellant.

Duffus, J.: This is an appeal against the order of the Senior Magistrate, Warri, striking out this action.

This action started before the Native Court, and was transferred by the Divisional Adviser, under section 28 (1) (*c*) of the Native Courts Ordinance (Cap. 142) to the Magistrate, Warri, for hearing and determination.

The matter came before the Senior Magistrate for trial, and both the plaintiff and defendants were represented by counsel. No objection was taken as to the validity of the transfer but counsel for the defendants objected to the writ on two grounds, one of them being that the writ was not properly before the Court as it offended against sections 3 (*a*) and 6 (1) (*a*) of the Illiterates Protection Law, 1956, No. 7 of 1957.

The learned Senior Magistrate, after hearing counsel for the plaintiff upheld both objections raised by counsel for the defendants and held that the writ was bad on the face of it and therefore not properly before the Court and the case was struck out.

This appeal was then brought to this Court and there are two grounds of appeal. I will deal with the first ground of appeal that the learned Senior Magistrate was wrong in law in striking out the writ of summons which was transferred to the Magistrate's Court from a Native Court on the grounds that the writ of summons did not comply with the Illiterates Protection Law.

I agree with the submissions of the learned counsel for the appellant on this ground. The Illiterates Protection Law is, as the title itself states, a law to protect and not penalise illiterates and the fact that the writer did not carry out all the provisions of that Law, cannot in my view mean that the document prepared is for that reason alone void and of no effect. This writ was on the face of it properly before the Native Court and was transferred to the Magistrate's Court for trial and with respect, I am of the view that the learned Senior Magistrate was wrong in holding that the writ was bad or not properly before the Court because it offended against the provisions of the Illiterates Protection Law, 1956.

His Lordship having held that the second ground of appeal could not be sustained continued:

The appeal is allowed and the decision of the Senior Magistrate striking out the case and awarding costs quashed, and the case is sent back to the Magistrate's Court for trial.

Appeal allowed.

JIMOH LADEJI
OKUNOLA AYINDE } ... ... *Appellants*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Quashie-Idun, Ag. J., 16th January, 1959.]

Criminal procedure—whether section 287 of Criminal Procedure Ordinance, Cap. 43 complied with—saving provisions of section 288 in case of non-compliance.

In an appeal against conviction by the Senior Magistrate, Ibadan, for wilfully and unlawfully damaging property, it was argued for the appellants that the trial Magistrate erred in law in not having told the appellants their rights as required by section 287 of the Criminal Procedure Ordinance, Cap. 43.

Held: (1) that the provisions of section 287 as to the duty of a Magistrate to inform a defendant not represented by Counsel of the three alternative courses open to him, after a *prima facie* had been made out against him, were mandatory but that by virtue of section 288 non-compliance with those provisions should not vitiate a trial provided the Court had called upon the defendant for his defence and asked him if he had witnesses and heard him and his witnesses and other evidence, if any;

(2) that although there was no record that the trial Magistrate had complied with section 287, it was clear on the face of the proceedings that each of the appellants made his defence from the dock and each called a witness and that in view of these facts it was difficult to assume that the trial Magistrate did not comply with section 287 and that the appellants had proceeded as they had done without a word from him;

(3) that even if it were correct that the trial Magistrate had failed to comply with section 287 the trial was not thereby vitiated as the provisions of section 288 had been complied with by the appellants' making their defence from the dock and calling witnesses.

Appeal dismissed.

Ibadan Criminal Appeal No. 1/84.CA/58.

Fakayode for Appellants.

Odutola, Crown Counsel, for Respondent.

Quashie-Idun, Ag.J.: The appellants were convicted by the Senior Magistrate, Ibadan, on a charge of wilfully and unlawfully damaging a house.

They have appealed against their convictions on two grounds one of which was—

"That the learned trial Magistrate erred in law in not telling the appellants of their right in accordance with section 287 of the Criminal Procedure Ordinance, Cap. 43."

Section 287 of the Criminal Procedure Ordinance is mandatory and states that at the close of the case for the prosecution and if a *prima facie* case has been made out against the accused who is not represented by Counsel, the Magistrate shall inform the accused that he has three alternatives given to him, namely—

(1) To make a statement from the dock without being sworn in which case he would not be cross-examined.

(2) To give evidence on oath in which case he would be cross-examined.

(3) That he need say nothing at all if he so wishes.

In addition, the Magistrate shall ask him if he has any witnesses to call.

Section 288 of the Ordinance states—

"Failure to comply with the requirements in section 287 shall not of itself vitiate the trial provided that the Court called upon the defendant for his defence and asked him if he had witnesses and heard the defendant and his witnesses and other evidence, if any."

It is not difficult to ascertain the intention of the Legislature in making these provisions in the Criminal Procedure Ordinance. The object clearly is to acquaint an accused person who is not legally represented and who has a case to answer with the procedure he has to follow after the close of the case for the prosecution.

It cannot, therefore, be argued that if an accused person is already aware of the procedure and follows it, the Magistrate is still bound to inform him of his rights.

In the present case although there is no record that the trial Magistrate complied with the requirements in section 287, it is clear on the face of the proceedings that each of the appellants made a statement from the dock and each called a witness. It is difficult to assume that the trial Magistrate did not comply with the statutory requirements and that without a word from the Magistrate, each of the appellants chose to make a statement from the dock and call a witness. I must say that although the section does not require a Magistrate to state on the record that the requirements of the section have been complied with I think that it is expedient for Magistrates to do so after complying with the section by just stating:

"The requirements of section 287 (1) (*a*) of the Criminal Procedure Ordinance, Cap. 43, have been complied with."

I am aware that His Lordship, the Chief Justice, has recently issued instructions to the Magistrates in this Region on this matter and it is hoped that Magistrates would in future make a note that they have complied with the requirements.

The appellants chose to state their defence from the dock. Although their statements were not made on oath, it was their defence and the Court heard them. The Court also heard the evidence of the witnesses called by the appellants. I hold therefore that the provisions in section 288 of the Criminal Procedure Ordinance, Cap. 43, were complied with and that the trial of the appellants are not vitiated even if it were correct that the trial Magistrate failed to comply with the requirements of section 287.

This ground therefore fails.

His Lordship dismissed the appeal having held that the second ground on which it was argued also failed.

Appeal dismissed.

THE OUEEN

v.

THE RESIDENT, IJEBU PROVINCE

In re J. A. C. Osunlaja ... ... *Appellant*

THE QUEEN

v.

THE RESIDENT, IJEBU PROVINCE

In re E. O. Olaleye ... ... *Appellant*

[FEDERAL SUPREME COURT: Abbott, Brett and Mbanefo, F.JJ., 19th January, 1959.]

Certiorari—*refusal of injunction—appeal—propriety of Law Officers of the Crown and members of Government Legal Department appearing for individual where Crown's interests involved—right of appeal to Federal Supreme Court—section 3 of Federal Supreme Court (Appeals) Ordinance, Cap. 229—Western Region Appointment and Recognition of Chiefs Law, 1954, No. 1 of 1955—section 34 and W.R.L.N. 14 and 61 of 1955—whether appeal lay against refusal of injunction and grant of* mandamus—*all rights of appeal statutory—cannot be conferred by Rules of Court—futility of granting* mandamus *against Government officer whose post already abolished—Appointment and Deposition of Chiefs Ordinance, Cap. 12, under which duty sought to be enforced already repealed by Chiefs Law, 1957—effect of saving provisions in section 12 of Interpretation Ordinance, Cap. 94—punishment by way of fine for contempt of an order of High Court never made—whether contempt criminal or non-criminal—right of appeal against punishment for contempt.*

Three appeals were brought in this case in the following circumstances. One J. A. C. Osunlaja had successfully applied to the High Court for a writ of *certiorari* requiring the Resident, Ijebu Province, to send to that Court to be quashed the records relating to the appointment or recognition of one E. A. Olaleye as the Dagburewe of Idowa, and particularly a letter which had been written by the said Resident appointing, among others, the said Olaleye as a member of Ijebu Judicial Council. There was no appeal against the order of the Court for the issue of the writ of *certiorari*.

Later however, the successful applicant also applied to the High Court, this time unsuccessfully, for an injunction restraining the said Olaleye from holding himself out and performing any of the functions pertaining to the office of Dagburewe of Idowa, enjoying any of the profits, rights and privileges attaching thereto, and sitting as a member of a number of local government councils and a Native Court by virtue thereof. Subsequently the said Osunlaja successfully applied to the High Court for a writ of *mandamus* to issue against the Resident, or Provincial Adviser, Ijebu Province, to compel him to hold an enquiry under the Appointment and Deposition of Chiefs Ordinance, Cap. 12, into the matter of the Dagburewe Chieftaincy pursuant to an alleged order of the Court in the previous application for a writ of *certiorari*. The said Olaleye had also been held to have been in contempt of the High Court in having continued to hold and perform the duties of the office of Dagburewe of Idowa and had been adjudged to have flouted an order prohibiting him from so doing, which order was said to have been impliedly incorporated in the judgment in the *certiorari* proceedings; as a result he had been fined ten pounds.

In the hearing of the three appeals brought against the decisions of the High Court as above, the objection was raised to the appearance of the Attorney-General of the Western Region on behalf of Olaleye on the ground that the said Olaleye was a private person and that therefore the Legal Department and the Law Officers of the Crown were not in any way concerned.

Held: (1) that as regards the objection to the appearance of the Attorney-General the question in each case of such objection was for the Court to decide whether or not the Crown has a sufficient interest in the subject-matter of the litigation to entitle Law Officers of the Crown (including members of the Government Legal Department) to appear on behalf of the party whom they might desire to represent and that since the objection had not been raised throughout the whole of the proceedings in the lower Court, it was too late to be entertained;

(2) that as regards Osunlaja's appeal against the refusal to grant the injunction sought, even assuming the office of the Dagburewe of Idowa to be worth more than £50, it could not be said (having regard to the established law that the "value" whereon depended a right of appeal must be looked at from the point of view of the appellant) that the injunction sought to restrain Olaleye from performing the duties of his office had any "value" to Osunlaja at all, because there could be no guarantee that the appointment of Osunlaja as the Dagburewe would necessarily follow or be made more likely by the restraining of Olaleye from acting in that office; and that therefore the decision of the High Court refusing the injunction was not one from which an appeal lay to the Federal Supreme Court on the ground that within the meaning of section 3 (*a*) (*ii*) of the Federal Supreme Court (Appeals) Ordinance, Cap. 229, that decision determined directly or indirectly a question respecting a civil right of the value to Osunlaja of £50 or upwards;

(3) that even considering the appeal against the refusal of an injunction on its merits, it was clear that if the injunction had been sought separately and not as part of other proceedings in the case, the jurisdiction of the High Court would have been ousted by section 34 of the Western Region Appointment and Recognition of Chiefs Law, 1954, No. 1 of 1955, applied by Western Region Legal Notices 14 and 61 of 1955 to the chieftaincy in question before the application for an injunction was made as a further step in a previous suit and as an ingenious device to get round the provisions of the Western Region Appointment and Recognition of Chiefs Law, 1954, No. 1 of 1955;

(4) that as regards the appeal against the order granting the writ of *mandamus*—

(*i*) the right to appeal would not exist unless it was expressly conferred by statute and that the appropriate statutory provisions in this respect were to be found not in section 3 (*a*) (*iii*) but in section 3 (*a*) (*ii*) of the Federal Supreme Court (Appeals) Ordinance, Cap. 229, since the granting of the writ of *mandamus* involved the finding that the appointment of Olaleye as the Dagburewe of Idowa was invalid and therefore the order indirectly determined a question respecting a civil right of a value agreed by both parties to be worth more than £50; the history of section 3 (*a*) (*iii*) showed that it was meant to deal exclusively with appeals in matrimonial causes, and to hold that it could cover also appeals in *mandamus* cases because a decree was the same thing as an order and because the rules of the former Supreme Court of Nigeria required that *mandamus* proceedings should be taken by application for order *nisi* followed by order absolute as in matrimonial cases, would mean that rules of court could confer a right of appeal, which but for them, did not exist;

(*ii*) that the Court could not uphold the order of the lower Court granting the *mandamus* because no formal order had in fact been made in the previous *certiorari* proceedings that an enquiry should be held and also because even if with the repeal of the Appointment and Deposition of Chiefs Ordinance, Cap. 12, by the Chiefs Law, 1957, the duty to hold an enquiry under the former law had been saved by section 12 of the Interpretation Ordinance, Cap. 94, the fact remained that on the date when the order granting the *mandamus* was made there was no such person as a Resident or Provincial Adviser, Ijebu Province, these offices having been abolished and therefore there was nobody who could hold the enquiry and against whom the order could be enforced;

(5) that as regards the civil appeal against the judgment which had held Olaleye to be in contempt of the High Court and whereby he had been fined ten pounds, committal appeared to be the invariable punishment in non-criminal contempts whereas in criminal contempts which are misdemeanours at common law, fines could be imposed and that therefore the contempt in this case must be regarded as criminal in nature and so the appeal (being a civil appeal) was not competent; had the comtempt being non-criminal in nature the same result would have followed as section 3 (*a*) of the Federal Supreme Court (Appeals) Ordinance conferred no right of appeal in the circumstances of this case;

(6) that however (treating the matter as a criminal appeal), the lower Court erred in law in having held that the conduct of the appellant amounted to contempt of court since there had been no order made by the High Court which he could have disobeyed.

Appeal against refusal of injuction dismissed, allowed against issue of mandamus, *struck out as a civil appeal but allowed as a criminal appeal against conviction for contempt of court.*

Cases cited:

Brownsea Haven Properties Ltd. v. *Poole Corporation*, [1958] 1 All E.R. 205.

R. v. *Archbishop of Canterbury*, [1903] 1 K.B. 289.

Adams v. *Naylor*, [1946] A.C. 543.

Meghji Lakhamshi and Bros. v. *Furniture Workshop*, [1954] A.C. 80.

E. W. Gillett and Co., Ltd. v. *Lumsden*, [1905] A.C. 601.

Lady Davis and Another v. *Lord Shaughnessy and Anor.*, [1932] A.C. 106.

Food Controller and Others v. *Cork*, [1923] A.C. 647.

The Resident, Ibadan Province and Another v. *Lagunju*, 14 W.A.C.A. 549.

R. v. *Barnardo*, [1889] 23 Q.B.D. 305.

Scott v. *Scott*, [1912] P. 241; [1913] A.C. 417.

O'Shea v. *O'Shea and Parnell* (1890) 15 P.D. 59.

Izuwora v. *R.*, 13 W.A.C.A. 313.

FSC 165/58; 165A/58; 165B/58; 165C/58.

Adekunle for Appellant Osunlaja.

F. R. A. Williams, Q.C., Attorney-General, Western Region (*Oki, Acting Legal Draftsman* with him) for Appellant Olaleye.

Abbott, F.J. : This matter came before us on the 3rd December, 1958, in the form of the record of suit No. I.57/55 of the Ibadan Judicial Division of the High Court of Justice of the Western Region. The record contains all the three judgments appealed

from, which were treated in the Court below as having been given in the same suit, namely, that above specified. For reasons which we shall state later, we consider that this was incorrect, and that each judgment was given in a separate matter. The series of proceedings began with an application filed on the 17th February, 1955, by one J. A. C. Osunlaja for a writ of *certiorari* requiring the Resident, Ijebu Province, to send to the Ibadan High Court to be quashed the records relating to the appointment or recognition of one E. A. Olaleye, as the Dagburewe of Idowa, and particularly a letter dated the 4th January, 1955, written by the said Resident appointing, among others, the said E. A. Olaleye as a member of the Ijebu Judicial Council. In the same application a writ of *mandamus* to compel the Resident to hold an enquiry into the Dagburewe Chieftaincy dispute was also sought, but this prayer was withdrawn when the rule *nisi* was applied for. In the events which happened, the applicant succeeded in his application and the order for the issue of the writ of *certiorari* was duly made on the 16th May, 1956. No appeal was lodged against this order.

The next proceeding which it is material to mention was an application filed by Osunlaja on the 23rd November, 1956, for an injunction to restrain Olaleye from:

1. Holding himself out as, and performing any of the functions pertaining to the office of Dagburewe of Idowa.
2. Enjoying any of the profits, rights and privileges attaching to the said office.
3. Sitting as a traditional member of Ijebu Southern District Council, and
4. Sitting as—
   (*a*) Member of Ijebu Divisional Council.
   (*b*) President, Idowa Town Council.
   (*c*) President, Ijebu Judicial Council.
   (*d*) President, Idowa Native Court.

The injunction was refused by Stuart, J., and it is against this refusal that the first of the appeals which came before us is brought. In order to distinguish between the various appeals we have numbered this appeal as FSC165/58.

Before opening his argument on the appeal, counsel for the appellant raised the objection to the appearance on behalf of the respondent of Mr R. F. A. Williams, the Attorney-General of the Western Region, on the ground that the respondent to the appeal was a private person and, therefore, the Legal Department and Law Officers of the Crown in the Western Region were not in any way concerned. Appellant's counsel, however, had to concede that, not only in the injunction proceedings in the Court below, but throughout the whole of the proceedings in suit I.57/55, during which Olaleye was represented by a member of the Legal Department, had he not made any such objection and we considered that it was too late to raise this matter for the first time on the hearing of this particular appeal. We, therefore, overruled the objection.

We think, however, that it may be useful to give our views, for guidance in the future, on the type of occasion when it is proper for the Law Officers of the Crown (including members of a Government Legal Department) to appear in such cases as that now before us and with that in view we would refer to the judgment in the very recent case of *Brownsea Haven Properties Limited* v. *Poole Corporation.* [1958] 1 All E.R. 205. In that case, counsel for the respondents took a preliminary objection to the representation of the defendant Corporation by the Treasury Solicitor much in the same form as that taken by counsel for the appellant in the appeal which we are now discussing. The judgment of the Master of the Rolls in the case cited refers to a decision

of the Court of Appeal in *R.* v. *Archbishop of Canterbury*, [1903] 1 K. B. 289. In both cases the *ratio decidendi* was that the Crown had a sufficient interest in the subject matter of the litigation to entitle the Treasury Solicitor to justify his appearance for, and representation of, the Poole Corporation, in the first case, and the Archbishop in the second case. In *R.* v. *Archbishop of Canterbury*, Romer, L.J., at page 295, said—

> "It appears to me that where the Crown for good and sufficient reasons thinks it is for its interests that the defence of an individual in an action or proceeding against him, should be undertaken, and the Treasury Solicitor is delegated by the Treasury authorities to act as solicitor for that individual, that is within the rights of the Crown, and is within the purview of the ordinary duties of the Solicitor".

Having cited that passage, Lord Evershed, M.R., in the *Poole Corporation* case continued as follows:

> "No doubt, in ninety-nine cases out of a hundred, the view of a Minister of the Crown that the Crown was 'interested' in any given subject-matter would, at the least, strongly support the conclusion that it was; but I should not, as at present advised, be disposed to hold that in such cases the *ipse dixit* of a Minister or his representative was itself conclusive. In the present case, however, I feel no doubt at all that the Crown has an 'interest' according to the ordinary acceptation of that word, in the subject-matter in dispute".

We would respectfully agree with and adopt the view of the Master of the Rolls here expressed and we consider, therefore, that as it is not possible to lay down any general principle, it is necessary in each case for the Court before which the objection is taken, to decide whether or not the Crown has a sufficient interest in the subject-matter of the litigation to entitle the Law Officers of the Crown to appear on behalf of the party whom they desire to represent. We observe that in *Adams* v. *Naylor*, [1946] A.C. 543, a servant of the Crown who was sued in tort was represented by the Attorney-General instructed by the Treasury Solicitor.

Having disposed of the objection of appellant's counsel we proceeded to ask him to satisfy us that there is, in fact, a right of appeal to this Court from the High Court's refusal to grant an injunction in this case. It is well established that no appeal lies unless a right of appeal is expressly conferred by statute, and we do not find the provisions of the law relating to civil appeals to this Court easy to construe. The right of appeal from the High Court in the cases dealt with by that Court in its original jurisdiction is conferred by section 3 of the Federal Supreme Court (Appeals) Ordinance, Cap. 229 of the Laws of Nigeria and the material part of that section reads as follows:

> "An appeal shall lie to the court of appeal—
>
> (*a*) from all final judgments and decisions of a High Court—
>
> (*i*) given in respect of a claim for a sum of fifty pounds or upwards; or
>
> (*ii*) determining, directly or indirectly a claim or question respecting property or any civil right or other matter where such property, civil right or other matter is of the value of fifty pounds or upwards; or
>
> (*iii*) from any decree *nisi* or absolute (made by a High Court), provided that no appeal from an order absolute for dissolution or nullity of marriage shall lie in favour of any party who, having had time and opportunity to appeal from the decree *nisi* on which such order may be founded, shall not have appealed therefrom".

Counsel for the appelllant found himself in a difficulty until assisted by the learned Attorney-General of the Western Region who pointed out that there was evidence before the Court below in the shape of an affidavit sworn by the appellant to the effect that the respondent, Olaleye, was in receipt of a salary, which, if taken to be a monthly salary, would confer a right of appeal under section 3 (*a*) (*ii*) on the basis that the refusal of the injunction, indirectly at least, determined a claim or question respecting a civil right of the value of fifty pounds or upwards. Appellant's counsel having based his right of appeal on the paragraph last above referred to and in view of what transpired at the hearing of the appeals by Olaleye, when, *inter alia*, the Attorney-General informed us that he and his opponent were in agreement that the office of Dagburewe of Idowa is worth more than £50, we were disposed to hold though not without some hesitation, that there was a right of appeal under section 3 (*a*) (*ii*) against the refusal of the injunction.

We then proceeded to hear the appeal on its merits on this basis as hereafter appears but it has since occurred to us that, while the proceedings in *mandamus* to which we later refer might, by reason of the holding of the enquiry ordered thereby have resulted in the unseating of Olaleye, the appellant in those proceedings, from his office as Dagburewe and so have determined indirectly a question respecting a civil right of the value to Olaleye of fifty pounds or upwards, the same could not be said of the injunction proceedings as regards Osunlaja, the appellant therein; because, as was said by the Judicial Committee of the Privy Council in *Meghji Lakhamahi and Brothers* v. *Furniture Workshop*, [1954] A.C. 80, the "value" whereon rests a right of appeal must be looked at from the point of view of the appellant. It could not be said that the injunction, sought by Osunlaja, to restrain Olaleye from performing the duties of his office, had any "value" to Osunlaja at all, because there could be no guarantee that the appointment of Osunlaja as Dagburewe would necessarily follow or be made more likely by the restraining of Olaleye from acting in that office.

We also observe that in *E. W. Gillett and Co. Ltd.* v. *Lumsden*, [1905] A.C. 601, which was an appeal from an award of an injunction without damages, their Lordships of the Judicial Committee upheld a submission that the appeal was not competent because no appeal lay unless the matter in controversy exceeded the sum or value of 4,000 dollars and in that action no sum or value was in controversy. This case was considered in *Lady Davis and another* v. *Lord Shaughnessy and another*, [1932] A.C. 106, where it was pointed out that the headnote to the earlier case was wrong and where their Lordships' judgment in the earlier case was explained.

For these reasons we hold that no appeal lies, but in case we should be mistaken in this view we proceed to express our opinion on the merits of the appeal.

In dismissing the application for the injunction Stuart, J., held that he had no jurisdiction to grant it and ground (1) of appeal states that in so holding, Stuart, J., erred in law. On this subject, in the first place, appellant's counsel conceded that if he had brought his motion for the injunction as a proceeding separate and distinct from suit I.57/55, the High Court would have had no jurisdiction, that jurisdiction having been ousted by section 34 of the Western Region Appointment and Recognition of Chiefs Law, 1954, No 1 of 1955, which had applied to this chieftaincy since the 23rd February, 1955, by virtue of Western Region Legal Notices 14 of 1955, and 61 of 1955. That brings us to ground (2) of the grounds of appeal which questions the learned Judge' sview that the application should not have been brought in suit I.57/55. With that view we are in entire agreement, not only because as a matter of procedure the *certiorari* proceedings terminated in themselves, but because they were only concerned

with the validity of Olaleye's appointment or recognition, not with any legal right which Osunlaja might have, and we would add that in any event a permanent injunction was not the appropriate remedy at that stage. We consider that the bringing of the application as a step in the previous suit was an ingenious device adopted in an attempt to get round the provisions of the Western Region Appointment and Recognition of Chiefs Law, 1954, No 1 of 1955. For the reasons given, therefore, we agree with Stuart, J.'s view that he had no jurisdiction and if we considered that an appeal lay against the refusal of the injunction we should dismiss it. But, in the circumstances, it must be struck out.

The second appeal which came before us was filed by E. O. Olaleye and we have numbered this FSC 165A/58. It is an appeal from the judgment of Sir Adetokunbo Ademola, C.J., Western Region (as he then was), dated the 14th August, 1957, making absolute an order *nisi* "for a writ of *mandamus* to issue against the Resident, or Provincial Adviser, Ijebu Province, to compel him to hold an enquiry into the matter of Dagburewe Chieftaincy in compliance with the Order of this Court dated 16th May, 1956, granting a writ of *certiorari* for the purpose of quashing the records relating to the appointment or recognition of one Olaleye (the interested party) as the Dagburewe of Idowa". We quote from the first paragraph of the judgment of the learned Chief Justice. It is important at this stage to refer also to the terms of the *ex parte* motion asking for the order to show cause why the *mandamus* should not issue and to the terms of the motion on notice which followed the granting of the prayer of the *ex parte* motion. The *ex parte* motion reads as follows:

> "TAKE NOTICE that this Honourable Court will be moved on Monday the first day of April, 1957, at the hour of 9 o'clock in the forenoon or so soon thereafter as Counsel can be heard on behalf of the applicant for an order directed to the Resident now known as Provincial Adviser, Ijebu Province, asking him to show cause why a writ of *mandamus* should not be issued against him in order to compel him to hold an enquiry, in compliance with the judgment in the above case, into Dagburewe Chieftaincy Dispute under Appointment and Deposition of Chiefs Ordinance, Cap. 12, Laws of Nigeria, and for such further or other order or orders as to this Honourable Court may seem fit".

The motion on notice reads as follows:

> "TAKE NOTICE that pursuant to the order granting leave for writ of *mandamus* made by this Honourable Court on Monday, the first April, 1957, this Honourable Court will be moved on the 20th day of May, 1957, at the hour of 9 o'clock in the forenoon or as soon thereafter as counsel can be heard on behalf of the applicant for an order that the said *rule nisi* be made absolute for writ of *mandamus* to compel the Resident, now known as Provincial Adviser, Ijebu Province, to hold an enquiry in compliance with the judgment in the above case, into Dagburewe Chieftaincy Dispute under Appointment and Deposition of Chiefs Ordinance, Cap. 12, Laws of Nigeria, and for such further or other order or orders as to this Honourable Court may seem fit".

It will be observed that both of these motions use the phrase "in compliance with the judgment in the above case". The "above case" is in fact, suit I.57/55 and the judgment referred to is plainly that in the *certiorari* proceedings. This was given on the 16th May, 1956, and is referred to in the extract from the judgment of the learned Chief Justice set out above.

Counsel for the respondent, that is for Osunlaja, had filed a preliminary objection on four grounds to this appeal and to the third appeal which we shall discuss later in

this judgment. But, as the Attorney-General for the Western Region pointed out, there appeared to be a doubt whether a right of appeal against the order of *mandamus* exists at all and if it were to be held that it did not exist, then obviously there would be nothing to object to. The hearing of the preliminary objection was, therefore, deferred until the question of the right of appeal had been decided. The Attorney-General based his argument that there was a right of appeal in the first place on section 3 (*a*) (*iii*) of the Federal Supreme Court (Appeals) Ordinance, Cap. 229, and he first submitted that as the *mandamus* proceedings followed the procedure laid down in the rules of the former Supreme Court of Nigeria, that is, order *nisi* followed by order absolute, and that, as a decree is the same thing as an order the right of the appellant to appeal is conferred by section 3 (*a*) (*iii*). We then referred him to the original form of section 3 (*a*) which appears in the 1933 Volume of the Laws of Nigeria. As originally enacted it reads as follows:

"An appeal shall lie to the Court of Appeal—

(*a*) from all final judgments and decisions of the Supreme Court or the High Court:

(*i*) given in respect of a claim for a sum of fifty pounds or upwards; or

(*ii*) determining, directly or indirectly, a claim or question respecting property or any civil right or other matter where such property, civil right or other matter is of the value of fifty pounds or upwards; or

(*iii*) from any decree *nisi* or absolute (made by the Supreme Court), provided that no appeal from an order absolute for dissolution or nullity or marriage shall lie in favour of any party who, having had time and opportunity to appeal from the decree *nisi* on which such order may be founded, shall not have appealed therefrom".

A perusal of the Protectorate Courts Ordinance appearing in the same Volume shows that in those days the High Court of the Protectorate had full jurisdiction in the Protectorate except in matrimonial causes, probate and admiralty, which fell within the jurisdiction of the then Supreme Court. In our view the words enclosed in brackets in the original form of section 3 (*a*) (*iii*) "(made by the Supreme Court)" were inserted as a reminder of which tribunal in those days had jurisdiction in matrimonial causes, probate, and admiralty and as a clear indication of the meaning of the first six words in the paragraph. When, by legislation enacted in 1943 and coming into operation in 1945, the Protectorate Courts were abolished and the Supreme Court of Nigeria was established for the whole of the country by the Supreme Court Ordinance, 1943, the words "or the High Court" in the 1933 version of the section were deleted and, of course, they did not appear in the revised edition of the Laws of Nigeria published in 1948. Unfortunately, however, the words "(made by the Supreme Court)" in section 3 (*a*) (*iii*) were, presumably owing to an oversight, retained. They are, of course, now mere surplusage. The Attorney-General's submission involves holding either that the Ordinance as originally worded gave a right of appeal from a writ of *mandamus* granted by the Supreme Court, but not from one granted by the High Court, or that section 77 of the Supreme Court Ordinance, 1943, which purported merely to substitute references to the Supreme Court for references to the High Court wherever they occurred in any legislation, had the incidental effect of extending the class of matters in which an appeal lay. We cannot accept either of these propositions. The Attorney-General having taken time to consider this matter of history, submitted further arguments in an endeavour to show that the right of appeal against the order of *mandamus* lay under section 3 (*a*) (*iii*) and he referred us to sections 27 and 31 (*e*) of

the Supreme Court of Judicature (Consolidation) Act, 1925, suggesting that the draftsman of the Nigerian section had endeavoured to combine these two provisions. He further submitted that if section 3 (*a*) (*iii*) had been intended to deal with appeals in matrimonial causes alone it would have said so, and that the words in the proviso "from an order absolute for dissolution or nullity of marriage" show that the preceding words "decree *nisi* or absolute" do not apply exclusively to matrimonial causes, and that if they did and a decree were refused no appeal would lie against the refusal. On this subject the Attorney-General referred us to the judgment of Lord Wrenbury in *Food Controller and others.* v. *Cork*, [1923] A.C. 647, at page 668, where is found this *dictum*—

> "I derive little, if any, assistance from the knowledge that, for instance, a particular section is in terms identical with a section which as the law previously stood was found in a framework different from that in which it is now found. To ascertain the present law it is necessary to consider such a section in the framework in which it now stands. In other words, I have to consider the statute law as it is".

It is suggested to us that section 3 (*a*) (*iii*) should be construed in the framework not as at the time it was drafted in 1933 but as at 1943, subject to the adaptations which have been made since then, and further that the Ordinance should be so interpreted as to avoid the absurdity which it is said would arise if it were to be held that there was no appeal from an order of *mandamus* granted by the Court below.

We are not impressed by the argument from absurdity. We have already pointed out that an appeal does not lie unless a right of appeal is expressly conferred and we would point out further that in England no appeal lies from the decision of a Divisional Court in *mandamus* in a criminal matter. We see nothing repugnant to reason in the suggestion that the decision of a High Court in *mandamus* should be final, and the question whether it is inconvenient is not for us to settle.

We have come to the conclusion that, attractive as Mr Williams' argument is, section 3 (*a*) (*iii*), when one looks at its history, deals exclusively with matrimonial causes. A second reason for this conclusion is that the proviso, which obviously deals only with matrimonial causes, is so closely connected with the words which precede it that we find it impossible to say that those words deal with anything else, and thirdly we are unable to accept the argument that the existence of a right of appeal should (except as regards matrimonial causes, where the procedure is laid down by statute) depend on whether the judgment or decision appealed from is given in a cause or matter for which the rules of court lay down order *nisi* followed by order absolute as the appropriate procedure. We are unable to accept the Attorney-General's argument that the rules of court can confer a right of appeal which, but for them, did not exist.

To sum up, we take a view, as to the proviso, diametrically opposed to that advanced by Mr Williams.

The Attorney-General went on to argue that in fact there was also a right of appeal in this case under section 3 (*a*) (*ii*) and endeavoured to distinguish from the present case the case of *The Resident, Ibadan Province and another.* v. *Lagunju*, 14 W.A.C.A. 549, a case involving the construction of section 3 of the Chieftaincy Disputes (Preclusion of Courts) Ordinance, 1948, where at page 553 the learned President of the Court said this—

> "In my view proceedings by way of *certiorari* taken with the object of compelling the executive to perform its quasi-judicial function of holding due enquiry cannot be said to be a cause or matter instituted for the determination of any question relating

to the selection or appointment of a chief within the meaning of the Ordinance. It determines no question relating to the selection or appointment, it is merely a means of compelling the performance of a statutory duty".

In our view the submission that the cases are distinguishable is well founded. The case cited established that proceedings for *certiorari* to quash the recognition of a chief were not in the words of the Ordinance "instituted for the determination of any question relating to the selection.....of a chief". Here the Attorney-General submits that the writ of *mandamus* involves the finding of fact that the appointment of Olaleye as the Dagburewe of Idowa is invalid and, therefore, that order indirectly determines a question respecting a civil right, and we are in agreement with that submission. We have had some doubt whether the right is "of the value of £50 or upwards". The Attorney-General submitted that the value of such a civil right should be determined by what an assignee thereof might be prepared to pay, but in the absence of evidence that the right is assignable we doubt the value of that approach. However, as we have already mentioned, counsel on both sides were agreed that the office is worth more than £50, and we were content, with some hesitation, to accept that.

Counsel for Osunlaja preferred to make no submission on the question whether an appeal lay under section 3 (*a*) (*ii*) and in view of the fact that in FSC165/58 he based his own right of appeal against the refusal of the injunction under that paragraph of section 3 (*a*) we consider that he cannot now be heard to say that Olaleye has no right of appeal under the same paragraph. We, therefore, consider that in this case it must be said that a right of appeal against the order of *mandamus* lies under section 3 (*a*) (*ii*).

Four grounds of appeal had been filed, but on a hint from the Court Mr Williams did not argue them specifically. It is material here to set out the operative part of the order appealed from. It reads as follows:

"IT IS HEREBY ORDERED that a writ of *mandamus* do issue against the Resident (now known as the Provincial Adviser, Ijebu Province) compelling him to hold an enquiry as ordered by this Honourable Court on the 16th day of May, 1956, into Dagburewe Chieftaincy dispute under Appointment and Deposition of Chiefs Ordinance, Cap. 12, Laws of Nigeria".

It will be observed that this formal order differs in its terms from both notices of motion and from the first paragraph of the judgment. Mr Williams pointed out (*i*) that, at the date of the order (14th August, 1957) there was no such person as a Resident or Provincial Adviser, these offices having been abolished and provision having been made for the discharge of their remaining statutory functions by other officers or authorities; (*ii*) that, therefore, there was nobody who could hold the enquiry and nobody against whom the order could be enforced; (*iii*) that the enquiry was ordered to be held under an Ordinance which was no longer in force, the Appointment and Deposition of Chiefs Ordinance, Cap. 12, having been repealed, in the Western Region, by the Chiefs Law, 1957, with effect from the 20th June, 1957; (*iv*) that the enquiry was to be held in compliance with an order which was never made, because the judgment of the 16th May, 1956, which was that in the *certiorari* proceedings, contained no order to hold an enquiry.

Mr Adekunle for the respondent submitted that the formal order of *mandamus* must be read with the judgment on which it is founded, but conceded that the judgment of the 16th May, 1956, contained no such order as is specified in the order of *mandamus*. He went on to urge, however, that such an order (for the enquiry) was made in that judgment by necessary implication. With this submission we emphatically disagree, and we consider that these proceedings, like those for an injuction, were wrongly regarded as part of suit I.57/55.

Mr Adekunle next applied to vary the formal order of *mandamus* by altering the date "16th day of May, 1956" to "14th day of August, 1957", but this application was refused because (*i*) of such an application proper notice must be given, pursuant to the rules of this Court and (*ii*) even if the requirement of the rules were waived and the variation made, the formal order would not be in any way improved.

Mr Adekunle next advanced the submission that the formal order is irrelevant. Nothing need be said on that point except that this submission we regard as more astonishing than serious.

On the question of the repeal of Cap. 12 we were referred to section 12 of the Interpretation Ordinance. Even if that saves the duty to hold an enquiry under Cap. 12 we could not see against whom the order of *mandamus* could be enforced, and Mr Adekunle was unable to tell us, and contented himself with submitting that it was too late to raise this point now. We certainly think that this point should have been advanced to the learned Chief Justice in the *mandamus* proceedings. It is plain that the whole of the record concerns matters which were of considerable importance and we were glad to hear from the Attorney-General that in his view the conduct of Olaleye's case in the Court below, throughout, was such that the Court below never received from Olaleye's counsel the assistance to which it was entitled. It seems to us undoubted that had it been pointed out to the learned Chief Justice that there was no person against whom an order of *mandamus* could then be enforced he would never have made the order for *mandamus*. For this Court to sustain the judgment in the *mandamus* proceedings, would, in our view, amount to making a useless and unenforceable order, a step which any responsible tribunal in full possession of the facts would decline to take. It follows that, in our judgment, the appeal against the writ of *mandamus* must be allowed.

We turn now to the third appeal. The first notice of appeal filed by Olaleye is in accordance with the form specified by rule 12 of the Rules of this Court—in order words, it is framed as a notice of appeal in a civil matter. By this notice Olaleye seeks the reversal of the judgment of the learned Chief Justice of the Western Region (as he then was) whereby Olaleye was held to be in contempt of the High Court by reason of having continued to hold and perform the duties of the office of Dagburewe of Idowa. He was adjudged to have flouted an order prohibiting him from so doing, said to be impliedly incorporated in the judgment in the *certiorari* proceedings. The punishment imposed was a fine of ten pounds and costs of twenty guineas. We have numbered this appeal FSC165c/58.

Like the applications for the injuction and for the order of *mandamus* the contempt proceedings were taken as a further step in suit I.57/55 and it is plain both from this fact and from the course of the proceedings in the Court below, that that Court purported to treat the contempt there alleged as being non-criminal in nature, and with that designation both counsel who appeared before us were at first in agreement. The Court below arrived at that view on the basis, presumably, that the contempt proceedings were instituted as a form of execution under or in enforcement of the judgment in the *certiorari* proceedings. When we first dealt with this third appeal, while we were of opinion that the presumed basis for the view of the Court below was unsound, we were inclined to agree that the contempt found was non-criminal in nature. This point would have had to be considered in any event, but it was spot-lighted by the course adopted by Olaleye's advisers shortly before the date fixed for the hearing of the appeal. They had, in addition to the notice of appeal filed pursuant to rule 12, filed

(*i*) notice of an application, on Criminal Form 4, for extension of time in which to give notice of appeal and (*ii*) a notice of appeal on questions of law on Criminal Form 1. Holding the view we did at the first hearing, with which, as we have said, both counsel before us concurred, and we having so indicated, the Attorney-General withdrew both the notices specified above, and the applications were accordingly struck out. We had given to this proposed criminal appeal the number FSC 165B/58.

At the close of the first hearing we reserved our judgment and, during consideration thereof, we found grave doubts arising of the correctness of our view that the contempt concerned was non-criminal in nature and was in fact treated as such in the Court below. One of the main reasons for our doubts was the nature of the penalty imposed upon Olaleye. We have been at some pains to ascertain if a contempt of a non-criminal nature is punishable by fine, and we can find no instance in which this has ever been done. Committal appears to be the invariable punishment in such contempts, whereas in criminal contempts, which are misdemeanours at common law, instances of the imposition of fines are legion. It is also perhaps material to point out that in the case of disobedience to a Court order for payment of money, imposition of a fine would be completely inappropriate and imprisonment would appear to be the only effective punishment.

Having thus had our doubts aroused, we re-opened the hearing of the appeal against the contempt judgment, and heard argument from counsel on both sides as to the nature of this particular contempt.

The Attorney-General, almost up to the conclusion of his argument, sought to maintain the earlier view held by him, his opponent, and this Court that the contempt was non-criminal in nature and supported his submissions by citing the following authorities:—*Reg.* v. *Barnardo* (1889) 23 Q.B.D. 305; *Scott* v. *Scott*, [1912] P. 241, and, on appeal, [1913] A.C. 417; *O'Shea* v. *O'Shea and Parnell*, (1890) 15 P.D. 59: and *Izuora* v. *R.*, 13 W.A.C.A. 313.

We find it necessary to refer only to the third and second of these authorities. In *O'Shea* v. *O'Shea and Parnell*, at page 64 of the report, Lindley, L.J., says this—

> "There are obviously contempts and contempts; there is an ambiguity in the word; and an attachment may sometimes be regarded as a civil proceeding. For instance, where an order was made by the Court of Chancery in former days there was no mode of enforcing such order but by attachment. We must not, therefore, be misled by the words "contempt" and attachment, but we must look at the substance of the thing."

This passage was quoted with approval by Lord Atkinson in the House of Lords at page 464 of [1913] A.C.

This passage seemed to us of paramount relevance in this appeal, in particular Lindley, L.J.'s words: "we must look at the substance of the thing". Taking that course here, what do we find? We find that the appellant was ordered to pay a fine and costs for the alleged contempt of disobeying an order of the High Court which, in our view as expressed above in FSC 165A/58, was never made. It then seemed to us, subject to any further arguments that might be addressed to us, that this concluded the question and put it beyond doubt that this alleged contempt was in fact criminal in nature.

On our pointing this out to the Attorney-General he found himself constrained to agree with us, and to abandon the standpoint from which he began his argument. Mr Adekunle, too, agreed that, if we took the view, as we do, that there was in the *certiorari* judgment no order against Olaleye and, therefore, no order which he could have disobeyed, the correct designation of this contempt is criminal. It follows that, in our view, the projected appeal FSC 165c/58 is not competent and must be struck out. Had we found the contempt to be non-criminal in nature, the same result would have followed as we do not consider that section 3 (*a*) of Cap. 229 confers a right of appeal in the circumstances of this case.

The Attorney-General, at the invitation of the Court, then applied for the re-listing of his notice of application for extension of time within which to give notice of appeal and of his notice of appeal, both of which, as previously mentioned, had been withdrawn and struck out. We granted the Attorney-General's application, extended the time as necessary and then dealt with the matter as a criminal appeal.

We find it necessary to refer only to the second ground of appeal which reads as follows

"The learned Chief Justice erred in law in holding that the conduct of the appellant in this case amounted to contempt of Court."

Both counsel adopted the arguments advanced by each at the earlier hearing of appeal FSC 165c/58.

We can dispose of this appeal FSC 165B/58 very briefly by re-iterating what we have said above, namely, that there being no order which Olaleye could have disobeyed, the learned Chief Justice erred in finding him guilty of contempt. The appeal in FSC 165B/58 must, therefore, be allowed, the conviction and sentence set aside and a judgment and verdict of acquittal entered. The fine and costs, if paid, must be refunded to the appellant. For the sake of convenience and because of the exceptional course which the appeals have taken, we have adopted the somewhat unusual expedient of giving our decision on the criminal appeal in the same judgment as that dealing with the civil appeals.

To summarise our judgment, therefore, we strike out the appeal against the refusal of the injunction (FSC 165/58.). We allow the appeal against the order for issue of the writ of *mandamus* (FSC 165A/58) and set aside the judgment of the Court below granting that order. Having struck out the civil appeal against the finding of contempt (FSC 165c/58), we allow the criminal appeal against the conviction for contempt (FSC 165B/58). We make no order as to the costs of any of the appeals.

In conclusion we direct that a copy of this judgment be forwarded to the Attorney-General of the Federation for his consideration of the provisions of section 3 (*a*) of the Federal Supreme Court (Appeals) Ordinance. We have in this judgment pointed out wherein the various difficulties lie and we would venture to express our hope that an early opportunity will be sought for the clarification of this section by the Federal Legislature.

Appeal against refusal of injunction dismissed, allowed against issue of mandamus, struck out as a civil but allowed as a criminal appeal against conviction for contempt of court.

YEKINI ADEYOYE ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE : Quashie-Idun, Ag. J. 23rd January, 1959.]

Criminal law and procedure—wilful and unlawful damage to property—several accused acted independently in furtherance of the crime—discharge of one on submission of no prima facie *case need not involve discharge of others—failure of complainant to mention name of accused at earliest opportunity—non-direction on material evidence in appellant's favour—miscarriage of justice.*

The appellant, who had been charged with two other persons, had been convicted of wilful and unlawful damage to property, one of the two other accused having been discharged by the trial Magistrate at the close of the case for the prosecution on the ground that he had no case to answer. Upon his appealing against his conviction on two grounds—

Held: (1) that whilst it would be wrong to reject the same evidence as against one accused and accept it as against another when both had done the same act in the commission of a crime, the evidence however in the present case was that although the accused acted together in the commission of the crime, each had performed acts independently of what the others did in furtherance of the crime and that therefore the discharge of the one did not preclude the calling upon the other to make his defence;

(2) that if however the complainants knew the accused persons previously to the commission of the crime and had omitted to mention their names to the police when making their complaints, then failure of the trial Magistrate to take that omission into consideration before deciding whether the evidence of the complainants were true or not amounted to a non-direction by him on material evidence in favour of the appellant which non-direction had occasioned a miscarriage of justice.

Appeal allowed.

Cases cited:

S. Iyanda v. *J. O. Laoye* (*unreported* decision of High Court, Ibadan, on 23rd November, 1956).

Tijani Alao and Another. v. *Commissioner of Police*, (*unreported* decision of High Court, Ibadan, on 4th November, 1958).

Criminal Appeal No. I/57.CA/58.

M. Agbaje (*Akinjide* with him) for Appellant.

Odutola, Crown Counsel, for Respondent.

Quashie Idun, Ag. J.: The appellant was charged together with two other persons on two counts alleging wilful and unlawful damage to houses of the complainants. At the close of the case for the prosecution the 1st accused was discharged as the trial Magistrate ruled that the evidence against him was not sufficient for him to be called upon to answer.

At the close of the case for the defence the 2nd accused was found guilty and ordered to be given six strokes of the cane as he was only a youth. The appellant who was the 3rd accused was found guilty on both counts and sentenced to 18 months I.H.L. on each count; sentences to run concurrently.

From the conviction the appellant has appealed to this Court.

The 1st ground of appeal argued is that the Magistrate erred in law in calling upon the appellant for this defence when he had held on the same facts that there was no case for the 1st accused to answer. In support of the submissions on this ground, Counsel has referred the Court to the judgment of Ademola, C.J., in the case of *S. Iyanda* v. *J. O. Laoye*, High Court, Ibadan 23rd November, 1956. In that case, seven persons were charged together with an offence. The trial Magistrate ruled that no *prima facie* case had been made against six of the accused persons and called upon the 1st accused to answer the charge. He was eventually convicted. On appeal, the learned Chief Justice allowed the appeal and stated as follows in his judgment:

> "It is clear from the record of proceedings that the evidence against each accused person before the learned Magistrate is the same. There is not an instance where the appellant was singled out as having done anything which the others did not do. It is difficult to see how the learned Magistrate could, on the evidence before him make a different ruling in respect of any of the accused persons. From the evidence, what applied to one must apply to the other.....".

I agree with the view expressed by the learned Chief Justice in his judgment that if the evidence against a number of persons accused of an offence is that they all did the same act in the commission of the offence and that there is no evidence that any of the accused persons did anything different from what the others did, then it would be wrong for the Court to reject the evidence as far as some of the accused persons are concerned and accept the same evidence against the others.

In the present case, however, the evidence was not that all the accused persons did the same thing in the commission of the offence. The evidence was that although they acted together, in the commission of the offence each accused performed acts independently of what the others did in furtherance of the commission of the crime. It is my opinion, therefore, that the facts of the present case are distinguishable from the facts of the case referred to and that the judgment of the learned Chief Justice is not applicable to this case.

This ground of appeal therefore fails.

The 2nd material ground of appeal argued is that the learned trial Magistrate erred in convicting the appellant particularly as the 1st and 2nd witnesses for the prosecution did not mention the name of the appellant to the Police.

In his evidence under cross-examination one of the complainants, Amusa Akanmu who was the 1st witness for the prosecution stated as follows:

> "In my first statement I merely reported that my house had been damaged and gave no details. In my 2nd statement I gave details of the incident. It was when the three accused persons brought the Police to the village that I first mentioned them to the Police as being among those who had damaged my house".

Earlier in his evidence this witness had stated that he knew all the accused before the day on which the offence was committed and that he and the accused persons lived in the same village.

The 2nd witness for the prosecution, Sunmonu Ajagbe who was also a complainant also admitted in his evidence that it was when the 1st witness for the prosecution, the three accused persons and he had been arrested and taken to the Police Station that he mentioned the accused persons as being among those who had damaged his house. There

is evidence also that one of the accused persons had taken the Police to the village on a complaint that his house had also been damaged. When the Police were near the village they saw the 1st and 2nd witnesses for the prosecution walking along the road. The 1st and 2nd witnesses for the prosecution tried to run away when they saw the Police. The Police later prevailed upon them to stop. It was then that the complainants said that the accused had damaged their houses and that they had been looking for them. This was after one of the accused persons had pointed the complainants out to the Police as having damaged his house. If the complainants know the accused persons previously and had omitted to mention their names to the Police when they were making their complaint, I think the trial Court should have taken into consideration that omission before deciding whether the evidence of the complainants was true or not.

I can find nothing in the judgment of the trial Magistrate to indicate that he considered this omission on the part of the complainants. The omission on the part of the complainants to mention at the earliest opportunity the names of those they alleged had damaged their houses gave the impression that at the time they were making their complaint they did not know the persons who had damaged their houses. It is my view also that it did not add any weight to the evidence they gave in Court. It rather tended to depreciate the value of the evidence in Court.

If the complainants did not previously know the accused, they would not be expected to give their names to the Police. If they knew the names of the accused, and did not give them to the Police, then there should have been an explanation as to why they did not do so. In the present case no explanation was given by the complainants as to why they made the omission.

In the case of *Tijani Alao and another.* v. *C.O.P,* which was determined by me on the 4th November, 1958 on a ground similar to the present one I stated as follows:

> "It is not for this Court to speculate as to what happened between the date on which the statements were made and the date on which evidence was given in Court; but, it is my view that when an eye-witness omits to mention at the earliest opportunity the names of persons he said he saw committing an offence, a Court must be cautious in accepting his evidence given later and implicating other persons unless a satisfactory explanation is given as to why the names were not mentioned before".

I reiterate the same view in this case.

I think that the omission of the trial Magistrate amounts to a non-direction by him on material evidence in favour of the appellant. This in my view has occasioned a miscarriage of justice and I allow the appeal.

The appellant is acquitted and discharged.

Appeal allowed.

ODUOLA ALAMU AND FIFTEEN OTHERS ... *Appellants*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Quashie-Idun, Ag.J., 30th January, 1959.]

Criminal procedure—evidence—findings of fact on—appellate court will not interfere—inspection of locus in quo*—non-compliance with procedure—no substantial miscarriage of justice—sentence—severity justified by prevalence of offence.*

The appellants who had been convicted by the Senior Magistrate, Ibadan, on a charge of wilfully and maliciously damaging property, appealed to the High Court on the grounds: (1) that the trial Court should not have accepted the evidence of one of the witnesses for the prosecution identifying in Court the accused as the persons who damaged his property when prior to the trial he had had an opportunity but had failed to identify them to the Police; (2) that the trial Court erred in law by failing to comply with the procedure for the inspection of the *locus in quo*; (3) that the sentences were excessive. The Crown did not support the conviction of three of the appellants.

Held: (1) that there being, apart from the evidence of the prosecution witness in question, evidence of other prosecution witnesses identifying the accused in connection with the charge, the Court would not interfere with the trial Magistrate's findings of fact based on the evidence of witnesses for the prosecution;

(2) that there was an irregularity in the procedure adopted for the inspection of the *locus in quo* in that the record did not show that the prosecution witnesses were recalled for cross-examination after the visit which had been requested by the cousel for the appellants at the close of the case for the prosecution and in connection with which the trial Magistrate had made some notes of inspection showing some discrepancies between the evidence given in Court and what transpired at the inspection, but that the trial Magistrate considered those discrepancies before arriving at his final decision and that the irregularity in the procedure adopted had not resulted in a substantial miscarriage of justice;

(3) that the severity of the sentences was justified having regard to the fact that the offence with which the appellants were charged was very prevalent at the time.

Appeals of thirteen appellants dismissed: three appellants discharged and acquitted.

Cases cited:

R. v. *Dogbe*, 12 W.A.C.A. 184.

Tijani Olaopa and Others v. *Commissioner of Police*, (Ibadan Appeal Case No. I/20CA/58 of 28th October, 1958 *unreported*).

R. v. *Abontendomhene Asare Apietu and Others*, 11 W.A.C.A. 24.

Inspector-General of Police v. *Adekunle and Others*, 1955-56 W.R.N.L.R. 16.

Inspector-General of Police v. *Adunfe and Others*, 1957 W.R.N.L.R. 179.

Inspector-General of Police v. *Bello and Others*, 1957 W.R.N.L.R. 83.

Ibadan Criminal Appeal No. I/92CA/58.

Akinjide for Appellants.

Odutola, Crown Counsel for Respondent.

Quashie-Idun, Ag.J.: The appellants, who were convicted by the Senior Magistrate, Ibadan, on a charge of wilfully and unlawfully damaging a house of one Alimi Iddo, have appealed to this Court. The Crown Counsel has intimated to the Court that he does not support the conviction against 5th, 6th and 8th appellants.

The grounds on which the appeal is based and on which Counsel for the appellants has made submissions are—

(1) That the trial Magistrate erred in law in accepting the evidence of the first witness for the prosecution on the identification of the accused persons when the said witness had prior to the trial failed to identify the appellants as the persons who had damaged his house and store when he had the opportunity to do so.

(2) That the trial Magistrate erred in law by failing to comply with the procedure laid down in *Rex* v. *Dogbe*, 12 W.A.C.A.184, as regards the visit to the *locus in quo*.

(3) That the sentences imposed on the accused are excessive.

In support of his submissions on the 1st ground of appeal argued, Counsel has referred the Court to the evidence of Edwin Izedoruwan called by the defence. The evidence of this witness was that at the request of the Deputy Superintendent of Police the 1st witness for the prosecution and other persons (who were not called as witnesses in the present case) were called to identify people in the Court Hall and that with the exception of accused Nos 1, 2 and 8, all the other accused persons were present. Witness said that the 1st prosecution witness then identified five persons as having been among the persons who damaged his house and that only four of the five persons were before the trial Court. Witness also said that the other accused persons were arrested and charged with murder and that 1st prosecution witness was the complainant in the murder case. It is not clear from the evidence of this Police Officer as to whether the 1st prosecution witness was asked by the Deputy Superintendent of Police to identify the persons who had taken part in damaging his house or the persons who were alleged to have committed the murder of two persons. Under cross-examination the 1st prosecution witness denied in his evidence that he mentioned only five persons to the Police. He said he mentioned the names of 26 persons and that the accused persons were arrested at his instance. Apart from this evidence, there was the evidence of other witnesses for the prosecution who said they mentioned the names of the accused to the Police in connection with the charge before the Court. In view of the evidence, I think it was a question of whether the trial Court believed the evidence of the prosecution witnesses who said they mentioned the names of the accused to the Police or the evidence of the Police Officer who was called by the defence.

It was thus a question of facts for the trial Court to decide and having accepted the evidence of the witnesses for the prosecution, this Court will not interfere with that Court's findings.

This ground therefore fails.

On the second ground argued by Counsel for the appellants it is submitted that there has been a miscarriage of justice by the trial Magistrate not complying with the procedure laid down in the case of *Rex* v. *Dogbe*. In the case of *Tijani Olaopa and others* v. *Commissioner of Police* (Appeal Case No. I/20CA/58) which was heard by me at Ibadan on the 28th October, 1958, I dealt extensively with the facts which led to the judgment pronounced by the West African Court of Appeal in the case of *Rex* v. *Dogbe*. Dogbe was charged with murder and the nature of the evidence required to substantiate a murder charge must be very high. In the present case, I am bound to hold that

the Magistrate did not comply with the procedure laid down in *Dogbe's* case; but the important question for this Court to decide is whether or not, the failure on the part of the trial Magistrate to comply with the requirements has resulted in a substantial miscarriage of justice.

In the case of *Rex* v. *Abontendomhene Asare Apietu and others*, 11 W.A.C.A. 24, where a ground similar to the present was argued on behalf of the appellants the Court of Appeal stated in its judgment as follows:

> "The omission with which we are dealing could in no way have prejudiced the appellants, and we have not the slightest doubt that had there been any substance in the complaint, Counsel for the appellants would have requested the recall of those witnesses, themselves for the purposes of cross-examination. In any event, as the Jury examined the spot themselves they were in just as good a position as anyone else in the world to judge as to the visibility."

It is important to observe in this case, that it was Counsel for the accused who is also Counsel for the appellants, who at the close of the case for the prosecution requested that the Court should visit the *locus in quo*. After the inspection hearing was resumed in Court. The defence of the appellants then commenced. There is nothing in the record to show that Counsel for the accused requested that the witnesses should be recalled in order that he might put to them questions to show that as a result of the inspection the evidence given by the witnesses for the prosecution was not true. There are however, portions of the notes of inspection made by the Magistrate which show that he himself found some discrepancies between the evidence given in Court and what transpired at the inspection. There is no doubt that he considered those discrepancies before he made his final decision. The question as to whether or not an irregularity such as the one now complained of has resulted in a substantial miscarriage of justice has been dealt with in a number of cases by the Courts in this country. The decisions of the Courts are in support of the opinion expressed by the West African Court of Appeal in the case of *Rex* v. *Abontendomhene Asare Apietu and others* to which I have already referred.

I would refer to the following cases:

Inspector-General of Police v. *Adekunle and others*, 1955-56 W.R.L.N.R. 16; *Inspector-General of Police* v. *Adunfe and others*, 1957 W.R.N.L.R. 179; and *Inspector-General of Police* v. *Bello and others*, 1957 W.R.N.L.R. 83.

For the reasons I have stated I am of the opinion that no miscarriage of justice has occurred as a result of the non-compliance with the procedure laid down by the West African Court of Appeal in *Rex* v. *Dogbe* by the trial Magistrate in the inspection of the *locus in quo*.

This ground of appeal also fails.

The third ground of appeal is that the sentences imposed by the Magistrate are excessive. I can only repeat what I have already stated in a number of cases which I have heard on appeal since October 1958, that, this kind of offence was very prevalent at a particular period and that the Magistrates were entitled to punish offenders with some degree of severity. I therefore have no desire to interfere with the sentences.

The appeal is accordingly dismissed ir respect of the appellants with the exception of Nos 5, 6 and 8 who are acquitted and discharged.

Appeals of thirteen appellants dismissed; three appellants acquited and discharged.

YINUSA BAKARE ... ... *Defendant/Appellant*

v.

RASAKI ISHOLA ... ... *Plaintiff/Respondent*

[HIGH COURT OF JUSTICE: Jibowu, C.J., 16th February, 1959.]

Defamation—slander—words uttered in the heat of anger in the course of altercation and fight—mere vulgar abuse—judicial notice of common form of abuse in altercations—actual words complained of not proved—findings of fact did not justify verdict.

In an appeal from the decision of a Magistrate's Court awarding the plaintiff/respondent damages against the defendant/appellant for slander it was shown that there had been a fight preceded by an altercation between the parties and that in the heat of anger the defendant/appellant had in the presence of others spoken of the plaintiff in *Yoruba* the words which were alleged to be: "*Ole ni o. Elewon, iwo ti o sese ti ewon de yi*" which in English meant: "You are a thief. Ex-convict, you who have just come out of prison".

Held: (1) that the words complained of were mere vulgar abuse as they had been spoken while the parties were exchanging words which led to blows, that is, as usual in this country, while they were abusing each other, and that it was a matter of common knowledge of which the Court took judicial notice that people commonly abuse each other as a prelude to a fight and call each other in *Yoruba* "*Ole! Elewon*" meaning in English "Thief! Ex-convict", which abuses no one took seriously as they were mere words of anger;

(2) also that the actual words complained of had not been proved in view of the variant versions of the same given in evidence by the plaintiff and one of his witnesses and that those words should have been stated exactly as the defendant/appellant spoke them and an English translation then furnished.

Appeal allowed.

Case cited:

Gray v. *Jones*, [1939] 55 T.L.R. 437; [1939] 1 All E.R. 798.

Ibadan Suit No. I/51A/58.

A. Ademola for Defendant/Appellant.

Akinloye for Plaintiff/Respondent.

Jibowu, C.J.: This is an appeal against a decision of Mr T. A. Makanju, Magistrate, dated the 9th June, 1958, whereby he gave judgment for the plaintiff for £10 damages for slander with £6 6*s* 0*d* costs.

The words complained of are—

"*Ole ni o. Elewon, iwo ti o sese ti ewon de yi*", meaning "You are a thief. Ex-convict, you who have just come out of prison".

There was evidence, which the learned Magistrate believed, that there was an altercation between the parties before a fight took place between the parties and others in the defendant's parlour.

The Magistrate made the following findings of fact, with which I agree:—

"It is certain that altercation preceded the fight, and that the parties bandied words one to another. I believe the plaintiff and his first witness that the defendant made the offending expression alleged against him in the heat of anger and that he did so directly".

Mr Ademola for the appellant has submitted that the plaintiff should not have succeeded on these findings which lead to a conclusion that the words complained of were mere vulgar abuse.

There can be no doubt from the evidence of the respondent's first witness that the words complained of were spoken by the appellant while he and the respondent were exchanging words which led to blows. In other words, the words were spoken while the parties were, as usual in this country, abusing each other. It is a matter of common knowledge of which this Court takes judicial notice that people commonly abuse each other as a prelude to a fight and call each other "*Ole*! *Elewon*" (Thief! Ex-convict), which abuses no one takes seriously, as they are words of heat or anger, and are nothing but vulgar abuse.

Attempt was made in this case to show that the defendant's words were taken seriously. Mr Ademola referred to the evidence of the respondent's first witness, Rafiu Salami, who was the only witness who purported to testify about the words complained of. His reaction to the words complained of was to ask the plaintiff to come along with him. This does not show that he thought less of the plaintiff or that he believed the plaintiff was an undesirable person to associate with.

The circumstances of the case definitely show that the appellant was angry and spoke in the heat of passion, and the Magistrate rightly blamed the respondent for going to the appellant's parlour to fight with him.

In my view, the findings of fact made by the learned Magistrate do not justify the verdict, which should not be allowed to stand.

This appeal ought to be allowed on another ground which was not argued and the ground is that the words complained of were not proved. The law is clear that the actual words complained of must be proved: *see* page 556 of *Gatley on "Libel and Slander"*, 4th edition. In this case, the appellant was supposed to have spoken in *Yoruba* language. What he said must, therefore, be stated as he said it, and an English translation can then be furnished.

The plaintiff's evidence-in-chief was—

"The defendant pointed to me and my wife and told the man that these were the thieves that invaded him. I asked the defendant whether he was directing his remarks to me, and he said he was and that I was a thief, and that I had just returned from prison."

In cross-examination he said—

"The defendant made the two utterances. These are the thieves that invaded me and 'You are a thief'. You have just returned from prison".

His first witness, Rafiu Salami, stated in his evidence-in-chief:

"I heard the defendant saying, 'the plaintiff is a thief, he is an ex-convict, he has just returned from prison, don't keep him company'".

In cross-examination he stated:

"The defendant did utter the expression 'He is a thief'. The defendant also said 'He is an ex-convict. He has just returned from prison'."

None of them told the Court the actual words alleged to have been spoken by the defendant.

The learned Magistrate referred to *Gray* v. *Jones*, [1939] 55 T.L.R. 437; [1939] 1 All E.R. 798, as an authority for the proposition that it is actionable *per se* to call a person an ex-convict, and he did not suggest that the facts of the case are identical with those of the present case. The principles decided by the case would have been applicable to this case if there was no question that the words complained of were just vulgar abuse.

The appeal succeeds and the judgment of the learned Magistrate is hereby set aside with the order for costs and judgment is entered for the appellant with four guineas costs in the Court below and eighteen guineas costs of this appeal.

Appeal allowed.

BENJAMIN LASODE ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Irwin, J., 18th February, 1959.]

Criminal law and procedure—corruptly demanding money contra section 116 (1) of Criminal Code, Cap. 42—demanding same with menaces with intent to steal contra section 406—variance between first count and evidence—cured by verdict—section 102 of Magistrates' Courts (Western Region) Law, 1954 (No. 5 of 1955)—whether "threats of any injury or detriment of any kind" within section 406 restricted only to person threatened.

In an appeal by a police constable against his conviction by the Magistrate's Court, Abeokuta, on two counts of corruptly asking the complainant contrary to section 116 (1) of the Criminal Code, Cap. 42, for the sum of £10 in order that he "might not arrest or apprehend" the complainant's driver for reckless driving and also of demanding that sum with intent to steal with the threat that the said driver would be "arrested and prosecuted" if the demand was not met, the objection appeared to have been taken that there was a variance between the first count and the evidence in that the demand was averred to have been made on account of a forbearance to apprehend while it was proved to have been made on account of a forbearance to prosecute.

Held: (1) that this variance was not an essential one and was one that was cured by the subsequent verdict;

(2) that further, section 102 of the Magistrates' Courts (Western Region) Law, 1954 (No. 5 of 1955) precluded the taking or allowing of the present objection in so far as in the circumstances the appellant was not in fact deceived or misled by the variance;

(3) that the words "threats of any injury or detriment of any kind" within the meaning of section 406 were not restricted to threats made to the person threatened by the offender and must be construed in a wide sense to include threats made to one person of injury or detriment to another.

Appeal dismissed.

Cases cited:

R. v. *Tomlinson* (1895) 1 Q.B. 706.

R. v. *Boyle*, 10 Cr. A.R. 180

Abeokuta Appeal No. AB/7CA/1958.

Appellant absent.

Eboh, *Acting Senior Crown Counsel*, for Respondent.

Irwin, J.: The appellant who was a constable in the Nigeria Police Force was convicted by the Magistrate's Court, Abeokuta, on two counts.

The first charged him under section 116 (1) of the Criminal Code with corruptly asking the complainant, Lamidi Oyindasola, for the sum of £10 in order that he "might not arrest or apprehend" the complainant's driver, Isikalu Adebare, for the offence of reckless driving. The second charged him under section 406 of the Criminal Code with demanding that sum with intent to steal it from the complainant with the threat that Isikalu Adebare would be "arrested and prosecuted" for the offence if the demand was not complied with.

The evidence of the complainant was that the demand was made outside the Police Station where Adebare was detained before being released on bail, the appellant saying that he should bring £10 for the matter to be dropped, and adding that if he did not, Adebare would be prosecuted. It is not disputed that there was a variance between the first count and the evidence in that the demand was averred to have been made on account of a forbearance to apprehend while it was proved to have been made on account of a forbearance to prosecute.

I do not consider that this was an essential variance and it was, I think, one that was cured by the subsequent verdict.

It is moreover provided by section 102 of the Magistrates' Courts (Western Region) Law, 1954 (No. 5 of 1955), that:

> "On any appeal from a decision of a Magistrate's Court no objection shall be taken or allowed to any proceeding in such Court.....or for any variance between any complaint or summons and the evidence adduced in support thereof in such court".

Having regard to the proviso to that section it does not appear to me in the circumstances of this case that the appellant was in fact deceived or misled by the variance.

On behalf of the appellant it was further argued that his proved conduct did not constitute the offence charged under section 406 in that the words "threats of any injury or detriment of any kind" in the section were to be construed as restricted to threats to the person threatened by the offender.

Sections 406, 407, 408 and 409 of the Criminal Code relate to threats and are manifestly derived from the English Larceny Acts.

In *R.* v. *Tomlinson* (1895) 1 Q.B. 706, the scope of the corresponding sections of the Larceny Act, 1861, was considered; it was there held that the word "menaces" must be construed in a wide sense and that it was not confined to a threat of injury to the person or property of the person threatened.

A similar construction was given to the word by the Court of Criminal Appeal in *R.* v. *Boyle*, 10 Cr. A.R. 180, where the appeal was against conviction under section 45 of the Larceny Act, 1861.

The marginal note to section 406 of the Criminal Code is—

"demanding property with menaces with intent to steal".

The elements of the offence are the same as those of the offence made punishable by section 30 of the Larceny Act, 1916, which replaced section 45 of the Larceny Act, 1861.

The words in section 406 "threats of any injury or detriment of any kind" have, I think, an even wider meaning than the words "menaces" in the Larceny Act.

On the facts proved in this case the appellant was, in my view, rightly convicted of the offence charged under that section.

The appeal is dismissed and the conviction on each count is affirmed.

Appeal dismissed.

ASHIMI POPOOLA ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Irwin, J., 20th February, 1959.]

Evidence—similar facts of previous offence—admissibility in rebuttal of defence of innocent possession.

In an appeal by a police constable against his conviction by the Magistrate's Court, Abeokuta, for demanding the sum of £3 3*s* with intent to steal contrary to section 406 of the Criminal Code, Cap. 42, and for attempting to obtain that sum by false pretence contrary to sections 419 and 509, it was argued that the trial was vitiated by the admission of inadmissible and highly prejudicial evidence suggesting that on a previous occasion the appellant had obtained from a witness, other than the complainant in the present case, a sum of money in similar circumstances and by means of a similar false pretence. This witness had been seen in the company of the appellant and the complainant by another police constable who gave evidence to the effect that the complainant had then asked him for a loan of money in the presence of the others and at a time when, according to the complainant, the demand was being made by the appellant, who had also, in answer to the other police constable's enquiry, answered that the witness in question observed following him about was his brother. This witness's evidence however was that he was then pressing the appellant for the repayment of money previously obtained from him in circumstances similar to those alleged in the present case.

Held : that the appellant's defence being one of innocent possession in that he had alleged that the sum of money in question in the present case had been given to him for the purchase of a piece of cloth for the complainant who was his friend, evidence to the effect that on a previous occasion a sum of money had been obtained by him from another person in circumstances and by means similar to those here alleged was admissible and had been rightly admitted in rebuttal of that defence.

Appeal dismissed.

Cases cited:

Makin and Another v. *Attorney-General for New South Wales.* [1894] A.C. 57.
Noor Mohamed v. *R.* [1949] A.C. 182.
Thompson v. *D.P.P.*, [1918] A.C. 221.

Abeokuta Criminal Appeal No. AB/2CA/58.

Appellant absent.

Obisesan, Crown Counsel for Respondent.

Irwin, J. : This is an appeal against conviction by the Magistrate's Court, Abeokuta, for demanding the sum of £3 3*s* with menaces with intent to steal, an offence punishable under section 406 of the Criminal Code, and for attempting to obtain that sum by false pretence, an offence punishable under sections 419 and 509 of the Criminal Code.

On behalf of the appellant, a constable in the Nigeria Police Force, the appeal was argued upon these grounds—

"1. The learned Magistrate erred in law in admitting inadmissible and highly prejudicial evidence (*viz.*, evidence of the fifth prosecution witness '*in extenso*' in respect of a different offence for which the appellant was not facing trial), whereby the appellant had no fair trial, having been portrayed so early in the proceedings as of a criminal disposition and tendency.

2. The learned Magistrate erred in law in not excluding the evidence of the fifth prosecution witness which '*in extenso*' dealt with an offence with which the appellant was not charged thereby allowing it to vitiate the fair trial of the appellant.

3. The decision is erroneous in law in that the learned Magistrate misconceived the decision in *Makin and another* v. *Attorney-General for New South Wales* [1894] A.C. 57, which principally directs the exclusion of prejudicial evidence such as was admitted by the learned Magistrate in this case."

The appellant was found in possession of three one pound currency notes which had been previously marked because of a complaint made to the police by the eighth prosecution witness, Layiwola Akamo. Akamo was on the evidence led by the prosecution the victim of the appellant's demand.

On the 18th May, 1957, the day after his arrest, the appellant in a statement to the police said that the money was given to him for the purchase of a piece of cloth for Akamo who was his friend.

That the money had been paid for this purpose was the defence made by the appellant in the witness-box and put to witnesses for the prosecution in cross-examination.

Sabitu Onipede, fifth prosecution witness, was seen in the company of the appellant and Akamo by another constable, John Amole, seventh prosecution witness. Amole said that Akamo asked him for the loan of money in their presence at a time when according to Akamo, the demand was being made.

Amole also said that he spoke to the appellant enquiring why Onipede was following him about and that the appellant replied that Onipede was his brother.

Onipede's story was that he was then pressing the appellant for repayment of a sum of money obtained by the appellant in similar circumstances and by means of a similar false pretence on a previous occasion. Onipede accompanied the appellant and Akamo throughout the evening of the 16th May when the demand was being made except for a period while he waited for them to return from the Government Reservation Area; he spent that night in the appellant's house and said he heard Akamo tell the appellant that he would look for the money and let him have it early on the next day.

There was thus a connection between the acts charged and the previous transaction of which this witness spoke; his evidence explained the circumstances in which the appellant came to make the demand.

It cannot, I think, be said on the authority of *Noor Mohamed* v. *R.*, [1949] A.C. 182, that this evidence was not in rebuttal of any defence which had been raised, and was not relevant to any issue which the prosecution had to prove.

In the course of the argument on behalf of the appellant notice was invited to the following well-known passage in the judgment of Lord Sumner in *Thompson* v. *Director of Public Prosecutions*, [1918] A.C. 221, quoted in the *Noor Mohamed* case:—

"Before an issue can be said to be raised which would permit the introduction of such evidence, so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which

the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

In the present case the defence that the money come into the possession of the appellant for a wholly innocent purpose was not a fancy or imaginary one, it was the defence which the appellant himself set up in the statement he gave to the police at the outset of their enquiry and to which he adhered at his trial.

I am of the opinion, therefore, that the evidence complained of was rightly admitted.

The appeal is dismissed and the conviction is affirmed.

Appeal dismissed.

THE QUEEN
v.
JOHN ADELODUN

[HIGH COURT OF JUSTICE: Morgan, J., 23rd February, 1959.]

Criminal law—murder—abusive songs by political opponents after an election—self-defence—use of lethal weapon—words as sufficient provocation at present stage of development in Nigeria—weapon and mode of use in retaliation out of proportion to provocation.

The accused was charged with the murder of an unknown drummer on or about the 11th day of May, 1958, at Odo Igbemo, in the Akure Judicial Division. On the 10th of May, an election into the Local Council had taken place and the defeated candidate was the accused's first cousin. The case for the accused was that on the day of the crime, a number of persons and the deceased had come to the front of his house singing abusive songs and making jest of him, the songs being to the effect that the singers were going to ride him as if he were a horse, that he was going to suffer and that his parents were slaves. Although he had remonstrated with them, they had not stopped singing the abusive songs and they had left the road only to come to the front of his house and use more violent language. He said he was enraged and pained, ashamed and even nearly knocked his head against the ground; he had slapped one of them and all the others had then attacked him; he had escaped, and had thereupon taken from the entrance of the house what he thought was a firewood and attacked his assailants with it; and that it was when he suddenly saw blood that he discovered that what he had in his hand was in fact a matchet. In a statement previously made to the police and admitted in evidence however, he had stated that when he met the deceased a fight arose between them and he then cut the deceased with a matchet a number of times first on the road and then in front of the house whither he had run. The *post mortem* examination showed that the deceased had on various parts of his body some ten wounds most of them being of a severe character. The defences put forward were self-defence and provocation.

Held: (1) that on the facts it could not be accepted that the accused really though at first that what he had in his hand was a firewood and not a matchet and that as regard the defence of self-defence, even if there had been a fight, he was not justified in using a lethal weapon against his opponent unless the assault on him was so violent as to make him consider his own life to be in danger and that there had been in this case an exercise of force beyond what was reasonable in the circumstances;

(2) that as regards the defence of provocation, although it is the duty of a trial Judge to determine whether on his view manslaughter or murder is the appropriate verdict if having regard to the circumstances prevailing in Nigeria at the present stage of development it might be fairly said that a reasonable person in Nigeria, in consequence of the provocative words used might be so rendered subject to passion or loss of control as to be led to use violence with fatal results and that the accused was in fact under the stress of such provocation, yet the injuries inflicted upon the deceased in this case were so severe and so many and the weapon used such that the mode of retaliation has to be regarded as being out of all proportion to whatever the deceased said or did to the accused so as to have reduced the killing from murder to manslaughter.

Accused convicted and sentenced to death.

Cases cited:

R. v. *Laoye*, 6 W.A.C.A. 6.
R. v. *Udo Akpapan* (1956) 1 F.S.C. 1.

Wonaka v. *Sokoto N.A.* (1956) 1 F.S.C. 29.

Howel's Case (1221) Maitland's Select Pleas 94.

R. v. *Starley* (*reported* in *The Times* of 14th May, 1952).

Holmes v. *D.P.P.*, [1946] A.C. 588.

Mancini v. *D.P.P.*, [1942] A.C. 1.

R. v. *McCarthy*, [1954] 2 Q.B. 105.

R. v. *Thomas*, (1837) 7 C. and P. 817.

Charge No. AK/33c/58.

Ogundare for the Accused.

Fagbemi for the Crown.

Morgan, J.: The crime for which the prisoner stands charged is that he on or about the 11th day of May, 1958, at Odo Igbemo, Ekiti, in the Akure Judicial Division, murdered an unknown male African drummer.

The following are the facts of the case for the Crown.

On Sunday the 11th May, 1958 the prisoner's wife Omoetan John (the seventh prosecution witness) went out after breakfast to go and have her hair plaited. On her return she found the prisoner sitting on a chair in front of their house. She saluted him but he did not answer in a pleasant manner. She asked him what was wrong and he told her that some people had been singing abusive songs about him. She herself had heard the songs at the place where she was having her hair plaited and she asked the prisoner if his reason for answering her in a cold manner was because of the songs. The prisoner said "No". His wife asked him to come into the house but he did not do so. She then went to his cousin, Peter Apata, the eighth prosecution witness, who was then in the adjacent house, and told him what she had observed. Peter went with her and found the prisoner still sitting outside the house. Peter spoke to the prisoner and appealed to him to be patient and to go in. The prisoner got up and followed his wife into the house while Peter went to his own mother-in-law's house.

There was an election into the Local Council on Saturday the 10th May, 1958 and the defeated candidate, one Joseph Ale, is the prisoner's first cousin and was a candidate of the NCNC party.

On entering the house the seven prosecution witness left the prisoner in the house and went to the kitchen. After about thirty minutes she heard some shouts outside the house and ran outside from the kitchen. She saw some people running away and saw her husband standing near the house and holding a matchet. She ran towards him but fell down. The prisoner was walking away and told the people who followed him to go back and that he was going to Ado Ekiti.

The seventh prosecution witness was not the only person who heard the shouts. One of the others was Ojurongbe Odofin, the ninth prosecution witness. On that day he was attending a meeting at Odo Igbemo Quarter and on hearing the shouting rushed out of the meeting. The meeting was taking place in a house some one hundred and fifty yards from the prisoner's house. When the ninth prosecution witness came out of the house where the meeting was taking place, he saw a man running and being chased by the prisoner who was holding a matchet. The man fell down and the prisoner struck him some blows with his matchet. The man died on the spot. The ninth prosecution witness wanted to go near the prisoner but the prisoner told him not to come near. He said that he was taking his matchet to the Divisional Adviser at Ado Ek

Later, one Disu Oloriawo, the fifth prosecution witness, who also had heard the alarm and was heading for the place where the shouts were coming from, met the prisoner near the C.M.S. Church at Igbemo. The prisoner held a matchet, but he dropped it on being asked by Disu Oloriawo to do so. Disu Oloriawo took possession of the matchet and took it to the Oba of Igbemo.

On the same day the emissaries of the Oba of Igbemo took the prisoner and his matchet to the Police Station at Ado Ekiti. The fourth prosecution witness, P.C. Edward Ajagunna, got the matchet from the second prosecution witness at about 4 p.m. on that same day and forwarded it to the Forensic Science Laboratory at Oshodi in the Colony Province of the Western Region. There the Medical Laboratory Technologist in charge—Mr Paul Adebayo Bello, the sixth prosecution witness, examined the matchet and found its blade to be stained with human blood. The Laboratory Technologist's written report is Exhibit "C".

The second prosecution witness, P.C. Ezekiel Femi, saw the prisoner at Ado Ekiti Police Station, when he arrived there with the emissaries of the Oba of Igbemo. The witness and one Lance Corporal Soleye left Ado Ekiti for Igbemo on investigation at about 5.45 p.m. on that same day. On arrival at Odo Igbemo Quarter they saw a corpse on the pavement of a house adjacent to the prisoner's house. There were many injuries on the body. Some on the thigh, at the back of the neck and one at the elbow. The witness and Lance Corporal Soleye collected the dead body and took it to the mortuary of the Iddo General Hospital. They returned to Ado Ekiti at about 00.30 hours on the 12th May, 1958. They had made enquiries at Igbemo as to the identity of the deceased but were unable to find out his name. *Post mortem* examination was not performed on the body during that night. The second prosecution witness returned to Igbemo at about 1 p.m. on the 12th May, 1958, and in his presence the first prosecution witness Doctor Ralph Nkeaka, performed *post mortem* examination on the body.

According to the evidence of Doctor Nkeaka the body was that of an adult African male. The right arm was partially amputated at the elbow joint. There were two deep lacerations on the exterior aspect of the left lower arm and another on the right hand extending from the third finger web upwards to about one-third the distance to the elbow joint. There was a deep laceration on the posterior aspect of the right thigh involving all the popliteal vessels. A severe laceration of the neck extended from the left scapular region across the neck to the region of the right sterno-clavicular joint and extending deep into the neck, involving the carotid vessels and down to the cervical spine injuring the spinal cord. A severe laceration extended from the angle of the left scapula across the left axillar to about two inches from the left nipple and from the opening thus produced by this wound protruded portions of the spleen and the large bowel, both abdominal organs being severely damaged. There was a deep laceration in the posterior side of the left elbow and there were other minor multiple lacerations on the head and the penis. In the opinion of the doctor death was caused by haemorrhage and shock resulting from the injuries to the carotid vessels, the spinal cord, the spleen and the large bowel.

On the 12th May, 1958, the second prosecution witness charged the prisoner with killing a drummer and cautioned him. The prisoner made a statement exhibit "A" (Translation—exhibit "A1"). He was taken before Mr Dennis Howard, a Divisional Adviser (third prosecution witness) on 21st May, 1958. Mr Howard has stated on oath that he remembered having seen the prisoner in his office in May 1958. That he was brought by a constable in connection with a charge of murder and that the police-

man who brought him had a statement with him which had been written down beforehand. The statement was read out in *Yoruba* by the District Office Interpreter. The Divisional Adviser asked the prisoner through the interpreter if the statement was correct and if he made it voluntarily and the prisoner said that it was correct and voluntary. The Divisional Adviser thereupon endorsed the statement. According to the witness's recollection the prisoner said that he wanted to make an additional statement. The witness then asked the prisoner if the one read out to him was correct and voluntary and the prisoner said "Yes". The prisoner did in fact make an additional statement which the Divisional Adviser also endorsed—*see* exhibits "B" and "B1".

The prisoner has challenged the correctness of the statement. He said that he did not say that the incident occurred two days after the election. That he said that he did not know the name of the drummer but that he knew the names of the persons who engaged him. That he did not say that the incident occurred on the street and that he said that it occurred in front of his own house. He said that he told the second prosecution witness the names of the five persons who engaged the drummer but that the witness refused to record the names. I tried the issue of admissibility separately and having formed the view that the second and third prosecution witnesses spoke the truth I admitted the first statement in evidence. It will be noted that the second prosecution witness did not record in the statement that the incident occurred two days after the election. What he recorded was that "voting was completed day before yesterday", *i.e.*, 10th May, 1958. Furthermore it will be observed that the prisoner admitted under cross-examination that he mentioned only two names to the Divisional Adviser, not five, and also that when he made the additional statement he said nothing further about the people in question.

The prisoner, in his first statement, said: "When they started playing, those drummers were up to five, that drummer make them to be six. I do not know their names. They started to sing in proverbs against me, they abused my mother and father. I then called that drummer (and spoke to him and he went down the road) when he was returning the second time he started again to call the names of my mother and father and started to abuse me. I was ashamed and even nearly knocked my head against the ground. I then met him and fight arose between us. I then cut him with matchet up to five times..... I first of all gave him matchet cut on the road. He then ran to the front of the house. There I gave him matchet cuts." It is true that the prisoner has retracted some important aspects of his statement and that when a prisoner retracts a statement previously made by him the court should satisfy itself that the statement was voluntary and correctly recorded. I am satisfied that Mr Dennis Howard, the Divisional Adviser, spoke the truth about the confirmation of the statement by the prisoner and that Police Constable Femi recorded correctly the statement made to him by the prisoner. I therefore find that the statement as recorded by the second prosecution witness was recorded as made by the prisoner and that it was made voluntarily. It will also be seen from the evidence of the ninth prosecution witness that it is a fact that the prisoner chased the drummer and struck him blows with his matchet.

The prisoner gave evidence in his defence and has called a witness. He said in his defence that at about 2 p.m. on Sunday, the 11th May, 1958, he saw five persons and a drummer. That they came to the front of his house singing abusive songs and making jest of him. Some of the songs were to the effect that the singers were going to ride him as if he were a horse, that he was going to suffer and that his parents were slaves. He said that the people were standing on the road and that he went to them

and spoke to them and that although they left they did not stop the abusive songs. He said that the people came back later. That they left the road, came to the front of his house, and used more violent language. He said that he was enraged and pained and that he got up and slapped one of them, Pius Adebisi. He said that all the others began to beat him and that he struggled and escaped from them. He said that he took a firewood from the entrance to the house and attacked all his assailants with it. He said that he suddenly saw blood and discovered that what he held in his hand was a matchet and not a firewood.

His witness, Elijah Ojo, did not claim to be an eye-witness. The substance of his evidence is that he was at the same meeting attended by the ninth prosecution witness, that he himself rushed out but that none of those who attended the meeting with him arrived at the scene of the incident before him.

Counsel for the defence has commented on the evidence of the doctor and submitted that the failure to identify the corpse examined by the doctor is fatal to the case for the Crown: *R.* v. *Laoye*, 6 W.A.C.A. 6. He has submitted further that the deceased provoked the prisoner: *R.* v. *Udo Akpapan* (1956) 1 F.S.C. 1.

The learned Counsel for the Crown has submitted that even assuming that the prisoner was provoked the mode of his resentment must bear a reasonable relationship to the provocation to reduce the crime from murder to manslaughter: *Wonaka* v. *Sokoto Native Authority* (1956) 1 F.S.C. 29.

On the facts there is no doubt that the prisoner hit the drummer several times with his matchet and that the deceased died on the spot. Even the prisoner's own witness said: "When I came out I found a dead body outside my house". The second prosecution witness found a dead body outside a house adjacent to the prisoner's house and removed the body to the mortuary at Iddo.

There is some doubt regarding the doctor's evidence as to the actual date on which he performed the *post mortem* examination. The body, according to the evidence of Police Constable Femi, was delivered at the hospital around midnight on the 11th May, 1958 (because the second prosecution witness returned to Ado Ekiti at 00.30 hours on the 12th May, 1958, after travelling a distance of about 22 miles). It appears that what the doctor's record shows is the date on which the body was admitted into the mortuary and not the date on which *post mortem* examination was performed. I do not consider that this apparent conflict as to the date on which *post mortem* examination was performed is fatal to the case for the Crown. In the first place the second prosecution witness gave evidence to the effect that he saw the doctor perform *post mortem* examination on the body that he (second prosecution witness) took to the mortuary. Secondly the injuries which the second prosecution witness saw on the body that he took to the hospital are identical with those which the doctor stated in his evidence that he found on the body in question.

I have given thought to the case for the defence and it appears that two defences are raised. Self-defence and provocation.

As regards the defence of self-defence the prisoner said that after he slapped Pius Adebisi all the other persons with Adebisi attacked him. That he struggled and when he escaped from them he took what he thought was firewood and hit the people with it.

Self-defence is a defence of one-self, or other persons whom one is under a duty to defend, against a wrong doer in prevention of a forcible and violent felony. It was said in *Howel's* case (1221) Maitland's Select Pleas 94, that a man is justified in using against an assailant a proportionate amount of force in defence of himself. I disbelieve the evidence of the accused that he thought that he held a firewood. In my view the defence is an after-thought. As regards the prisoner's evidence about a fight having taken place this is what the prisoner said in his statement—*see* Exhibits "A" and "A1". "When he (not they) was returning the second time *he* started again to call the names of my mother and father and started to abuse me.....*I then met him and fight arose between us. I* then cut him with matchet." In my judgment the prisoner, after he had been persuaded by his wife and the eighth prosecution witness to go inside his house, heard the drummer returning from down the road. He went and met him and attacked him with a matchet. The drummer ran and he chased him. He then hit the drummer with his matchet several times. In my judgment he must have taken the matchet from the house when he left to meet the drummer on the road.

What reasonable apprehension of danger did the prisoner have from the drummer? Even if there was a fight, and in my view there was none, having regard to the evidence of the ninth prosecution witness whose evidence I believe, a person assaulted is not justified in using a lethal weapon against his opponent unless the assault is so violent as to make him consider his own life to be in actual danger. The Court will not look with favour on the exercise of force beyond the amount which is reasonable in the circumstances of each occasion: *R.* v. *Starley*, *The Times*, 14 May, 1952.

On the question of provocation if one reads over the prisoner's statement it is clear that he was annoyed or, to use his own words, enraged and pained, because of the abusive songs and drumming. Will these words and songs reduce murder to manslaughter? I have already rejected the prisoner's story that there was a fight. Viscount Simon, L.C., said in *Holmes* v. *Director of Public Prosecutions*, [1946] A.C. 588:

"This brings me to the question which as I understand, was the actual reason why the law officer's certificate was given in this case, *viz.*, whether 'mere words' can ever be regarded as so provocative to a reasonable man as to reduce to manslaughter felonious homicide committed upon the speaker in consequence of such verbal provocation..... It is first to be observed that provocation by 'mere words' may have more than one meaning. It may mean provocation by insulting or abusive language, calculated to rouse the hearer's resentment. The contrast with provocation by physical attack is obvious. A blow may in some circumstances rouse a man of ordinary reason and control to a sudden retort in kind, but the proverb reminds us that hard words break no bones and the law expects a reasonable man to endure abuse without resorting to fatal violence. It is in this sense that the constantly repeated statement in the old works that 'mere words' do not reduce murder to manslaughter is to be understood."

Foster Sutton, F.C.J., said in the *R.* v. *Udo Akpapan* (1956) 1 F.S.C. 1, 2:

"In our view, in the circumstances prevailing in Nigeria at the present stage of development, if the case is one in which the view might fairly be taken (*i*) that a reasonable person in Nigeria, in consequence of the provocative words used, might be so rendered subject to passion or loss of control as to be led to use violence with fatal results, and (*ii*) that the accused was in fact under the stress of such provocation, then it is the duty of the trial Judge, or Jury, as the case may be, to determine whether on his or their view manslaughter or murder is the appropriate verdict. In other words whether the kind of provocation actually given was the kind which he or they as reasonable men would regard as sufficiently grave to mitigate the killing."

Now, were the words and drumming complained of by the prisoner, even if they were accompanied by a fight in which no other weapon except possibly the fist is shown to have been used, so grave as to constitute such a provocation as would mitigate the killing of the drummer and reduce the crime from murder to manslaughter? According to Viscount Simon, L.C., in *Mancini* v. *Director of Public Prosecutions*, [1942] A.C. 1:

"The mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

See also *Wonaka* v. *Sokoto Native Authority* (1956) 1 F.S.C. 29, 31.

Further in *R.* v. *McCarthy*, [1954] 2 Q.B. 105, at page 112, the Court of Criminal Appeal said:

"No Court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. That must be left to the collective good sense of the Jury, and what no doubt would govern their opinion would be the nature of the retaliation by the provoked person."

The prisoner was so annoyed by the songs and drumming he heard that his wife had to go and get help to persuade him to go inside. The next thing, according to the evidence—his own statement—was that he went and met the drummer and (as he says, after a fight) cut him several times with a matchet. According to *East* (*see Hale* 1 P.C., pages 453-454):

"Where the punishment inflicted for a slight transgression is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty; it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder notwithstanding such provocation."

And Parke, B., told the Jury in *R.* v. *Thomas* (1837) 7 C. and P. 817:

"Suppose, for instance a blow were given, and the party struck beat the other's head to pieces by continued, cruel and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder."

The injuries inflicted upon the deceased were so severe and so many and the weapon used such that in my judgment the mode of retaliation is out of all proportion to whatever the deceased said or did to the prisoner so as to reduce the killing of the deceased by the prisoner from murder to manslaughter. I hold that the defence of provocation also fails and I find the prisoner guilty of the murder of the drummer.

Accused convicted and sentenced to death.

OGHOMIENOR ASAGBA ... ... *Plaintiff*
(For himself and on behalf of the Asagba family)

v.

EMOVBOYAN AND TWO OTHERS ... ... *Defendants*

[HIGH COURT OF JUSTICE : Duffus, J., 26th February, 1959.]

Customary land tenure—wrongful destruction of palm trees by customary tenants—customary owner's remedy—trespass or action for waste—injury to reversion as measure of damages.

In an action by the plaintiff to recover damages from the 1st defendant for wrongfully cutting down and damaging palm trees on land owned by the plintiff's family and for injury to the reversion, it was proved that the defendant was a customary tenant of the plaintiff's family, paying tribute only if he collected palm fruits in a particular year and that he had cut down the palm trees as alleged.

Held : (1) that on the evidence the 1st defendant as a customary tenant had no right to cut down the palm trees;

(2) that on the point as to what form the action of the customary owner of the land should take, if the defendant had not been a customary tenant and as such in possession of the palm bush the action should have been in trespass, but if he was a customary tenant and as such in possession and lawfully on the land, then the action would be properly brought as one for waste, it not having been argued that, as a customary tenant and on the terms and conditions established in the case, the defendant could not commit waste;

(3) that the measure of damages which the plaintiff was entitled to recover from the defendant was the diminution in the value of the reversion arising from the defendant's destruction of the palm trees.

Plaintiff awarded damages.

Warri Suit No. W/53/58.

Akpovi for Plaintiff.

Ekeruche for Defendants.

Duffus, J.: The plaintiff in this action sued on behalf of himself and the Asagba family. He obtained the leave of the Court to sue in a representative capacity. The action was brought against the three defendants to recover damages for wrongfully cutting down and damaging palm trees on their land at Okuovbori and for injury to the reversion. The plaintiff claims that the Asagba family are the owners of Okuovbori palm bush and that the defendants are their customary tenants and his action is one in waste.

The defence as pleaded is a denial of the plaintiff's claim. The defendants also specifically deny cutting down any palm trees and deny that they were customary tenants of the plaintiff's family.

At the close of the plaintiff's case, learned Counsel for the defendants submitted that plaintiff's case had disclosed that the cutting down of the trees by the 1st defendant, and by the 2nd and 3rd defendants were separate and distinct acts and that this had been a misjoinder. Learned Counsel for the plaintiff at this stage elected to discontinue the action against the 2nd and 3rd defendants and was allowed to do so.

On the facts it has been clearly established that the land at Okuovbori belongs to the plaintiff's family. The defendant admitted that there is a judgment establishing that the Asagba people owned all the palm trees and he also admits that he cut down nine palm trees in the Asagba palm bush. He gives no real reason to justify his acts except to say that the Asagba people own the land with them. He admits he cut down trees before on the same land and was brought to Court and had to pay damages.

The plaintiff put in evidence the records in a previous case between parties representing the Asagba people and the people of Ikiwa and Okuovbori over the same land (Civil Appeal W/5A/192 *Asagba* v. *Okorokporo* 1st, 2nd and 3rd). It was there clearly established that Okuovbori land belongs to the Asagba people. The 1st defendant is a member of the Okuovbori people and in my view this judgment binds him.

His Counsel raised the point that he was not a customary tenant. It does appear that he was not one of the Okuovbori people who paid tribute for the palm bush in 1958 when the trees were cut down. The plaintiff, however, gave evidence that he was a customary tenant. I accept the plaintiff's case on this point. In my view the 1st defendant is a customary tenant of the Asagba family irrespective of whether he pays tribute on not. The evidence establishes that he only pays tribute if he collects palm fruits in a particular year.

It is admitted that the 1st defendant cut down nine palm trees. It is clear on the evidence that he had no right to do so and that he is liable in damages to the plaintiff. The only debatable point was what form the action should take—if the 1st defendant was not a tenant and as such in possession of the palm bush the action should be in trespass; if however, he was a customary tenant and as such in possession and lawfully on the land then the action would in my view be properly brought as one for waste. It has not been argued that he cannot, as a customary tenant, on the terms and conditions established in this case, commit waste. This is a case where the liability of the defendant is so clear that if necessary I would have amended the action to allow the plaintiff to claim in trespass.

I am, however, of the opinion that the action has been properly brought. The evidence establishes that the plaintiff's family are the owners of this land and that the defendant was their customary tenant and as such lawfully on the land and further that the defendant wrongfully cut down the palm trees. The evidence also establishes that it was a part of the terms of the tenancy that the defendants should not cut down the palm trees, which are one of the main sources of revenue to the Asagba family on the land.

The defendant's act was an injury to the reversion and he is liable in damages to the plaintiff. I also find that the plaintiff was properly authorised to bring this action.

On the question of damages the plaintiff's claim is greatly exaggerated. His evidence as to the value of a palm tree is in my view also exaggerated. The measure of damages is the diminution in the value of the reversion. I will assess these damages at £20.

On the question of costs the defendants were jointly represented by Counsel. The plaintiff will have the general costs of the action although I will take into account the amount of damages awarded.

The action was discontinued against 2nd and 3rd defendants and they are entitled to costs. I will hear Counsel on the question of their costs.

I will proceed to tax the plaintiff's and defendant's costs.

Plaintiff awarded damages.

SUBERU BELLO AND NINE OTHERS ... ... *Appellants*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE : Quashie-Idun, Ag.J., 7th March, 1959.]

Criminal procedure –evidence same as against all the accused—submission of no case upheld as regards some—whether the others could still be convicted—section 8 of Criminal Code, Cap. 42—inspection of locus in quo*—no substantial miscarriage of justice from non-compliance with procedure.*

The appellants who had been convicted in a Magistrate's Court of wilfully and and unlawfully damaging property, appealed to the High Court on the grounds that the trial Magistrate erred in law in (1) that although the evidence against all the accused was the same he failed to discharge the appellants when he found that the three other accused persons whose defence of *alibi* had been checked and found correct by the Police had no case to answer; (2) that the irregularity in the conduct of the visit to the *locus in quo* was so grave as to amount to a substantial miscarriage of justice.

Held : (1) that the trial Magistrate's ruling upholding the submission of no case to answer meant only that he was not satisfied as a result of the investigation by the Police that the three accused concerned took part in the commission of the offence and that this did not mean that he was not satisfied that the other accused persons were present when the offence was committed;

(2) that the evidence showed that the appellants were some of the men in the hostile crowd which damaged the property of the complainant and that even if no specific acts in the commission of the offence were attributed to any one of them, they could be properly convicted on the evidence under section 8 of the Criminal Code, Cap. 42;

(3) that the report of the trial Magistrate furnished at the request of the Court made it clear that all that happened at the inspection of the *locus in quo* was the pointing out by one of the prosecution witnesses of the place where he stood on the day of the incident and that the omission of the trial Magistrate to take evidence at the inspection and to re-call the witness in question thereafter (Counsel for the accused not having himself requested such re-call) did not amount to a substantial miscarriage of justice.

Per curiam : It is obvious from the reasons given by the trial Magistrate in his ruling for discharging the three accused persons that the trial Magistrate in fact discharged the three accused persons before hearing their defence of *alibi*. I know of no rule of law that where an accused person makes a statement to the Police that he was not present at a particular time when he was alleged to have committed an offence and the Police make investigations and are of the opinion that the statement of the accused is correct, the Court would discharge the accused without hearing the evidence of *alibi*. I say this because irrespective of what investigations the Police might make touching the whereabouts of the accused, the evidence of *alibi* like any other evidence must be proved in Court and witnesses called to support that defence examined and cross-examined. It may well happen that proper handling of the witnesses under cross-examination will break down the defence of *alibi*.

Appeal dismissed.

Cases cited:

R. v. *Coker and Others*, 20 N.L.R. 62
Adeyeye v. *Commissioner of Police* (decided by High Court, Ibadan, on 23rd January 1959, *unreported*).
Inspector-General of Police v. *Adunfe and Others*, 1957 W.R.N.L.R. 179.
Inspector-General of Police v. *Bello and Others*, 1957 W.R.N.L.R. 83.
R. v. *Abontendomhene Asare Apietu and Others*, 11 W.A.C.A. 24.
Ibadan Criminal Appeal No. I/14CA/59.
Akinjide and *Adisa* for Appellants.
Obisesan, *Crown Counsel*, for Respondent.

Quashie-Idun, Ag.J. : The ten appellants were charged together with four others with the offences of wilfully and unlawfully damaging a Kit Car and properties of one Alhaji Salami and of taking part in an unlawful assembly.

At the close of the case for the prosecution the learned trial Senior Magistrate ruled, on the submission of Counsel for the accused, that the 8th, 9th and 11th accused had no case to answer and discharged them.

The ruling of the trial Magistrate reads as follows:

"I uphold the submission of the learned defence Counsel that the *alibis* of the 8th, 9th and 11th accused persons were checked and found correct. I hold therefore that the 8th, 9th and 11th accused persons have no case to answer. I also uphold the submission of defence Counsel that all the fourteen accused persons have no case to answer on the 2nd count."

The trial Magistrate then proceeded to hear the defence and at the end of the trial, convicted the ten appellants on the 1st count. From their convictions the appellants have appealed on two main grounds which have been argued on their behalf. They are (1) that the decision of the learned trial Magistrate was erroneous in point of law in that he failed to discharge all the accused persons when he found that the 8th, 9th and 11th accused persons had no case to answer on both counts although the evidence against all the accused persons were the same and (2) that the learned trial Magistrate erred in law in convicting the accused in view of the unsatisfactory conduct of the trial as regards the visit to the *locus in quo* and that the irregularity is so grave as to amount to a substantial miscarriage of justice.

In support of the submission on the 1st ground argued, learned Counsel for the appellants has referred to the cases of *Regina* v. *Coker and others*, 20 N.L.R. 62 and to a judgment of Ademola, C.J., in *Adeyeye* v. *Commissioner of Police*, High Court, Ibadan, 23rd January, 1958.

In the first case cited the learned Judge (Hubbard) made the following observation in his judgment:

"A submission that there is no case to answer means that there is no evidence on which the Court could convict even if the Court believed the evidence given. The submission should be limited to that and the Court should not be addressed on the credibility of the witnesses or the weight of their evidence even if they were accomplices."

I am in agreement with the observation of Hubbard, J. It is obvious from the reasons given by the trial Magistrate in his ruling for discharging the three accused persons that the trial Magistrate in fact discharged the three accused persons before

hearing their defence of *alibi*. I know of no rule of law that where an accused person makes a statement to the Police that he was not present at a particular time when he was alleged to have committed an offence and the Police make investigations and are of the opinion that the statement of the accused is correct, the Court would discharge the accused without hearing the evidence of *alibi*. I say this because irrespective of what investigations the Police might make touching the whereabouts of the accused, the evidence of *alibi* like any other evidence must be proved in Court and witnesses called to support that defence examined and cross-examined. It may well happen that proper handling of the witnesses under cross-examination will break down the defence of *alibi*. To hold as the trial Magistrate held in this case is no indication that he did not accept the evidence *in toto* of the witnesses for the prosecution. I can only say that what he meant by his ruling was that he was not satisfied that the three accused persons took part in the commission of the offence.

Now, this, in my view does not mean that the trial Magistrate was not satisfied that the other accused persons were there. In other words the trial Magistrate was not satisfied as a result of the investigation or check made by the Police, that the three accused persons took part in the commission of the offence. The evidence showed that a crowd of hostile men attacked the house of the complainant and that some damaged his car, while others damaged his house. There was evidence that the appellants were some of the men in the hostile crowd. Even if no specific acts in the commission of the offence were attributed to any of them they could be properly convicted on the evidence under section 8 of the Criminal Code, Cap. 42.

As regards the second case of *Adeyeye* v. *Commissioner of Police* cited, the circumstances under which the trial Magistrate in that case discharged some of the accused persons on the ground that no *prima facie* case had been made out against them are different from those in the present case as the reasons given by the Magistrate and quoted above clearly show. In my view this ground of appeal fails.

In support of the second ground of appeal, it is submitted that the trial Magistrate committed an irregularity in the conduct of the inspection of the *locus in quo*. I called for a report from the trial Magistrate. The report was accepted in evidence as Exhibit "Z". It is clear from the report and from the record made by the trial Magistrate on the 26th August, 1958, that it was only the second prosecution witness who indicated anything at the inspection. The Court was shown a verandah where the second prosecution witness had said he stood on the day of the incident.

The record of proceedings clearly shows that the inspection took place after the second witness for the prosecution had given evidence. When the trial resumed the third witness for the prosecution commenced his evidence. There is nothing on the record to show that Counsel for the accused requested that the second witness for the prosecution should be recalled but it is submitted that the omission of the trial Magistrate to take evidence at the inspection and to recall the second prosecution witness amounts to a miscarriage of justice.

I am unable to agree.

In the case of *Inspector-General of Police* v. *Adunfe and others*, 1957 W.R.N.L.R. 179 the Federal Supreme Court held that an inspection held in the absence of the accused which only was to assist the trial Magistrate to understand and follow the evidence given on both sides did not lead to a miscarriage of justice. Again, in the case of *Inspector-General of Police* v. *Bello and others*, 1957 W.R.N.L.R. 83, Ademola, C.J., held that where the Magistrate omitted to make notes on his record of the object of the

visit to the *locus in quo* and what transpired at the inspection, the verdict could not be vitiated if the appeal court was satisfied that there had been no substantial miscarriage of justice. I would also refer to the case of *Rex* v. *Abontendomhene Asare Apietu and others*, 11 W.A.C.A. 24, in which it was held that no miscarriage of justice had occurred in an omission on the part of the trial Judge, similar to the one now complained of.

This ground of appeal also fails. Although no ground of appeal against sentences was filed in support of the tenth appellant I hold the view that the ninth and the tenth appellants are quite young and that the sentences imposed upon them were excessive. I accordingly vary the sentences and order each of them to enter into bond in the sum of £200, one surety each in the same amount, to be of good behaviour for two years. In default each is sentenced to twelve months imprisonment with hard labour.

The appeals in respect of the other appellants are accordingly dismissed.

Appeal dismissed.

J. M. JOHNSON ... ... *Plaintiff*

v.

MOBIL OIL NIGERIA LTD. ... ... *Defendant*

[HIGH COURT OF JUSTICE: Taylor, J., 16th March, 1959.]

Trespass arising from unlawful entry—whether relationship between petroleum company and dealer in charge of their petroleum service station one of landlord and tenant, master and servant or licensor and licensee—tenancy monthly—invalidity of notice to quit—measure of general and special damages—exemplary damages.

The plaintiff was claiming from the defendant *inter alia* general and special damages for trespass committed by the defendant in unlawfully entering on the 30th August, 1956, on premises in the plaintiff's possession before the expiry of a valid notice to quit. His case was that by a letter dated the 15th November, 1955, he had accepted the defendant's offer in a letter dated the 14th November, of engagement as a "dealer" at one of the defendant's petrol filling and service stations at Mokola in Ibadan; that by a letter dated the 31st of July, 1956 the defendant purported to serve on him a notice terminating the relationship existing between them within thirty days to expire on the 31st August, 1956; that this letter was not received by him before the 7th or 8th August, 1956; and that the notice was therefore bad in law. For the plaintiff it was argued that the defendant's relationship with him was one of landlord and tenant whilst for the defendant it was argued that the relationship was one of master and servant in so far as the plaintiff did not have exclusive possession of the premises in question.

Held: (1) that having regard to the facts that the defendant's letter of the 14th November, 1955, offering the plaintiff engagement as a dealer required him, among other things, to pay the defendant the sum of £25 a month as a service charge for the expenses involved by way of maintaining the building of the defendant's petrol filling and service station and the equipment on the premises owing to depreciation arising from the plaintiff's user and that the keys of the premises and the safe were in the possession of the plaintiff day and night—he being required to operate the station for twenty-four hours a day—there was present in the relationship between the parties such a regular periodical payment in the nature of a rent coupled with an exclusive possession of the premises and service equipment, subject to certain reservations, as warranted the decision that that relationship was not one of licensor and licensee but of landlord and tenant;

(2) that in the circumstances the tenancy must be regarded as a monthly one beginning from the 15th of November, 1955, and therefore terminable only by a month's notice to quit served so as to expire on the 15th of the month, in this case the 15th of September, 1956;

(3) that the plaintiff was therefore entitled to damages for the defendant's unlawful entry on the 30th August, 1956;

(4) that he was entitled to only so much special damages as he was able strictly to prove but also to exemplary damages on account of the defendant company's high-handed, insolent and contemptuous disregard of his rights as shown not only by their breach of the legal requirements of a valid notice to quit but also by their action in

breach of their own invalid notice, their haste in taking stock or inventory in the absence of the plaintiff, his representative or an uninterested third party, their selling his stock without his consent and in his absence as well as causing the loss of his books of account and properties on the premises.

Plaintiff awarded damages accordingly.

Cases cited:

Johnson Akpiri v. *W.A.A.C.*, 14 W.A.C.A.195.

R. A. Balogun v. *U.A.C. Ltd. and Another*, 1958 N.R.N.L.R. 77.

S.C.O.A. v. *R. O. Ogana*, 1958 W.R.N.L.R. 141.

Clore v. *Theatrical Properties Ltd.*, [1936] 3 All E.R. 483.

Queens Club Gardens Estate Ltd. v. *Bignell*, [1924] 1 K.B. 117.

Ibadan Suit No. I/169/57.

O. Moore for Plaintiff.

A. Ademola for Defendant.

Taylor, J.: The plaintiff's claim against the defendant company is a threefold one to wit:

1. A claim for the sum of £5,000 as special and general damages for the trespass committed by the defendant company as a result of their unlawful entry on premises in the plaintiff's possession before the expiry of a valid notice to quit.

2. An account of the stock taken by the defendant company of all goods at the station on the 30th August, 1956 and payment over of whatever may be found due.

3. The return of all documents found at the station including cash sales book, credit sales book and stock book.

The defendant company have in their defence filed a counter-claim against the plaintiff for the sum of £1,016 13*s* 7*d* being the sum alleged to be due to them from the plaintiff through the sales of petrol and petroleum products and other supplies while he was in charge of the defendant company's service station at Mokola. This counter-claim is in addition to the other defences filed by the defendant company and with which I shall later deal.

It is the plaintiff's case that by a letter dated the 14th November, 1956, marked exhibit "A", he was offered an engagement by the defendant company as a "dealer" at one of their petrol filling and service stations at Mokola in Ibadan. This the plaintiff accepted by a letter dated the 15th November, 1955 and marked exhibit "B". By a letter dated the 31st day of July, 1956 the defendant company purported to serve on the plaintiff a notice of termination of the relationship existing between them within thirty days to expire on the 31st day of August, 1956. The plaintiff says that this letter was not received by him before the 7th or 8th August, 1956 and that the notice was therefore bad in law. The defendant company deny this allegation though admitting the service of the notice of termination as stated above. The plaintiff is put to the proof of this allegation of the date of receipt of the notice. That in short is the plaintiff's case and from it two main issues arise—

1. What is the legal relationship between the plaintiff and the defendant company?
2. In view of that relationship is the notice a valid notice?

There are other matters of lesser importance which arise in logical sequence from these two and I shall deal with them in their turn. For the moment I shall concern myself with these two main issues. The letter of the 31st July, 1956 which was marked exhibit "C" reads as follows:

"Dear Sir,

This registered letter is your official thirty days notice that we are invoking our privilege of cancelling our dealer agreement with you regarding the Mobil Service Mart, Oyo Road, Ibadan.

On 1st September or sooner, if you desire, we will have a new dealer who will be prepared to buy your inventory on hand at that time, and you in turn must be prepared to settle your account with us."

The letter was addressed to the plaintiff care Mobil Service Mart, Oyo Road, Ibadan and was written by the defendant company's manager in Ibadan. The only evidence with respect to the receipt of this letter was given by the plaintiff himself. He was able to say that exhibit "S" was written by him in Lagos and addressed to the defendant company's Ibadan manager on the 6th August, 1956 before he received the letter of termination. It should be mentioned in passing that the request to "hold on" as appears in the first paragraph of exhibit "S" has no reference to the notice of termination but to something entirely different and unconnected with it as deposed to by the plaintiff. The other paragraph would seem to support this contention of the plaintiff. The defendant company gave no evidence as to the date and method of despatch of this letter nor even as to where it was posted. The only witness who could have given material evidence on this point was D. G. Haskins, the Ibadan area manager at the time and he was not called nor his absence explained. On the evidence before me I have no reason to doubt the plaintiff's word that in actual fact he received this notice on the 7th or 8th August. Why the defendant company did not choose to despatch such an important letter if sent from Ibadan, I cannot understand. Having accepted the plaintiff's version on this point the next question is whether such notice received on such date was a valid notice. On this point the plaintiff contends that the thirty days' notice was to be reckoned as from the date of the receipt of the notice which would in this case be the 7th or 8th August and that it would expire on the 7th or 8th September. That any entry before that date was not justified in law and constituted a trespass.

The outcome of that issue is dependent on the major one as to the position of the plaintiff *vis-a-vis* the defendant company. Mr Moore, learned Counsel for the plaintiff, submitted that such a relationship was one of landlord and tenant and I was referred to the case of *Johnson Akpiri* v. *W.A.A.C.*, 14 W.A.C.A. 195, but in my view this case is of little assistance in so far as it turned on whether the appellant was a tenant within the meaning of section 2 (1) of the Recovery of Premises Ordinance (Cap. 193). Mr Ademola on the other hand contended that the plaintiff was in the position of a servant of the defendant company in so far as he did not have exclusive possession of the premises in question. On this point he referred the Court to the following two cases:—*R. A. Balogun* v. *U.A.C. Ltd. and anothers*, 1958 N.R.N.L.R. 77 and *S.C.O.A.* v. *R. O. Ogana*, 1958 W.R.N.L.R. 141. In the former the agreement specifically provided that the plaintiff was not a tenant, but inspite of that the important thing to bear in mind in all these cases is that the agreement between the parties must speak for itself on this point, not necessarily specifically for it may be by inference to be gathered from a perusal and interpretation of the agreement as a whole. In the case

of *Balogun* v. *U.A.C. and another*, from the report it would seem that the only right conferred on the plaintiff was to enter the premises and operate the petrol tanks, pumps, etc., whereas in the case of *S.C.O.A.* v. *R. O. Ogana*, in addition to that right the respondent was also to buy the petrol and other oil products himself though only from the appellant company. In the case before me the plaintiff's rights on the premises as will be seen when I come to set them out are of a more extensive nature than possessed by the relevant party in the two cases to which I was referred by Mr Ademola. At page 78 of the report containing the case of *Balogun* v. *U.A.C. and another*, the learned trial Judge quoted a passage in *Halsbury's "Laws of England"*, 2nd edition, Volume 20, page 8 paragragh 5 as follows:

> "A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a licence, and not as a lease. In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance of the agreement. If the effect of the instrument is to give the holder the exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and control of the owner, it is a licence. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee required that he should have exclusive possession."

Turning now to the agreement, exhibit "A", we find the following provisions which in my view take this case completely out of the class of cases depicted by *Balogun* v. *and another*, and *S.C.O.A.* v. *R. O. Ogana*:—

1. The responsibility for the efficient operation of the station to a standard demanded by the defendant company is that of the dealer.

2. The dealer is responsible for hiring of suitable staff subject to the minimum of ten imposed by the defendant company.

3. The station is to be operated 24 hours a day.

4. Apart from the sale of petrol and oil products, there is provision for the sale of motor car accessories and servicing of motor cars.

5. The dealer is to pay to the defendant company the sum of £25 a month as a service charge for the expenses involved in depreciation and maintaining the building and equipment of the company.

6. Finally it is stipulated that—"The station will be given to you with the firm understanding that upon receipt of thirty days' notice in writing by either party, you may leave or be replaced."

7. Although it is not apparent from the wording of the agreement, exhibit "A", it came out in evidence that the keys of the safe and the premises under his dealership were kept by the plaintiff and in addition he was free to sell his own accessories pertaining to cars on the premises.

Now does such an arrangement of this nature as contained in exhibit "A" and with particular reference to the above matters spell a lease or a licence? Looking at the above seven points I am particularly struck firstly by the fifth though curiously enough no reference was made to it by the parties at the hearing. This provides in effect that the plaintiff shall pay to the defendant company the sum of £25 a month which represents a charge for the expenses in which the defendant company would be involved from time to time by way of maintaining—(1) the building, and (2) equipment on the premises

owing to its depreciation caused by the plaintiff's user. I have had to do some interpolation here for that is the only way of fully understanding the fifth point in its abbreviated phrasing. This condition is something very similar to the condition for wear and tear of premises that is often found in agreements between landlords and tenants. In short the plaintiff is giving some monetary consideration for his user of the building and the equipment installed on the premises. That amount may not represent the full value derived by the plaintiff monthly for his user of the premises and equipment and call it by whatever name one may like to call it such as charges or expenses, one cannot run away from the fact that it is a regular periodical payment by the dealer to the owner for the use being made of the building and its fixtures. That is a simple though not an all-embracing definition of rent and coupled with the fact that the keys of the premises and the safe are in the possession of the plaintiff day and night, there can be little room for doubt that the plaintiff was in exclusive possession of the premises and service equipment subject to certain reservations. This element of exclusive possession is one of the important ingredients of a lease as distinct from a licence. It is true that examples are given in *Hill and Redman's "Law of Landlord and Tenant"*, 12th edition, page 12, of circumstances where a grantwith exclusive possession may also amount to a licence but these examples need not crave much of our attention in the consideration of this case.

Turning again to the wording of exhibit "A" we find in the paragraph defining the mode of termination of the relationship between the parties the following:—

"The station" including of course the building and its "equipment" "will be given to you....."

These words are very similar to if not stronger than the usual words in a lease about delivery of possession. There is a class of cases represented by that of *Clore* v. *Theatrical Properties Ltd.*, [1936] 3 All. E.R. 483 (which deal with a grant of certain portions of a theatre for use as refreshment rooms and the like) where such grants have been held to create licences and not leases. In my view by their very nature they stand on a different footing to the case before me.

I therefore hold that the relationship between the parties is that of landlord and tenant and not licensor and licensee. I should perhaps state that I have taken into account the fact that there is a training station on the Mart used by the defendant company for training service personnel. But the evidence on this point is meagre. It is not however disputed that the service training building is a separate and distinct erection from the actual service premises or station though both are as it were on the same Mart. Separate persons are in charge of each and neither is subordinate to the other, both being responsible to the defendant company.

From here we go on to the next issue as to the validity of the notice. Mr Ademola did not contend this point if the relationship between the parties is that of landlord and tenant as opposed to that of licensor and licensee. In fact the point cannot be disputed, that having accepted the evidence that the notice itself was received by the plaintiff on the 7th or 8th August, it is bad, terminating as it does on the 30th August on which day the defendant company went into possession.

But even if I went on the premise, which is wholly unsupportable by the evidence, that the notice sent out on the 31st July was received by the plaintiff on the same day, in my view it would still be bad in law. The notice itself has already been quoted by me earlier in this judgment and on notices the learned authors, *Hill and Redman*, on the *"Law of Landlord and Tenant"*, the 12th edition, at page 497, say as follows:

"If on the construction of the tenancy agreement, the tenancy is not a yearly tenancy, the notice must in the absence of any special stipulation be given so as to expire at the end of any complete period of his tenancy and be equal to the length of the period."

It would seem therefore that the tenancy being a monthly one beginning from the 15th November, 1955, the notice of termination must expire on the 15th of the month and in this case on the 15th September, 1956. The case of *Queens Club Gardens Estate Ltd.* v. *Bignell*, [1924] 1 K.B. 117, is authority for this proposition and further, at page 122, Lush, J., states in addition as follows:

"I may say that I very greatly doubt whether a notice to quit, assuming it to be free from objection in other respects can be said to be valid in which the landlord mentions a specific date for the termination of the tenancy and adds that 'on or before' that date they will require possession. A notice to quit must be certain and definite and I am by no means sure that a notice to quit in that form is a certain and definite notice to quit on the day specified."

In the case before me the letter gives 30 days notice and the notice further says in effect that a new dealer will be brought on the premises on the 1st September or sooner should the plaintiff so desire and that this new dealer would be prepared to purchase the plaintiff's goods which would obviously still be on the premises. I have my doubts whether a notice couched in that form is free from the vice of uncertainty. Had there been a later letter by the plaintiff or acceptable oral evidence to the effect that the plaintiff agreed or did not agree to possession being taken earlier and in the case of the former a specific date given, then both could have been read together to make the notice definite. It is true that the defendant company's area manager gave evidence that the plaintiff told him that they could take possession sooner than the expiration of the notice and evidence was led by the defence of circumstances amounting to a waiver by the plaintiff of the required 30 days' notice and an acceptance of a shorter period. Apart from the fact that such a waiver or agreement to accept a shorter period should have been specifically pleaded and it was not, I regret to say that I do not accept the evidence of the defendant company's area manager on this point.

Having enumerated the reasons for rejecting the evidence of the area manager on this point, His Lordship went on:

On the above findings the plaintiff is entitled to damages for the defendant company was not justified in the action taken by it on the 30th August. I now turn my attention to the question of damages—special and general. Special damages must be strictly proved and on the evidence before me I cannot hold that the plaintiff has proved his claim to the value of the personal effect at the station. That he had some uniform and motor accessories on the premises I have no doubt. That he has been unable to retrieve them through the action of the defendant company I am equally certain. But under this head I must have an enumeration of the articles and their cost price. The plaintiff was unable to do this and I therefore disallow the sum of £300 claimed in that respect.

As to the loss of earnings the plaintiff states that his net earnings were between £150 and £200 a month.

He was unable to produce his books of account to show this owing to the action of the defendant company. The sum of £77 was suggested to him by the defence Counsel as the correct figure. The defence were in a position to cement this suggestion by calling evidence on the matter. They failed to do this. I accept the plaintiff's

figure of £150 a month as his net earnings. It should be noted that the plaintiff's claim is not for one month's earnings in lieu of notice but one for loss of earnings through the defendant company's failure to give a valid notice. There is no evidence as to how the plaintiff fixes this loss at £350. Had the notice been a proper one it would have expired on the 15th September not on the 7th nor on the 30th August. The plaintiff has lost half a month's earnings by this invalid notice. I award on this head the sum of £75.

On the issue of general damages the plaintiff claims the sum of £4,350. Now what matter should a Court take into account in awarding a sum on this head. I refer to three passages in *Halsbury's "Laws of England,"* Volume 10, 1st edition, the first being at page 341, section 628 which states that—

"Evidence of injuries which cannot be regarded as the natural result of the wrongful act may be given in proof of the malice or violence of the defendant and although the damages cannot be given in respect of those injuries as such the jury may take them into account in awarding damages for the trespass."

The second passage is at page 306, section 566 and is as follows:

"Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner and vindicate the distinction between a wilful and an innocent wrongdoer.....

Finally at page 307 the learned author states that:

"In order to justify the award of exemplary damages, it is not sufficient to show merely that the defendant has committed a wrongful act. The conduct of the defendant must be high-handed, insolent, vindictive or malicious, showing a contempt of the plaintiff's rights, or disregarding every principle which actuates the conduct of gentlemen."

That the action of the defendant was high-handed, insolent and showed a contempt of the plaintiff's rights is well borne out by evidence which showed *inter-alia* that the defendant acted not only in breach of the legal provision as to the requirements of a valid notice but in fact in breach of their own notice, exhibit "C". In addition their haste in taking stock or inventory in the absence of the plaintiff or his representative or an uninterested third party; their selling his stock without his consent and in his absence as well as causing the loss of the plaintiff's books of account and properties he had on the premises showed a contempt for his rights. This is a case in which I should award exemplary damages, but in my view the plaintiff's claim is highly exaggerated. I do award the sum of £900 as general damages. I have further taken into account the fact that I must dismiss the plaintiff's third claim owing to the defendants' action under consideration.

On the second claim for an account I have given the plaintiff leave to surcharge and falsify the account already filed by the defendant company though I fail to see how he can do this in view of the loss of his own books of account and other relevant documents. I have adjourned the defendant company's counter-claim which is based on the result of the account by them.

As to the third claim for the return of all documents belonging to the plaintiff which were at the station on the 30th August, 1956, I fail to see how I can make an order as requested when the net result of the evidence of the area manager of the defendant company is that the articles are now irrecoverable. The Court will not make an order

which cannot be carried out. I therefore refrain from making an order on this head and would dismiss it but have taken it into account on another head as already stated.

There will therefore be judgment for the plaintiff for the sum of £975 and costs which I will now proceed to assess.

Plaintiff awarded damages accordingly.

FELIX IRETO ... ... *Appellant*

v.

INSPECTOR-GENERAL OF POLICE ... ... *Respondent*

[FEDERAL SUPREME COURT: Ademola, F.C.J., Abbott and Mbanefo, F.JJ., 16th March, 1959.]

Criminal law—obtaining money by fraudulent trick or device contra section 421 of Criminal Code, Cap. 42—mere false representation or pretence not synonymous with trick or device—facts not amounting to cheating contra section 421.

The High Court had dismissed the appeal of the appellant against the decision of the Acting Chief Magistrate, Warri, convicting him of obtaining the sum of £10 by means of a fraudulent trick or device contrary to section 421 of the Criminal Code, Cap. 42. The facts were that the appellant, who was a police constable, had been sent to serve a witness summons issued at the instance of the complainant whom the appellant later met and told falsely that he had been sent by the Police Inspector in charge of the case to demand the sum of £15 from him (the complainant) in order to help him in his case. After some discussion the complainant had offered £10 which the appellant accepted.

Held: (1) that while it is true that words coupled with a certain course of action could amount to a trick or device within the meaning of section 421, mere false representation or pretence was not synonymous with a trick or device neither of which in any kind was involved in this case;

(2) that also the facts did not amount to the offence of cheating within the meaning of section 421.

Appeal allowed.

F.S.C. 228/58.

Appellant in person.

Ademola, Crown Counsel, for Respondent.

Mbanefo, F.J.: The appellant was tried and convicted by the Acting Chief Magistrate, Warri, on a charge of obtaining £10 by means of fraudulent trick or device contrary to section 421 of the Criminal Code. He appealed against his conviction and sentence to the High Court and the appeal was dismissed. Against the judgment of the High Court dismissing his appeal he appealed to this Court.

The facts as found both by the Acting Chief Magistrate and the Judge are briefly as follows. The appellant was, until his trial, a police constable. In March, 1957, he was sent to Oviri Village to serve a witness summons issued at the instance of the complainant on a witness.

He met the complainant and told him that he had been sent by the Police Inspector in charge of the case to demand from the complainant £15 in order to help the complainant in his case. After some discussion the complainant offered £10, which the appellant accepted. There was no evidence that the Police Inspector sent the appellant to demand money from the complainant.

On the above facts the appellant was convicted of obtaining the £10 by fraudulent trick or device. When the appeal came up for hearing, Mr Ademola, Crown Counsel, who appeared for the respondent intimated that he could not support the conviction. He said that all that happened was that the appellant had told a lie which induced the complainant to pay him £10, and that no trick or device was employed.

It would appear from the learned Judge's judgment that the same argument was addressed to and rejected by him. Dealing with it he said in his judgment—

"I am of the opinion that the words fraudulent trick or 'device' include cases where the fraud is committed by words and/or conduct which would amount to a trick."

After reviewing the facts as set out above, he went on—

"There are circumstances which, in my view, would amount to the appellant obtaining this money by a fraudulent trick."

While it is true that words coupled with a certain course of action could amount to a trick or device, mere false representation or pretence is not synonymous with trick or device. There is no trick or device of any kind involved in the present case. The appellant represented that he had been sent by the Police Inspector to ask the complainant to pay him £15 in order to help the complainant in his case.

The facts as they stand do not, in our view, amount to cheating within section 421 of the Criminal Code. For these reasons we allow the appeal, set aside the conviction of the appellant, and order that he be acquitted and discharged.

Appeal allowed.

T. ADEGOJU (the Oloja of Ode Oka) ... ... *Appellant*

v.

AKINBOYE LEMONO AND TWO OTHERS ... *Respondents*

[HIGH COURT OF JUSTICE: Morgan, J., 1st April, 1959.]

Criminal law and procedure—stealing—ruling of no case to answer on defence of bona fide *claim of right under section 23 of Criminal Code, Cap. 42, taken by Court of its own motion—followed by acquittal and discharge—discharge only under section 286 of Criminal Procedure Ordinance, Cap. 43 appropriate—*prima facie *obtaining by false pretence—need to act under section 174 (2) of Criminal Procedure Ordinance—remission of case for rehearing under section 106 (b) of Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955.*

At the close of the case for the prosecution of the respondents for the offence of stealing, the Senior Magistrate, Akure Magisterial District, had rejected the submission of no case to answer made on their behalf but had then of his own motion held that on the evidence adduced before the Court the defence of *bona fide* claim of right availed and had thereupon found the respondents not guilty and discharged them. On appeal—

Held: (1) that having heard the case for the prosecution the Court has a duty, even if no submission to that effect had been made by the defence, to discharge an accused if there was no case made out against him;

(2) but that if on a charge of stealing there was a *prima facie* case of obtaining by false pretence the trial Magistrate ought to have acted under the provisions of section 174 (2) of the Criminal Procedure Ordinance, Cap. 43, and put the accused on trial for that offence;

(3) that the trial Magistrate erred by considering the merits of the case after the close of the case for the prosecution whose evidence he purported to have acted upon and that even if there had been evidence that the defence of *bona fide* claim of right under section 23 of the Criminal Code, Cap. 42, would have availed, the only power exercisable by the trial Magistrate at that stage was a power of discharge under section 286 of the Criminal Procedure Ordinance, Cap. 43 and not a power of acquittal and discharge;

(4) that in the circumstances the case must be remitted pursuant to section 106 (*b*) of the Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955, for rehearing by another Magistrate.

Appeal allowed, case remitted for rehearing by another Magistrate.

Case cited:

R. v. *Coker and Others*, 20 N.L.R. 62.

Akure Charge No. AK/6CA/58.

Adekunle for Appellant.

Adeyefa for Respondents.

[*Note.*—The decision in (3) above should be read in the light of the decision of the Federal Supreme Court in *Inspector-General of Police* v. *Sydney Marke*, (1957) 2 F.S.C. 5]

Morgan, J.: This is an appeal from the judgment of the Senior Magistrate, Akure Magisterial District, given on the 21st May, 1958.

In the lower court the respondents were charged with stealing and unlawful damage to property but the second count was withdrawn before hearing commenced. At the close of the case for the prosecution the counsel for the respondents submitted that no case was made out for them to answer. The learned Magistrate after rejecting the submission made by the respondents' counsel proceeded of his own motion to consider a point not raised by the defence. He stated that it was clear from the evidence led by the prosecution that the respondents' intention in taking the drum in question in the case was to dispute the appellant's right to use it as the Oloja of Oka. After considering the points he himself raised and without any evidence having been adduced to the Court by the defence, he found the respondents not guilty and discharged them.

On a preliminary objection taken by the counsel for the respondents I struck out the second ground of appeal and counsel for the appellant withdrew the third and fourth grounds of appeal. It therefore remains only one ground of appeal.

Mr Adekunle has submitted under this ground:

1 (*a*) That after rejecting the submission of the counsel for the respondents it was the duty of the learned trial Magistrate to stop there and not go further.

(*b*) That although the evidence does not support a charge of stealing it supported one of obtaining by false pretences. That the Magistrate was wrong to have acquitted the respondents at that stage of the proceedings and ought to have complied with the provision of section 286 of the Criminal Procedure Ordinance.

(*c*) That it was wrong of the learned Magistrate to have invoked the provision of section 23 of the Criminal Code at that stage of the proceedings.

The learned counsel for the respondents submitted that the learned Magistrate gave a ruling on the submission made to him and that section 286 of the Criminal Procedure Ordinance has the effect of an acquittal.

As regards ground 1 (*a*) I am unable to agree with the counsel for the appellant. In my judgment at the close of the case for the prosecution the court has a duty even if no submission to that effect was made by the defence to discharge the accused if there was no case made out against him.

As regards ground 1 (*b*) if on a charge of stealing there was a *prima facie* case of obtaining the goods in question by false pretences the learned Magistrate ought to have acted under the provision of section 174 (2) of the Criminal Procedure Ordinance and put the accused on his trial for that offence. Futhermore the learned Magistrate erred by considering the merit of the case at that stage of the proceedings. As was clearly stated by Hubbard, J. in *R. v Coker and others*, 20 N.L.R. 62, 63:

"The meaning of a submission that there is no case for an accused person to answer is that there is no evidence on which, even if the Court believed it, it could convict. The question whether or not the Court does believe the evidence does not arise, nor is the credibility for the witnesses in issue, at this stage."

The position is slightly different in the present case however because the learned Magistrate purported to have acted upon the evidence adduced to him by the prosecution. He said in his judgement:

"It is very clear from the evidence led by the prosecution that the accused persons' intention of going to take the Agba Drum was to dispute first prosecution witness's right to use it as the Oloja of Oka".

This is clearly a matter of evidence and no direct evidence to that effect was adduced to the learned Magistrate. The evidence before him was that the first respondent was a rival candidate for the Oloja Chieftaincy and that the Agba Drum was the symbol of the Oloja Chieftaincy. Even if there had been primary evidence at the close of the case for the prosecution that the first respondent was the *de jure* Oloja of Oka—and there was none—the power exercisable by the learned Magistrate is that laid down in section 286 of the Criminal Procedure Ordinance and not a power of acquital. In my view this ground 1 (*b*) of the appeal must succeed.

As regards ground 1 (*c*) I can see nothing wrong in applying the provisions of section 23 of the Criminal Code to facts adduced to the Court by the prosecution but in my judgment there must be clear evidence before the Court to which the said provisions could be applied—and even after applying it the only order that could be made at that stage, if no evidence had been adduced to the Court by the defence is an order of discharge pursuant to section 286 of the Criminal Procedure Ordinance. This ground of appeal therefore also succeeds.

In conclusion I am of the view that the order of acquittal and of discharge should not have been made. I therefore, acting under the provision of section 106 (*b*) of the Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955, remit the case with this judgment to the Magistrate's Court. Akure, for determination by way of rehearing by another Magistrate.

The order for costs made at the lower court is hereby set aside. Cost at the lower court to abide the result of the rehearing. Costs in this Court are assessed at £18 18*s* 3*d*.

Appeal allowed, case remitted for rehearing by another Magistrate.

ADELEKE ARUTU ... ... *Appellant*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Ademola, F.C.J., Abbott and Mbanefo, F.JJ., 8th April, 1959.]

Criminal Procedure—inspection of locus in quo*—irregularity arising from denial to accused of right to cross-examine Crown witness—substantial miscarriage of justice—Evidence—Judge's notes of irregularly conducted inspection inadmissible—conviction based solely on inspection quashed.*

At the trial of the appellant for murder, the trial Judge had, three days after he had reserved his judgment, made in his record, notes of an inspection of the *locus in quo* carried out by him on that day. According to the notes, the appellant, his Counsel, Crown Counsel and witnesses were present at the inspection in the course of which two of the witnesses for the prosecution demonstrated to the Judge where they were hiding on two different occasions; the direction to which the deceased ran; the place where he was caught and where he was finally dragged to before being killed. No more proceedings appeared to have been taken after the inspection some three weeks after which the trial Judge delivered his judgment convicting the appellant of murder and sentencing him to death. On an appeal to the Federal Supreme Court—

Held: (1) that although an inspection of the *locus in quo* could properly be conducted after judgment had been reserved yet in a case where the inspection raises matters which were prejudical to an accused person, he or his Counsel has every right to put questions to the witnesses who had made statements and demonstrated to the Judge at the scene of the crime;

(2) that the procedure adopted for the inspection of the *locus in quo* had not followed that set out in *R.* v. *Dogbe*, 12 W.A.C.A. 184, as being necessary for the proper conduct of inspections and that the irregularity in this case which amounted to a denial to an accused person of the right to cross-examine a witness for the prosecution was grave enough to have amounted to a substantial miscarriage of justice;

(3) that as the inspection was irregularly conducted the Judge's notes of it should not have been regarded by him as admissible evidence, much less as the only ground on which to base the conviction of the appellant without any other facts found by him upon which his decision could have been founded.

Appeal allowed.

Case cited:

R. v. *Martin*, 12 Cox 204.

Ejidike and Others v. *Christopher Obiora*, 13 W.A.C.A. 270.

Karamat v. *The Queen*, [1956] A.C. 256; [1956] 1 All E.R. 415.

R. v. *Dogbe*, 12 W.A.C.A. 184.

Tameshwar and Another v. *The Queen*, [1957] A.C. 476.

FSC. 192/1958.

M. Agbaje (*Olowofoyeku*, *Fakayode*, *Ogunbiyi* and *Adisa* with him) for Appellant.

Rotimi George, *Assistant Director of Public Prosecutions*, for Respondent.

Ademola, F.C.J.: At the close of the argument in this appeal on the 2nd April, 1959, we allowed the appeal and announced we would give our reasons later. We now do so.

The appellant was on the 29th August, 1958, at Ibadan in the Western Region of Nigeria convicted of the murder of one Suara Onikede, and sentenced to death by Doherty, J. He appealed to this Court against his conviction.

The facts of the case before the learned trial Judge were shortly as follows. In March 1958, one Adegoke Adelabu who was a prominent leader in Ibadan of a political party known as the NCNC died as a result of a motor car accident. Some of his followers, probably misguided, for some reasons, gathered together in different centres and either deliberately or spontaneously started to attack houses of and persons of members of the rival political party known as the Action Group. The deceased was a member of this party; he lived at Onikede Village in the surburb of Ibadan. It would appear a large crowd apparently consisting of NCNC men in the neighbouring villages came to Onikede Village with a show of force carrying lethal weapons like guns, axes, matchets and cudgels. They were singing menacing songs to the effect that those who had conspired to kill their leader Adelabu would have no rest. When those who inhabited the little village of Onikede saw the crowd approaching they made good their escape. The deceased and two others found themselves together in the same hiding place in the bush. As the crowd approached the spot the three men scattered. The crowd spotted the deceased as he ran and chased him. The other two were able to occupy a better hiding place from which, they alleged, they were able to watch the fate of the deceased, who was caught by the mob. Before he was caught a report of a gun was heard. When he was caught he was brought back apparently still alive to a spot in the village. The two men in hiding alleged they saw him apprehended and saw him struggling to get away until he was brought back. They did not, however, see what happened thereafter as the crowd surrounded him. After the crowd had dispersed, the two men came out of their hiding place and saw that the deceased had been literally slaughtered. There was a great gash in front of his throat cutting right across to the bone behind.

These two men, who were third and fourth witnesses for the Crown, were the principal witnesses for the Crown against the appellant. Their evidence against the appellant was that he was one of the men in the crowd; that he carried a gun; when the appellant was apprehended he was seen still carrying his gun, and with others, followed the men who dragged the deceased back to the village.

After the case for the defence was closed and Counsel addressed the Court, the learned Judge reserved judgment. Three days later, that is, on the 9th August, 1958, the learned trial Judge, in his record, made a note of an inspection carried out by him that day. According to the note, the appellant, his Counsel, Crown Counsel and witnesses in the case were present at the inspection. The note described the Village and the houses in it, showing the position in which the third and fourth witnesses for the Crown, who were described by the Judge as eye-witnesses were hiding. The two men (third and fourth witnesses for the Crown), the note continued, then demonstrated to the Judge where they were hiding on the two different occasions, the direction to which the deceased ran, where he was caught and where he was finally dragged to. No more proceedings appeared to have been taken after the inspection and notes taken of the demonstration by the third and fourth witnesses for the Crown and what they said at the inspection. On the 29th August, 1958, the learned Judge delivered his judgment.

Counsel for the appellant has attacked this judgment mainly on two grounds.

The first concerns the inspection carried out by the Judge and his notes thereon. We find it difficult to accept that the learned Judge meant the inspection to be part of the proceedings in this case. Although there is hardly anything to show this on the record, the fact that everybody concerned with the trial of the case was present at the inspection is enough to support the view that it was arranged by the Court after judgment had been reserved. There is, however, no record of any evidence taken at the inspection except the Judge's own private notes which he made part of the record. It can, therefore, be assumed from this that he did not intend to regard the inspection as part of the evidence in the case. We are not saying an inspection of the *locus* could not be made after judgment had been reserved in a case. That it could be made at any time is clear from the following cases: *R.* v. *Martins*, 12 Cox 204; *Ejidike and others* v. *Christopher Obiora* 13 W.A.C.A. 270. Although the latter was a civil case we think the same principles apply. But where in a case of this nature, the inspection raises matters which are prejudicial to an accused person, he or his Counsel has every right to put questions to the witnesses who have made statements and demonstrated to the Judge at the scene of the crime. In fact, an inspection at which a witness demonstrated is part of the evidence and should be treated as such—*see Karamat* v. *The Queen*, [1956] A.C. 256; [1956] 1 All E.R. 415.

The procedure to be carried out at an inspection was clearly set out by the West African Court of Appeal in the case *R.* v. *Dogbe*, 12 W.A.C.A. 184, and we wish to draw attention to this case.

There were clearly irregularities in the conduct of the view of inspection of the *locus* in this case. In our view an irregularity which amounts to a denial to an accused of the right to cross-examine a witness for the prosecution is grave enough to amount to a substantial miscarriage of justice. The case *Tameshwar and another* v. *The Queen*, [1957] A.C. at page 483 was a case of an irregularity in the conduct of a view. Lord Denning, delivering the judgment of the Privy Council in that case, said:

> "Slow as their Lordships are to interfere, yet if it is shown that something has taken place which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, then their Lordships may well think it necessary to advise Her Majesty to allow an appeal."

But the present case does not rest on this irregularity alone. The Court found it desirable, and we think quite properly, that a visit to the *locus* was necessary in order to arrive at a just conclusion on the facts deposed to by the third and fourth witnesses for the Crown (whom the Judge described as eye-witnesses). It was indeed a good opportunity for the Judge to check up on their evidence; but in our view the inspection was to assist the Judge in assessing the value of the evidence he had heard from the witnesses. The learned trial Judge had not regarded the inspection in that way in this case. It is by no means certain that, without the demonstrations at the inspection, the Judge would have accepted, as evidence convincing enough to convict the appellant, the evidence of the third and fourth witnesses for the Crown. He relied solely on the inspection to convict the appellant. As the inspection was irregularly conducted the Judge's notes of it should not, in our view, have been regarded as admissible evidence much less as a reason for basing his decision.

It appears to us from his judgment that the learned Judge after the visit did not consider anything more than the inspection carried out. There is nothing to show in his judgment that he considered the evidence of these two witnesses any more. He was completely influenced by what he saw during the visit without considering the evidence in the case.

The decision arrived at by the learned trial Judge in the circumstances is based on an inspection which has been clearly found to be irregular. There are no other facts found by the learned trial Judge upon which the decision he arrived at can be founded.

In view of what we have already said, we do not think it necessary to deal with the other ground upon which the judgment of the learned trial Judge was attacked.

The appeal in the circumstances will be allowed. The conviction and sentence passed are hereby set aside and the appellant is discharged and a judgment and verdict of acquittal is entered.

Appeal allowed.

YESUFU ABODUNDE AND FOUR OTHERS ... *Appellants*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Abbott, Brett and Mbanefo, F.JJ., 17th April, 1959.]

Criminal procedure—inspection of locus in quo*—section 76 of Evidence Ordinance, Cap. 63—irregularity arising from non-compliance—section 11 (2) of Federal Supreme Court (Appeals) Ordinance, Cap. 229—principles on which Federal Supreme Court will order a re-trial.*

The appellants had been convicted and sentenced to death for the murder of a man by a gang of rioters, eye-witnesses having identified each of the appellants as having taken part in the attack on and killing of the deceased. At the close of the evidence on both sides and prior to the final addresses by counsel, the trial Judge decided to inspect the *locus in quo* and this inspection was carried out in the presence of counsel for both sides and the five appellants. Either at the time of the inspection or thereafter, the trial Judge had made notes of what transpired there, including details of demonstrations by eye-witnesses of the positions which they occupied both immediately before and at the time of the crime. Although the inspection took place before his final address, counsel for the accused however, had made no application for the recall of these witnesses so that they could be cross-examined on what transpired at the inspection.

The trial Judge before carefully considering the case against and for each of the appellants and before convicting them, had stated that his visit to the *locus in quo* had enabled him to follow and appreciate the evidence of the eye-witnesses better and to assess their credibility; the notes which he wrote on the inspection, he had continued, formed a part of the proceedings and he was satisfied that each of the eye-witnesses had a good opportunity of observing the events to which he had deposed in his evidence.

On an appeal, it was submitted for the Crown that the conviction of the appellants could not be supported in view of the facts and of the decision of the Federal Supreme Court in *R.* v. *Aruiu* (*see* page 141 of this Volume) in that the trial Judge had not complied either with section 76 of the Evidence Ordinance, Cap. 63, or with the procedure for the inspection of the *locus in quo* laid down in *R.* v. *Dogoe*, 12 W.A.C.A. 184, but that the Court should order a retrial under the powers conferred upon it by section 11 (2) of the Federal Supreme Court (Appeals) Ordinance, Cap. 229: it could not be said that the trial was a nullity, nor that there had not been a substantial miscarriage of justice justifying an invocation of the proviso to section 11 (1); if, it was argued further for the Crown, there were, apart from evidence based on the irregularly conducted inspection, other evidence sufficiently strong to warrant the conviction of the appellants, a retrial might be ordered.

Held: (1) that before deciding to order a retrial the Court must be satisfied—

(*a*) that there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand the Court is unable to say that there has been no miscarriage of justice, and to invoke the proviso to section 11 (1) of the Ordinance;

(*b*) that leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant;

(*c*) that there are no such special circumstances as would render it oppressive to put the appellant on trial a second time;

(*d*) that the offence or offences of which the appellant was convicted, or the consequences to the appellant, or any other person of the conviction or acquittal of the appellant, are not merely trivial; and

(*e*) that to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it;

(2) that applying these principles to the present case, and after the most anxious consideration, the Court had come to the conclusion that it would not be right to order a retrial of the appellants.

Per curiam: We have therefore (and as this is one of the first cases in which the exercise of the power to order a retrial has been argued in this Court) endeavoured to formulate the principles on which this Court should act in considering the exercise of that power. In formulating these principles we do not regard ourselves as deciding any question of law, or as doing more than to lay down the lines on which we propose to exercise a discretionary power. It is impossible to foresee all combinations of circumstances in which the question of ordering a retrial may arise, and it may be that further experience will lead us to formulate additional principles, or to modify those we have formulated in this judgment. We wish to make it clear that the Court will be free to do this without infringing the doctrine of judicial precedent.

Appeal allowed, conviction quashed, sentences set aside and retrial refused.

Cases cited:

R. v. *Arutu*, F.S.C. 192/58 (*see* page 141 of this Volume).

R. v. *Dogbe*, 12 W.A.C.A. 184.

R. v. *Kissell* (1916) State Reports of New South Wales 510.

R. v. *Eyles*, 23 Commonwealth Law Reports 1.

R. v. *Shabchook*, 39 Canadian Criminal Cases 386.

R. v. *Ivall*, 94 Canadian Criminal Cases 388.

R. v. *Thomas*, F.S.C. 93/57 (decided by Federal Supreme Court on 8th October, 1957, *unreported*).

Motayo v. *Commissioner of Police*, 13 W.A.C.A. 4.

F.S.C. 252/9581.

M. Agbaje (*Olowofoyeku*, *Akinjide*, *Adisa* and *Aiyeola* with him) for Appellants.
Lloyd, *Acting Director of Public Prosecutions*, for Respondent.

Abbott, F.J.: The appellants in this case appeal to this Court from the decision of the High Court of the Western Region, holden at Ibadan, convicting each of them of the murder of one Bello Aiki.

For the purposes of this judgment, it is not necessary to go further into the facts than to say that the appellants were all found by the learned trial Judge to have been members of a gang of rioters engaged in attacking persons and damaging buildings at a village called Iddo near Ibadan, at the end of March last year. In the course of the activities of the gang, a man named Bello Aiki was murdered, the cause of his death being matchet wounds which fractured his skull, and gunshot wounds in the chest. Eye-witnesses identified each of the appellants as having taken part in the attack on and killing of the deceased.

At the close of the evidence on both sides, and prior to the final addresses of counsel, the learned trial Judge, apparently of his own motion, decided to inspect the scene of the crime, and this inspection was carried out in the presence of counsel for both sides and the five appellants. Either at the time or thereafter, on the same day, so far as can be gathered from the record, the learned trial Judge made notes of what happened at the inspection, including details of demonstrations by the eye-witnesses of the positions which they occupied in the village immediately before, and outside the village at the time of the crime itself.

In his judgment, the learned trial Judge, after detailing the evidence for the prosecution and the defence, pointed out, quite correctly, that "the background of this case is political" and he continued—

> "I am conscious therefore of the necessity to exercise extreme caution in accepting the testimony of the eye-witnesses. I visited the *locus in quo* and am thus enabled to follow and appreciate the evidence better as well as assess the credibility of the witnesses. The note which I wrote on the inspection of the scene of crime forms a portion of these proceedings, it is unnecessary therefore to repeat its contents. I am satisfied that each of Akangbe Ogunrinola, fifth prosecution witness, and Amodu Adigun, fourth witness had a good opportunity of seeing the events to which he deposed in his evidence."

Then, after carefully considering the case against each appellant and his defence thereto, the learned trial Judge convicted each of the appellants as charged. In fairness to the learned trial Judge, it must be mentioned that, although the inspection took place before he began his final address, counsel who appeared for the appellant in the Court below made no application, as he might well have done, for the recall of the witnesses who had made statements and given demonstrations at the inspection, so that he could cross-examine them on what they had respectively said and shown.

Several grounds of appeal were filed, but none was argued, for reasons which shortly appear. It is material, however, to set out here the most important of these grounds. It reads as follows:

> "The learned trial Judge erred in law in making notes taken on the inspection of the *locus in quo* to form part of the proceedings and allowing his mind to be materially and substantially (affected) by them in coming to a decision in the case such notes having contained unsworn testimonies for the prosecution and no opportunity given for the defence either to cross-examine them or to give evidence in rebuttal."

When the appeal was called on, Mr Lloyd, Acting Director of Public Prosecutions, announced that, in view of the decision of this Court in *Regina* v. *Arutu*, F.S.C. 192/58 (*see* page 141 of this Volume) and of the facts of the present case, he could not support the conviction. He pointed out, very fairly and properly, that the conduct of the inspection was full of irregularities, in that the learned trial Judge did not comply either with section 76 of the Evidence Ordinance, or with the directions as to the correct procedure to be adopted at a view given by the West African Court of Appeal in *R.* v. *Dogbe*, 12 W.A.C.A. 184. Mr Lloyd went on to concede, by reference to the passage in the judgment which we have quoted above, that there was no doubt that the learned trial Judge's mind had been influenced by what occurred at the view.

Mr Lloyd then submitted that this Court should, in exercise of the powers conferred upon it by section 11 (2) of the Federal Supreme Court (Appeals) Ordinance, order a retrial: it could not be said that the trial was a nullity, nor that there had not been a substantial miscarriage of justice enabling the invocation of the proviso to section 11 (1) of the same Ordinance.

There were here, said Mr Lloyd, convictions based in part on evidence which had been wrongly admitted, and, in such a case, he urged, if there were, apart from such evidence, evidence sufficiently strong to warrant the conviction of the appellants, a retrial might be ordered. In support of his submission, Mr Lloyd cited the following cases:—

R. v. *Kissell* (1916) State Reports of New South Wales 510.

R. v. *Eyles*, 23 Commonwealth Law Reports 1.

R. v. *Shabchook*, 39 Canadian Criminal Cases 386.

R. v. *Ivall*, 94 Canadian Criminal Cases 388.

R. v. *Thomas*, decided in this Court on 8th October, 1957 (F.S.C. 93/57).

Motayo v. *Commissioner of Police*, 13 W.A.C.A. 4.

Mr Agbaje, for the appellant submitted that a retrial should not be ordered, because (*a*) the learned trial Judge, having, of his own motion, decided to view the *locus in quo* after all the evidence had been given, must have been in doubt as to the credibility of the eye-witnesses, and therefore as to the guilt of the appellants, (*b*) if the evidence wrongly admitted is excluded, all that is left is evidence whose reliability was doubted by the Judge, the benefit of which doubt should be given to the appellants. In regard to *Kissell's* case, counsel pointed out that the inadmissible evidence there was not, as it is here, vital to the issue before the Court: and that, if the Judge in this case had been able to make up his mind without the view, he would not have had the view: and while, in *Eyles'* case, nobody could say how far the jury's mind had been affected by the inadmissible evidence, the effect on the Judge's mind in the present case is clear. Appellants' counsel next submitted that *Thomas's* case is distinguishable from the present—certainly it is true to say that the evidence wrongly admitted here is of a more vital nature than that in *Thomas's* case. Mr Agbaje finally referred to the decision of this Court in *R.* v. *Arutu*, given on 8th April, 1959, and referred to earlier in this judgment.

In *Arutu's* case, there were exactly the same irregularities in the conduct of the inspection of the *locus in quo*, and this Court allowed the appeal in that case, and discharged the appellant.

It is important to note that the learned trial Judge in the present case, used in his judgment, in dealing with the inspection, almost the same language (certainly to the same effect) as he did in *Arutu's* case (which he also tried), and this Court held, in that case, that it was by no means certain that, without the demonstrations at the inspection, the Judge would have accepted, as evidence convincing enough to convict the appellant, the evidence of the two eye-witnesses who gave the demonstrations. In that case, however, this Court was not asked to exercise its power to order a retrial.

We have considered the cases cited by Mr Lloyd, but have been unable to extract from them any guiding principles. We have therefore (and as this is one of the first cases in which the exercise of the power to order a retrial has been argued in this Court) endeavoured to formulate the principles on which this Court should act in considering the exercise of that power. In formulating these principles we do not regard ourselves as

deciding any question of law, or as doing more than to lay down the lines on which we propose to exercise a discretionary power. It is impossible to foresee all combinations of circumstances in which the question of ordering a retrial may arise, and it may be that further experience will lead us to formulate additional principles, or to modify those we have formulated in this judgment. We wish to make it clear that the Court will be free to do this without infringing the doctrine of judicial precedent.

We are of opinion that, before deciding to order a retrial, this Court must be satisfied (*a*) that there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand this Court is unable to say that there has been no miscarriage of justice, and to invoke the proviso to section 11 (1) of the Ordinance; (*b*) that, leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant; (*c*) that there are no such special circumstances as would render it oppressive to put the appellant on trial a second time; (*d*) that the offence or offences of which the appellant was convicted, or the consequences to the appellant or any other person of the conviction or acquittal of the appellant, are not merely trivial; and (*e*) that to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it.

Applying those principles to the present case, and after the most anxious consideration, we have come to the conclusion that it would not be right to order the retrial of the five appellants.

It follows, therefore (Mr Lloyd having, quite rightly, declined to support the convictions) that these appeals must be allowed. The conviction of each appellant is quashed and his sentence is set aside, and we direct that a judgment and verdict of acquittal be entered in respect of each.

Appeals allowed, convictions quashed, sentences set aside and retrial refused.

SANUSI OGUNBODE AND SIX OTHERS ... *Appellants*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Abbott, Brett, and Mbanefo, F.JJ., 17th April, 1959.]

Criminal procedure—conviction not supported by the Crown—order for retrial.

The Crown having declined to support the conviction of the appellants the Federal Supreme Court quashed the same and set aside the sentences.

Held further that the case came within the principles enunciated in *Yesufu Abodunde* v. *The Queen.* (*see* page 145 of this Volume) and accordingly the Court ordered that the appellants be retried before a different Judge.

Appeal allowed, conviction quashed, sentences set aside and retrial ordered.

FSC 227/1958.

Mojeed Agbaje for appellants.

Lloyd, Acting Director of Public Prosecutions for Respondent.

Abbott, F.J.: We have listened to the arguments of counsel in this case. Mr Lloyd having declined to support the convictions, the appeal of each appellant must be allowed, his conviction quashed, and his sentence set aside. We consider, however, that this case comes within the principles enunciated by us in giving judgment this morning in *Abodunde* v. *The Queen* FSC 252/58 (*see* page 145 of this Volume) and relating to the circumstances in which a retrial may be ordered, and we therefore order that all the appellants be retried before another Judge. In these circumstances, it is better that we express no views about the evidence given at the trial before Doherty, J.

Appeal allowed, conviction quashed, sentences set aside and retrial ordered.

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C. JACKSON ODEDINA... ... ... } *Appellant*
(on behalf of himself and Messrs Ajibike Loan Service) }

v.

1. Y. M. FASHINA }
2. AKADIRI BAWALLA } ... ... *Respondents*

[FEDERAL SUPREME COURT: Abbott, Brett and Mbanefo, F.JJ., 20th April, 1959.]

Civil procedure—appeal from High Court's judgment setting aside Magistrate's Court's judgment—no leave to appeal granted by High Court—whether appeal competent having regard to section 4 (a) (ii) of Federal Supreme Court (Appeals) Ordinance, Cap. 229—section 75 (1) of Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955, confers right of appeal to Federal Supreme Court whilst section 4 (a) (ii) of Cap. 229 deals with procedure regulating such appeals—constitutional competence of Western Region legislature to confer rights of Appeal to Federal Supreme Court but not to regulate the procedure in such appeal—position not affected by section 123 of Magistrates' Courts (Western Region) Law, 1954, repealing Magistrates' Courts (Appeals) Ordinance, including section 12 thereof.

On the question whether an appeal from a decision of the High Court setting aside the judgment of a Magistrate's Court was properly before the Federal Supreme Court notwithstanding the fact that no leave to appeal had been granted by the High Court, it was argued that the provisions of section 4 (*a*) (*ii*) of the Federal Supreme Court (Appeals) Ordinance, Cap. 229, requiring leave to be obtained from the High Court had been abrogated by section 75 (1) of the Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955, since section 12 of the Magistrates' Courts (Appeals) Ordinance, Cap. 123, which gave a right of appeal in cases such as the present prior to the regionalisation of Courts, had been repealed by section 123 of Western Region Law, No. 5 of 1955 by its repeal of Cap. 123 itself.

Held: (1) that there is a distinction between the conferment of rights of appeal and the procedure regulating such appeals;

(2) that section 12 of Cap. 123 and section 75 (1) of Western Region Law No. 5 of 1955 both conferred rights of appeal and that it was within the constitutional competence of the Western Region legislature to enact provisions conferring rights of appeal to the Federal Supreme Court;

(3) but that it was not within the competence of that legislature to regulate the procedure applicable in such appeals and that section 4 of Cap. 229 being entirely a procedural section, could not be said to have been abrogated by any provision of Western Region Law, No. 5 of 1955;

(4) that leave to appeal not having been obtained from the High Court as required by section 4 (*a*) (*ii*) of Cap. 229, the Federal Supreme Court had no jurisdiction to entertain the present appeal.

Appeal struck out.

Case cited:

Oronsaye v. *Edoh*, 14 W.A.C.A. 595.

F.S.C. 203/1958.

Adekunle for Appellants.

Olu Ayoola for Respondents.

Abbott, F.J.: On the 14th April, 1959, we held that this appeal was not competent and must be struck out and we now give our reasons for coming to that decision.

The appeal was against the judgment of Irwin, J., in the Abeokuta Judicial Division of the Western Region High Court in its appellate capacity. The action began in the Ijebu-Ode Magistrate's Court and consisted of a claim by a licensed money-lender for the balance of money loaned by him to the present first respondent which loan was guaranteed by the second respondent. Judgment was given by the Magistrate in favour of the plaintiff/appellant and the defendant/respondent appealed to the High Court where his appeal was allowed and the judgment of the learned Magistrate was set aside. The plaintiff then appealed to this Court but observing from the record that no leave had been granted to the appellant by the High Court, to appeal to this Court we asked Mr Adekunle, Counsel for the appellant, before he opened his argument on the appeal, to satisfy us that this appeal was properly before us having regard to the provisions of section 4 of the Federal Supreme Court (Appeals) Ordinance, Cap. 229 of the Laws of Nigeria. The material parts of this section read as follows:

"4. An appeal shall lie to the Court of appeal from the decision of the High Court on appeal—

(*a*) from the decision of a Magistrate's Court..... where an appeal lies therefrom under any Ordinance or Law, subject to the following provisions:—

.....

(*ii*) where the High Court has reversed or materially altered the decision of a Magistrate's Court.....the High Court shall give leave to appeal from its decision subject to the like conditions as if the decision had been given in a suit originating in the High Court....."

Mr Adekunle submitted that the provisions of this section requiring leave to be obtained from the High Court had been abrogated by section 75 (1) of the Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955, and he based this proposition on the fact that section 12 of the Magistrates' Courts (Appeals) Ordinance, Cap. 123, which gave a right of appeal in cases such as the present, prior to the regionalisation of the Courts of this country, had been expressly repealed by section 123 of the Magistrates' Courts (Western Region) Law.

In making these submissions, Mr Adekunle, in our view, failed to distinguish between the conferment of rights of appeal and the procedure regulating such appeals. Section 12 of Cap. 123 and section 75 (1) of the Magistrates' Courts (Western Region) Law both confer rights of appeal and it is within the constitutional competence of the Western Region legislature to enact provisions conferring rights of appeal to this Court. It is not so competent for that legislature to regulate the procedure applicable in the case of such appeals, and section 4 of Cap. 229, being entirely a procedural section, cannot be said to be abrogated in any way by any provision of the Magistrates' Courts (Western Region) Law. Section 4 of Cap. 229 imposes certain statutory conditions which must be fulfilled before this Court can be properly seized of an appeal in a case such as this. Until those conditions have been fulfilled, this Court has no jurisdiction to entertain such an appeal, as was said by the West African Court of Appeal in *Oronsaye* v. *Edoh*, 14 W.A.C.A. 595 at p. 596. That being the case we ordered that the appeal be struck out and that there would be no order as to costs.

Appeal struck out.

ALIMI AKANNI AND SEVEN OTHERS ... ... *Appellants*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Abbott, Brett and Mbanefo, F.JJ., 23rd April, 1959.]

Criminal law—murder in the course of riot—deceased locked by some known but unapprehended members of riotous crowd in the house set on fire by unidentified members of the crowd—evidence of presence of appellants amongst riotous crowd avowedly out to kill someone other than deceased—no evidence as to anything done by appellants which contributed to death of deceased—no proof of common intent to kill deceased or do unlawful act likely to endanger life by setting fire to house where deceased burnt to death—mere presence in riotous crowd without more not enough to raise presumption of fact on which section 8 of Criminal Code could be applicable—standing by and watching woman burnt to death not participation in act of murder within section 7 of Criminal Code.

At the trial of the appellants for murder the evidence against them was that they had formed part of a crowd of people who had been armed with sticks, guns and matchets and were singing songs to the effect that they would like to kill a named individual who was apparently regarded as a political opponent of theirs. Some members of the crowd whose identities were known but who had not been apprehended entered the house of the intended victim and finding him absent pushed his aged mother met there into a room, locked her in and then rejoined the crowd. The house was thereafter set on fire by some members of the crowd but it was not clear who did this and there was no evidence that it was done by any of the appellants. The appellants were nevertheless convicted of murder, the trial Judge having relied upon section 8 of the Criminal Code for his decision.

Held: (1) that for section 8 to apply in the present case it must be shown that there was a common intention to kill the deceased or set fire to the house which latter act would in the circumstances have been both unlawful and likely to endanger human life;

(2) that the nature of the song which the crowd were singing did not necessarily show a common intention to kill the deceased or set fire to the house and that there being no evidence that any of the appellants was seen to have done anything which contributed to the death of the deceased their mere presence in the crowd without more was not enough to raise the presumption of fact on which section 8 could have applied in the case;

(3) that whilst the members of the crowd who stood by and watched the old woman burnt to death had behaved disgracefully, that did not bring them within the provisions of section 7 of the Criminal Code as to be regarded as participants in the act of murder.

Appeal allowed.

FSC. 295/58.

M. Agbaje for Appellants.

R. George, Assistant D.P.P., for Respondent.

Mbanefo, F.J.: The evidence against the appellants was that they were part of a crowd of about eighty people who entered Akufo Village armed with sticks, guns and matchets, singing songs and saying that if they caught the Alakufo they would kill him. The Alakufo is the head of the village. The crowd went to the house of Karimu Afolabi who it appears was the Alakufo. Some of them entered the house, but Karimu was not in. They saw the deceased, his aged mother; and some of them whose indentities are known and who are still at large, pushed her into a room and locked her in. They then went outside and rejoined the crowd. The house was set on fire by some members of the crowd but it is not clear who actually did it. In any event there is no evidence that it was set on fire by any of the appellants. As the house burnt the deceased was heard shouting, indicating that she was suffering pains. After the house had completely burnt down and the Police were sent for it was discovered that the deceased had been burnt to death in the room where she had been locked in. There is no doubt that she had been killed in circumstances which could without exaggeration be described as revolting and outrageous, and which, provided that those responsible for setting the house on fire could be found, we consider, amounted to murder. The appellants were charged, tried and convicted of the murder of the deceased.

The case against them is that they were seen amongst the crowd but there is no evidence that any of them entered the house or did anything to the house or the deceased or when they individually joined the crowd. In convicting them the learned trial Judge relied on section 8 of the Criminal Code which reads as follows:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".

For that section to apply here it must be shown that there was a common intention to kill the deceased or to set the house on fire which latter act would in the circumstances of the present case be both unlawful and likely to endanger human life. There was no evidence of a common intention to kill the deceased or to set the house on fire.

It was submitted by Mr George, Assistant D.P.P. that the nature of the song they were singing showed a common desire to kill and that that was enough evidence of a common intention. We do not agree that this is necessarily so here. Where the only evidence is that the appellants were amongst the crowd and there was no evidence that they were seen to do anything which contributed to the death of the deceased we do not consider that their mere presence without more is enough to raise the presumption of fact on which section 8 could be applied in this case. The members of the crowd who stood by and watched the house in which they knew an old woman was locked in and being burnt and did nothing behaved disgracefully, but that does not bring them within the provisions of section 7 of the Criminal Code as to be regarded as participants in the act of murder.

We are not satisfied that the evidence here is enough to support the conviction of the appellants. We, therefore, allow the appeal, set aside the conviction and sentence of each appellant and order that he be acquitted and discharged.

Appeal allowed.

BUSARI ALARAPE LAWAL AND THREE OTHERS (as Administrators of Adeleke Aremu, deceased) — *Plaintiffs*

v.

1. MESSRS A. YOUNAN AND SONS ... ...
2. THE ROYAL EXCHANGE ASSURANCE COMPANY LIMITED ... ... — *Defendants*

S. P. EKUN AND FIVE OTHERS (as Administrators of Alhaji Adegoke Adelabu, deceased) — *Plaintiffs*

v.

1. MESSRS A. YOUNAN AND SONS ... ...
2. THE ROYAL EXCHANGE ASSURANCE COMPANY LIMITED ... ... — *Defendants*

[HIGH COURT OF JUSTICE: Quashie-Idun, Ag.J., 27th April, 1959.]

Negligence—claims by administrators of deceased in respect of fatal accidents—applicability of Fatal Accidents Act, 1846, and Torts Law, 1958, Western Region Law No. 41 of 1958—administrators appointed by Customary Court—power to sue in the High Court—jurisdiction of Customary Court in administration of estates under customary law conferred by Second Schedule to Customary Courts Law, 1957, Western Region Law No. 26 of 1957—need for strict proof of alleged customary marriages—right of children, whether legitimate or not, to share in father's estate and as dependants—measure of damages—factors taken into account in assessing same.

The administrators of the estates of the deceased had on behalf of the latter's wives and children as their dependants sued the defendants for the death of the deceased in an accident involving two motor vehicles belonging respectively to the two defendants and driven by their drivers. The actions which had been consolidated by consent were brought under both the Fatal Accidents Act, 1846, and the Torts Law, 1958, Western Region Law No. 41 of 1958. Several issues of fact and law were raised in the case and upon these the High Court—

Held: (1) that the Torts Law, 1958, which came into operation after the deaths of the deceased could not apply to actions brought in respect of those deaths.

(2) that the Fatal Accidents Act, 1846, was a statute of general application within the meaning of section 14 of the Western Region High Court Law, 1954, No. 3 of 1955, and so in force in the Region at the time of the institution of the suits and applicable to the actions in this case;

(3) that the plaintiffs, as administrators of the estates of the deceased authorised by a Customary Court to administer the estates, could as customary administrators and on behalf of the customary dependants of the deceased bring the present actions even though based on English law since under the Second Schedule to the Customary Courts Law, 1957, No. 26 of 1957, Customary Courts have unlimited jurisdiction in the administration of estates under customary law;

(4) that in order to prove that the women claimed to be widows of the deceased had been married according to customary law it was not sufficient to call the alleged wives, the administrators or relatives of the deceased to say merely that the women concerned had been married in accordance with customary law and that the proper method of

proving a customary marriage in the absence of a system of registration of such marriages, would be to call either the person who gave away the woman in marriage or who witnessed the marriage ceremony or was sent to ask for the hand of the woman;

(5) that in the absence of satisfactory evidence that any of the alleged wives had been married to the deceased the claims brought on their behalf must be rejected;

(6) that the children (four and seventeen in number left respectively by the deceased, Adeleke Aremu and Alhaji Adegoke Adelabu) whether legitimate or not were entitled by the law of the land to inherit the estate of their fathers and were dependants of the latter;

(7) that the evidence in the case showed that the accident which resulted in the deaths of the deceased had been caused by the negligent driving of the driver of the first defendants' car and that for this reason only the first defendants were liable to pay damages to the plaintiffs;

(8) that in cases such as the present the measure of damages was the pecuniary loss suffered by the dependants as a result of the death of the person or persons on whom they had depended;

(9) that in assesssing the damages in respect of the death of the deceased Alhaji Adegoke Adelabu regard should be had to the amount he spent monthly on his seventeen children; the remunerations he received by virtue of his political office and the usually uncertain tenure of the same; his trading activities; the large number of his children thereby lessening the advantage each child could have derived from his estate; the fact of which judicial notice must be taken that as far as his younger children were concerned they would have the advantages of the Free Primary Education in the Region; the busy life he led and the numerous women he had neither of which was likely to have prolonged his life; and his liability to pay income tax;

(10) that in assessing the damages in respect of the death of the deceased Adeleke Aremu regard should be had to the nature of his trade at the time of his death, the fact that he left no assets; the ages of his children and whether or not they were attending school.

Judgment for plaintiffs against first defendants and for second defendants against plaintiffs.

Cases cited:

Comfort Ogunkoya and others v. *J. E. Peters*, 14 W.A.C.A. 505.

Thomas v. *Nabham and others*, 12 W.A.C.A. 229.

Alhaji Salawu Opowu v. *Salami Layiwola* (unreported decisions of Taylor, J., on the 13th August, 1956, and the West African Court of Appeal on the 13th May, 1957).

Finnegan v. *Cementation Company Limited*, [1953] 1 All E.R. 1130.

Ibadan Suits No. I/324/58 and I/326/58.

G. Agbaje for Plaintiffs.

J. A. Cole (*Savage* with him) for first Defendants.

Martin Jukes, Q.C. (*Omotosho* with him) for second Defendants.

Quashie-Idun, Ag.J.: On the 25th March, 1958, the deceased, Alhaji Adegoke Adelabu, the deceased Adeleke Aremu, and another person travelled in a car belonging to the first defendants from Lagos to Ibadan. The car was a Peugeot No. OO 8768 and was driven by Albert Anthony Younan, a partner of the firm of A. Younan and Sons. Between mile post 51 and mile post 52, the car collided with an Austin Car No. LC 3180 belonging to the second defendants and driven by their driver Adeleke Atanda. As a result of the collision the deceased, Alhaji Adegoke Adelabu, Adeleke Aremu and another passenger in the first defendants' car died on the spot.

The plaintiffs in both actions have instituted the two actions as the respective administrators of the deceased, Alhaji Adegoke Adelabu, and the deceased, Adeleke Aremu, claiming damages.

The administrators of the deceased, Adelabu, claim the sum of £100,000 while those of the deceased, Adeleke Aremu, claim £10,000. They allege negligence on the part of the servants of both defendants or alternatively negligence of one or other of the servants.

By consent of Counsel for the parties, the two suits were consolidated for hearing.

In their Statement of Claim the plaintiffs in both suits allege that the drivers of both defendants drove their vehicles at excessive speed and did not keep to their proper side of the road. It is also alleged by the plaintiffs that the driver of the first defendants lost control of his vehicle. The two suits were originally brought under the Torts Law, 1958, Western Region. The first suit is instituted for the benefit of seventeen children and nine wives of the deceased, Alhaji Adegoke Adelabu, and the second suit is instituted for the benefit of four children and two wives of the deceased Adeleke Aremu. The plaintiffs' Counsel applied by Motion on Notice to amend the Statements of Claim to the effect that the actions were brought under the Fatal Accidents Acts, 1846, and under the Torts Law, 1958, of the Western Region of Nigeria. The applications were not opposed and were granted.

I would state here that in my view the Torts Law, 1958, Western Region which came into operation on the 14th August, 1958, after the death of the deceased cannot be invoked by the plaintiffs and their actions cannot be brought under that Law. It has been submitted by Counsel for the defendants that the Fatal Accidents Act, 1846, does not apply to Nigeria. My attention has been directed to the case of *Comfort Ogunkoya and others* v. *J. E. Peters*, 14 W.A.C.A. 505, in which the claim was brought under the Fatal Accidents Act and in which the West African Court of Appeal refused to intervene as to the amount of damages awarded but observed that as the question of whether or not the Fatal Accidents Acts applied to Nigeria was not argued, the Court would express no opinion on the matter. It is contended by Counsel for defendants that the Fatal Accidents Act is not of general application in the United Kingdom, *i.e.*, England, Scotland and Northern Ireland and therefore does not apply to Nigeria. Counsel for the plaintiffs has contended however that the Act applies to Nigeria by virtue of section 14 of Western Region High Court Law, 1954, No. 3 of 1955. Section 14 of the Western Region High Court Law reads as follows:

"Subject to the terms of this or any other Law, the common law, the doctrines of equity and the Statutes of general application which were in force in England on the 1st January, 1900, shall be in force within the jurisdiction of the Court".

Counsel for the plaintiffs has submitted that as the Fatal Accidents Act, 1846, is admitted to be applicable in England and section 14 of the Western Region High Court Law specifically mentions England, the Act therefore is applicable to the Western Region. He has also referred to cases in which Statutes of general application in England have been held to apply to Nigeria, in particular the case of *Thomas* v.*Nabham and others* 12 W.A.C.A. 229, in which the Conveyancing Acts were held to apply to Nigeria although not applicable to Scotland. Apart from the cases referred to it is submitted on behalf of the plaintiffs that decisions of the High Court of this Region and of the West African Court of Appeal clearly show that the Fatal Accidents Acts have been held to apply to this country. Some of the cases referred to are *Alhaji Salawu Opowu* v. *Salami Layiwola,* decided by Taylor, J., at Ibadan on the 13th August, 1956, and the decision of the West African Court of Appeal in that case given on the 13th May, 1957. On the authorities referred to I am of the opinion that the Fatal Accidents Act was of general application to the Western Region of Nigeria at the time of the institution of the suits and that the suits have been properly brought under the Act. Whether or not the Act would continue to apply to this Region after the coming into force of the Torts Law is a different question.

Having disposed of this issue I now consider the other issues in the cases, namely:

(1) Whether the plaintiffs are entitled to institute the actions.

(2) Whether the plaintiffs have proved negligence.

(3) If the answers to 1 and 2 are in the affirmative, what should be the damages and to whom should they be paid.

It has been submitted by both Counsel for the defendants that the plaintiffs who have sued as administrators of the deceased persons have no power to do so as the Ibadan Grade B Customary Court has no jurisdiction to grant letters of administration. In answer to this submission Counsel for the plaintiffs has referred to the Second Schedule to the Customary Courts Law, Western Region Law No. 26 of 1957, which gives the Grade B Courts unlimited jurisdiction in the administration of intestate estates under customary law. The contention of Counsel for the defendants is that as the claims before the Court are not based on customary law but on English law, the plaintiffs should have obtained letters of administration from the High Court before instituting the actions. To uphold the submission of Counsel for the defendants on this issue is to make it impossible for the dependants of a deceased person according to customary law to bring actions under the Fatal Accident Act or the Western Region Torts Law of 1958. While agreeing with the submission that a grant of letters of administration in Ireland to administer an estate in Ireland would not entitle the administrator to administer an estate in England (*see Finnegan* v. *Cementation Company Limited* [1953], 1 All E.R. 1130, at page 1133) it is my view that the position here is different and the test is whether an authority given to the plaintiffs by the Customary Courts to administer the estate of the deceased persons entitles them to sue in the High Court as such administrators. I can see no objection in law to prevent them from doing so, for, although the basis of the claim is under English law it is by virtue of their right as customary administrators of the

deceased's estate and on behalf of the customary dependants that they have instituted these proceedings. I hold therefore that as administrators, the plaintiffs are entitled to sue. If any of the deceased persons had been married under the Marriage Ordinance the position would be different as there would be no question of administration of the estate under customary law. Having decided this issue I think I must now consider the question which is closely connected with it. It is whether or not the plaintiffs have proved that the women who are alleged to be the wives of Alhaji Adegoke Adelabu and Adeleke Aremu were married in accordance with Native Custom to the deceased persons.

In their Statement of Defence the defendants put the plaintiffs to the strictest proof of the claimants and the dependants. I refer to paragraph 7 of each of the Statement of Defence.

The plaintiffs contend that the persons named in their Statement of Claim as wives of the deceased were married to the deceased in accordance with Native Custom.

They called some of the women who have told the Court that they and others were married to the deceased persons in accordance with Native Custom. I do not think that this form is the proper method of proving Native Customary Marriage. Either the person who gave away the woman in marriage or a person who witnessed the ceremony or was sent to ask for the hand of the woman should be called to give evidence in proof of the marriage. I do not think that it is sufficient to call only the alleged husband or wife to testify as to the marriage, neither do I think that an administrator or a person claiming a benefit in the estate is alone competent to give that evidence. I cannot imagine any woman alleged to be a wife coming to Court and admitting that she was not married to a deceased person. As Native Customary marriages are not registered in this Region the danger of acting solely upon the testimony of the alleged couples or their administrators or dependants cannot be over estimated.

It is my view therefore that no satisfactory evidence has been given before me that any of the alleged wives of Alhaji Adelabu or Adeleke Aremu was married to either of the deceased persons in accordance with Native Custom. I therefore reject the claims brought on behalf of the alleged widows of the deceased persons. If they were not married to the deceased then they cannot be dependants as their associations with the deceased have no basis in customary law or English Law upon which they can claim damages as a result of the death of the deceased persons.

The position of the children of the deceased is however different. Whether they are legitimate or not, they are entitled by the law of the land to inherit the estate of their fathers and were dependants of their fathers. I accept the evidence that the deceased Alhaji Adegoke Adelabu left seventeen children and that the deceased Aremu also left four children.

The next issue I have to consider is whether or not the plaintiffs have proved negligence against both defendants or either of them. Apart from the two drivers nobody else was an eye witness to what occurred before the two vehicles collided. It is admitted that persons who were in the vehicle of the second defendants were asleep when the collision occurred. The passengers on the vehicle of the first defendants did not live to tell their story. I have only the evidence of the drivers of both vehicles as to how the collision occurred and I have to consider their evidence together with the circumstances of the case in order to be able to say whether both drivers were negligent or whether one of them was.

The evidence of Albert Anthony Younan is that he left Lagos with the deceased persons in his car between 3.00 p.m. and 3.15 p.m. on their return journey. There is a discrepancy in his evidence as to whether he left Lagos at the time stated by him or whether he meant Ikorodu Petrol Filling Station when he mentioned Lagos. He admitted that he did not tell the Coroner who held an Inquest on the deceased that he filled his petrol tank at Ikorodu Petrol Filling Station. He also admitted that if it was correct that he left Lagos at 3.15 p.m. and that the collision took place at 4.30 p.m. then he had covered 61 miles in one hour and fifteen minutes. He said that he was driving at a speed of between 40 to 50 miles an hour. Between mile 51 and mile 52 he saw a car approaching from the opposite side. The other car was approaching at a speed of between 60 to 80 miles an hour and was on its right side of the road, that is, on witness's side of the road. He said he assumed that the other driver had seen him and so he proceeded along. Witness continued and stated:—"After this I don't remember what happened". The last thing I remember was Adelabu saying to me, "Look at this car, it is coming straight at us." At that time I was still on my left side of the road. Later I found myself in the Jericho Hospital, Ibadan. In answer to a question put by the Court, witness said that when he first saw the other car which was approaching on its wrong side of the road it was 200 yards away. He said he did not stop his car because he thought the driver had seen him and would take his proper side. Under cross examination by Counsel for the second defendants, witness stated as follows:

"I cannot remember how near I was to the other vehicle before I lost consciousness. I think the other vehicle was about 75 or 100 yards away from me when Adelabu said the car was coming straight at us".

Witness said he could not remember if he drove towards the right hand side before Adelabu shouted and said the other car was coming straight at them. The deposition of witness before the Coroner was tendered in evidence without objection by Counsel for the first defendants and marked exhibit H. This is what he said to the Coroner: "I had started to go to my right hand side before the deceased Alhaji shouted".

The only witness called by the second defendants who has testified as to what occurred before the collision was the driver of the second defendants' Austin Car No. LC 3180, Adeleke Atanda.

He said he was driving his car with two passengers from Ibadan to Lagos. He said he was driving at a speed of about 40 to 45 miles an hour and that he was driving on the left hand side of the road.

He saw the other car about 4 to 5 telegraph poles away in front of him. It was on its right hand side of the road. Witness said he slowed down his speed. After travelling for a while the other car swerved to the left and got out of witness's way. Witness said he had slowed down his speed to about 20 to 25 miles an hour. When the other car was about 50 yards away it suddenly swerved to its right hand side again. In answer to a question put by the Court, witness indicated what he meant by 50 yards by stating that he estimated the length of the Court to be 50 yards. The length of the Court was paced by the Court Clerk at this juncture and it was about 17 yards or about 40 feet.

Witness said he swerved his car to the right hand side to avoid being struck by the other car. The other car however, struck his car on the left side of the front part of witness's car. The impact turned witness's car to face Ibadan direction. The following is the continuation of his evidence:

"At the time of the impact my car was in the centre of the road. I was then turning to the right. I swerved to the right to avoid being hit by the other car. The other car faced the bush on my left hand side after the accident..... The road was straight when I saw the other car swerve to the right about 50 yards away in front of me. I did not stop because the other car was travelling at a great speed and would have smashed my car and caused death to all my passengers. I therefore turned to the right to avoid being hit."

Under cross-examination by Mr Agbaje, Counsel for the plaintiffs, witness agreed that if both cars had kept on their proper side of the road the accident would not have occurred.

The second defendants called a witness, Latifu Anotuga, who must have been one of the first persons to arrive at the scene after the collision as at that time there was no Police man on the spot. He saw car No. OO 8768 on fire and he assisted in putting out the fire. The car was lying on its side. It was lifted and stood on its four wheels after the fire had been put out. The Austin car was standing on its four wheels and was facing Ibadan direction on the left side of the tarred portion of the road. Police Officers arrived at the scene and a sketch was made. The sketch was made without the assistance of any of the drivers of the two vehicles and after the vehicles had been moved from the positions in which they were after they had collided. The width of the road was given as 41 feet. There is evidence given by Corporal Ogunbo who saw the two vehicles at 4.30 p.m. after the collision. He said that the Austin car was standing on its four wheels facing Ibadan. It was about the middle of th · road. The other car was also standing on its four wheels and was facing Ibadan. The space between the two cars was about 4 feet. It is obvious to me that the sketch, Exhibit "H" does not represent the actual position of the two vehicles soon after the impact. The skid-marks shown on the sketch as being those of car OO 8768 do not assist in determining the point of impact as that car was proceeding from Lagos to Ibadan. There is, however, an important evidence that at the point marked "X" on the sketch as the point of impact, broken metal was found and that the broken metal appeared to have come from the front of car No. OO 8768. If this is correct, then it can be reasonably concluded that as far as that car was concerned, it was the front part that struck the other car or that the other car struck it at the front part.

The evidence that the collision occurred about the middle of the road is in my opinion quite clear. If it is so, then both of the drivers of the cars or one of them is guilty of negligent driving. I have carefully considered the evidence, the condition of both cars after the collision and the positions the two were immediately after the impact.

According to the driver of the first defendants he first saw the other car coming from the opposite direction when it was about 200 yards away. It was travelling on the wrong side of the road. The driver of the first defendants said he did not stop because he thought the other driver had seen him and would take his proper side. When the other

car was about 75 or 100 yards away from him, his passenger Adelabu shouted and said the other car was coming straight at them. What Adelabu said to the driver of the car in which he was travelling is material in deciding whether or not the first defendants' driver had ample opportunity to stop his car if he was not driving at a fast speed and was on the left hand side of the road. In my considered opinion the driver of the first defendants' car using reasonable care could have stopped his car if he was actually on the left side even before Adelabu shouted what I can only describe as a warning to him. But what happened after the warning of Adelabu? The driver of the first defendants said that he lost consciousness and did not know what happened after.

In his evidence before the Coroner he admitted that before Adelabu shouted, he had started to go to his right hand side. What happened, therefore was that he saw the other car travelling on its wrong side of the road and with great speed when it was 200 yards away from him. He did not stop but swerved to the right and then heard Adelabu shout and say that the other vehicle was coming straight at them. Then the collision occurred about the middle of the road. I accept the evidence that it was the left front side of first defendants' car which struck the other car or was struck by the other car.

I also accept the evidence that the car of the second defendants was struck at the left front side or struck the other car. The second defendants' car was turned anti-clockwise and faced Ibadan direction after the impact. This series of evidence has been of great assistance to me.

The driver of the second defendants' car said that when he first saw the other car it was on its wrong side but that it later went on its proper side. He, the driver of the second defendants kept to his proper side. But when the other car was about 40 feet from him, the other driver swerved to his right hand side. To avoid a collision, the driver of the second defendants swerved to his right and the two cars collided about the middle of the road. The two witnesses agree that each of them swerved to his right and I have to decide which of them was negligent in doing so. I believe the evidence of the driver of the second defendants that when the driver of the first defendants suddenly swerved to the right, the car of the second defendants was on its proper side and that in an attempt to avoid a collision and serious injuries to his passengers and damage to his car, he swerved to the right. I accept the evidence of the driver of the second defendants' car that he tried to get out of the way of the car of the first defendants which was heading towards the wrong side of the road. The fact that the collision occurred after the driver of the first defendants had swerved to the right is evidence that the driver of the second defendants' car was on his left side of the road. The serious damage done to the car of the first defendants which resulted in Adelabu being pinned in the left front part of the car and the evidence that the car caught fire are all proofs in my opinion that the first defendants' car was not travelling at a moderate speed. That car was lighter in weight than the Austin car driven by the driver of the second defendants. The fact that the heavier car was turned right round after the impact is also evidence of the force with which the lighter car struck it. In the circumstances I have reviewed in this judgment I think that the driver of the second defendants attempted to avoid what would have been a more serious collision and injuries to the passengers in his car and also to those in the other car. His evidence is that the car of the first defendants had practically cut across the road with its left mudguard facing the left mudguard of

the second defendants' car. It is obvious to me that if he had attempted to stop his car or to swerve to the left hand side as the positions of the two cars were at the time his car would have sustained a more serious damage with serious consequential injuries to his passengers or he would have been forced to drive his car off the road into the bush on the left side. The collision would have occurred in any case.

For the reasons I have stated, I find as a fact that the driver of the first defendants' car, Albert Anthony Younan, drove negligently on the day in question and by his neglegent driving caused the collision which resulted in the death of his passengers, Alhaji Adegoke Adelabu and Adeleke Aremu.

I do not believe that the driver of the first defendants' car lost consciousness before the collision. I believe that it was after the collision that he became dazed. He heard the shout of his passenger, Adelabu, just before the collision and at that time he said he had turned to the right. If that was what happened then at the time Adelabu called the attention of the driver to what was happening the car in which Adelabu was was heading towards the other car which must have been on the right hand side of the car in which Adelabu was.

I have come to the conclusion that the driver of the first defendants' car lost control of the vehicle while driving at a fast speed and swerved suddenly to the right hand side from which direction the other car was approaching.

It is not for me to speculate as to the causes which contributed to the driver losing control of his vehicle apart from the fact, which I have found, that he was driving fast but I am not convinced that the driver lost consciousness before the collision which occurred after Adelabu had shouted when the car was about 75 or 100 yards from the other car.

I now come to the question of damages. I have already stated that I am not satisfied that it has been sufficiently proved that the alleged widows of the deceased persons were married to the deceased persons in accordance with Native Custom. I emphasise that the Court has to be cautious in a case of his kind to find out whether persons who claim to have been married under Native Custom were in fact so married.

As I have already stated I cannot attach any importance to the evidence of a relative of a deceased person who alone gives evidence on the issue as to whether the deceased was properly married or not. I would treat that evidence in the same manner as I would treat the evidence of the deceased himself if he were alive.

If this care is not exercised there may well be cases in which persons living in concubinage will come to the Court and cloak their associations with men under the guise of native customary marriages. In the case of the deceased Adelabu the evidence is that he was a strict Moslem and an Alhaji. I cannot accept the evidence from the alleged wives and from the administrators or relatives of the deceased having interest in the estate that he resorted to the native customary form of marriage by marrying twenty women during his life time and continued to be regarded as a strict Moslem. I therefore consider damages only in respect of the seventeen children of Adelabu and the four children of the deceased, Aremu, whether they are the issues of a recognised native customary marriage or not.

In law the measure of damages is the pecuniary loss suffered by the dependants as a result of the death of the person or persons on whom they had depended.

In respect of the deceased, Adelabu, evidence has been given that his salary as a Leader of the Opposition in the Western House of Assembly was £1,680. A witness, Sanusi Okuola Akere, has given evidence that the Political Party of which the deceased Adelabu was a leader, paid him £50 a month up to the time of his death. This witness could not say if books of account were kept of the party's fund and also stated that Adelabu gave no receipts for the monthly payments made to him for assistance rendered to the party. I do not believe this evidence although I am prepared to believe that he probably received payments from his party to meet expenses incurred on behalf of the party.

Albert Younan stated in his evidence that the deceased Adelabu did business with his firm and was making a profit of more than £1,000 a year. The minimum amount of £1,000 added to his salary will bring his income to £2,680 a year. No satisfactory evidence has been given me as to how much he earned from the cars which he ran as Taxis. With the number of women he kept and the number of children he had I cannot accept the evidence that he paid £2 10*s* a month for the upkeep of each of the seventeen children he had after paying the school fees of those who attended school and spending money on their clothing. In awarding damages to the children I have taken cognizance of the fact that as the children are numerous the advantage which each can derive from the estate of the deceased cannot be as great as in the case of a few number of children even if their father had continued to live. I have also taken judicial notice of the fact that as far as the younger children are concerned they have the advantages of Free Primary Education in this Region. I have also taken into consideration the fact that there are assets in the estate of the late Adelabu.

I think it is reasonable to assess the regular income of Adelabu as £2,680 per annum. He died at the age of forty-three years and without any evidence that he would cease to be a Leader of Opposition in the Western House of Assembly it is reasonable to assume that he would have continued to act in that capacity for some years to come. That period cannot be indefinite as nobody can be certain of the period in which a politician can enjoy his popularity and maintain his position. There is also the fact that if he led a busy life he would not be expected to live as long as a person living a quiet life would do. His numerous women could not prolong his life either.

There is only one child of the late Adelabu attending a Secondary School and although there is evidence that some of the children are attending school no particulars were given about their schools. It is therefore difficult to estimate the amount he spent on his children in school fees. I have stated that I do not believe that he spent £2 10*s* a month on each child for food. I think that the amount should include other expenses apart from school fees, if any. I estimate that on the seventeen children the late Adelabu would reasonably spend £35 a month. The total expenditure for the year on the children would be £420. I would also assess his personal expenditure, *e.g.*, on his food, clothing, servants' salaries and the amount spent on the women he was alleged to have married at £600 a year. This leaves a balance of £1,020 per year out of which he would pay his Income Tax, the amount of which has not been disclosed.

In Kemp and Kemp on *Quantum of Damages*, Volume 2, at page 10, the following passage appears: "Where the deceased was a working man earning a steady wage and not leaving much of an estate on his death, the assessment of the damages caused to the child should not be difficult. One can estimate how many years the loss is likely to continue". In all the circumstances of this case as far as the claim in respect of Adelabu is concerned I award the sum of £6,030 to be distributed in the following manner among the children:—

	£
(1) Afusatu Adepate aged 20 years	200
(2) Salifatu Adepate aged 11 years	300
(3) Wosilatu Adenike aged 4 years	400
(4) Rasikolu aged 2 years	450
(5) Raufu Aderibigbe 16 years	150
(6) Rasidi Aderemi 14 years	180
(7) Anifatu Adedoyin 11 years	300
(8) Sarifatu Adekeye 7 years	300
(9) Ganiyi Adeteju 3 years	450
(10) Sumiatu Adekunbi 8 years	300
(11) Abasi Adegboyega 3½ years	400
(12) Felina Adedumola 3 years	400
(13) Nurudeen Olalekan 3½ years	400
(14) Mojidi Olasupo Ademola 2½ years	400
(15) Yekini Afolabi Adebayo 2 years	400
(16) Tajudeen Oladele 2 years	450
(17) Dauda Babatunde 3 months	500

In respect of the deceased, Aremu, the evidence is that he traded in beans and dry meat. He left no assets. I cannot believe that he spent the money stated in the evidence on his family and alleged wives. There is no evidence as to the extent of his business or how lucrative it was. Nevertheless the children were his dependants and are entitled to damages for loss sustained. The eldest child is Salifa aged eighteen years and not attending school. I award her £80. The next is Muili aged fifteen years and attending school she is awarded £150. Mulika is a school girl aged 11 years. She is awarded £150. The last child is Rasikatu aged one year—she is awarded £200. Total damages awarded in respect of the deceased Aremu is therefore £580.

Judgment is entered for the plaintiffs in the first suit No. I/326/58 against the first defendants for £6,030 and for the plaintiffs in the second suit No. I/324/58 against the first defendants for £580. Judgment is entered for the second defendants as against the plaintiffs in both suits.

Plaintiffs in the first suit No. I/326/58 are awarded costs of 350 guineas against first defendants. Plaintiffs in the suit No. I/324/58 are awarded costs of 100 guineas against first defendants, second defendants are awarded costs of 180 guineas against the plaintiffs in the first suit and 50 guineas against the plaintiffs in the second suit.

Judgment for plaintiffs against first defendants and for second defendants against plaintiffs.

SHITTU AJAO AND TEN OTHERS ... ... *Appellants*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Abbott, Brett and Mbanefo, F.JJ., 1st May, 1959.]

Criminal law and evidence—murder of political opponent of accused in the course of riot—regard had to political background of case—need for caution in accepting testimony of eye-witnesses of crime—effect of irregularly conducted inspection of locus in quo—admissions of accused supporting such testimony sufficient to warrant conviction—evidence of mere presence in riotous crowd not sufficiently specific as to individual participation in crime—insufficient to warrant conviction—conflict in evidence against accused resolved in his favour.

The appellants had been convicted and sentenced to death for murder committed during a riot in the course of which the deceased had been killed by members of a crowd consisting of supporters of a political party out to attack members of another political party. The question considered on appeal was whether there was evidence sufficient to warrant the conviction of the appellants having regard to the admissions of two of them, and to the testimony of the eye-witnesses of the crime when considered by itself and in the light of the political background of the case, and the irregularly conducted inspection of the *locus in quo* by the Judge in an endeavour to assess the truth or otherwise of such testimony.

Held: (1) that the trial Judge, paying due regard to the political background of the case, had correctly warned himself of the need for caution in accepting the testimony of the prosecution witnesses who were eye-witnesses of the crime;

(2) that having regard to the irregular manner in which the inspection of the *locus in quo* had been conducted, the appeal court had to exercise even greater caution in assessing the weight of such testimony;

(3) that in regard to the 1st and 8th appellants the testimony of the eye-witnesses was supported by admissions to the Police made by the appellants themselves as to their individual participation in the killing of the deceased, and that there was therefore sufficient evidence to warrant their conviction;

(4) that in regard to all the other appellants, excepting the 11th, all the evidence of the eye-witnesses amounted to no more than that they had been seen in the attacking crowd without any indication as to the part, if any, which they had played individually in the murder and that this was not sufficiently specific evidence of the participation of each of them in the crime as to warrant their conviction for murder;

(5) that in regard to the 11th appellant who was alleged by one of the eye-witnesses at the trial to have actually taken part in the killing of the deceased, this witness had in her deposition merely mentioned the appellant without saying as to his part in the killing and that therefore this conflict in the evidence against the appellant must be resolved in his favour.

Appeals of two appellants dismissed, those of nine others allowed.

Case cited:

R. v. *Dogbe alias Togbe*, 12 W.A.C.A. 184.

FSC. 286/1958.

M. Agbaje (*Akinjide* with him) for Appellants.

George, Assistant D.P.P., for Respondent.

Abbott, F.J.: On the 23rd April, 1959, at Ibadan, we dismissed the appeals of the 1st and 8th appellants and allowed the appeals of the other nine appellants and we now give our reasons for doing so. All the appellants were convicted at the Ibadan High Court of the murder of one Adeshina.

The facts are briefly these. This is another of the cases arising out of attacks made by National Council of Nigeria and the Cameroons supporters against Action Group supporters, as a result of the former's mistaken idea that the death of their leader in an accident had been caused by his political rivals. On this occasion a large crowd of National Council of Nigeria and the Cameroons supporters went to Egbeda Village near Ibadan where occurred certain of the events which we narrate later on and then to Olupo Village where a man named Lawani Adeshina was killed and was found afterwards to have been matcheted on the forehead and the back of the head both of which blows fractured the skull.

Two paragraphs in the judgment of the learned trial Judge have given us considerable concern and we set them out here—

"The first point I have to consider is the opportunity which the eye-witnesses had of observing the events to which they deposed in their evidence. On the 25th of October, 1958, the Court accompanied by counsel on both sides, Crown witnesses and all the accused persons, visited the *locus in quo* but, unfortunately, it was before the decision of the West African Court of Appeal in the case of *R.* v. *Dogbe alias Togbe*, 12 W.A.C.A. 184, was brought to the notice of the Court, and as the directions laid down in that case were not followed, the notes taken at the inspection do not form a part of these proceedings.

"Secondly, having regard to the political background of this case, I am conscious of the need for caution in accepting and weighing the testimony of the witnesses for the prosecution, and also to ensure, in assessing their credibility, that in giving their evidence they were not motivated by bias against political opponents. I now come to consider the case made against each of the accused persons *seriatim* and his defence thereto."

In the second of these paragraphs the learned trial Judge correctly warned himself of the need for caution in accepting the testimony of the prosecution witnesses. But, regarding the first sentence of the first paragraph, our minds have been much exercised to find what factors were taken into account by the learned trial Judge in considering what opportunity the eye-witnesses had of observing the events to which they deposed, because, if, as the learned trial Judge implies he did, he disregarded anything that occurred at the inspection which took place, we do not know what other factors could have been taken into account by him in this connection. We, therefore, in considering our decision with regard to these appeals have been obliged to exercise great caution in regard to what the eye-witnesses said they saw and in dismissing the appeals of the 1st and 8th appellants we have given more weight to other matters which, in our view, implicate them in the crime.

We deal first with the 1st appellant. The 4th prosecution witness, one of the eye-witnesses, says that he saw the 1st appellant hit the deceased on the head with a matchet and this witness subsequently, at an identification parade, identified the 1st appellant as one of the people who took part in the murder. The 7th prosecution witness, wife of the deceased, also saw the 1st appellant hit her husband on the head with a matchet and the 9th prosecution witness, another eye-witness, saw the same thing.

The 10th prosecution witness, a son of the deceased, also saw this. On the day after the murder, the 14th prosecution witness, a Police Constable, was searching Olorisa Village for persons suspected of this crime and there the 1st appellant came out from a corner and said: "Here I am, I am not going to run away", and he added that he was one of the people who went to Olupo Village to kill the deceased the day before. Before he made this statement, according to the witness, he was cautioned and the witness's statement that he had administered this caution does not appear to have been challenged in cross-examination. The witness's evidence continued to the effect that the 1st appellant then pointed out other persons who he said took part in the murder.

It is material to mention in passing that the statement of the 1st appellant as to the complicity of the others is, of course, evidence only against the 1st appellant and not against those others.

When the Police with the 1st appellant and other persons arrived at Egbeda Village, the 1st prosecution witness approached them and in reply to a question by him the 1st appellant said that he was not the only one responsible and added: "We are many who killed Adeshina". According to the 14th prosecution witness the 1st appellant also said that had it not been for party obligations he would not have gone to kill the deceased who was a relation by marriage. In his statement, Exhibit "N", made after his arrest, the 1st appellant admitted going to Egbeda Village to assist members of his party, the National Council of Nigeria and the Cameroons, in the fight between them and the Action Group members at Egbeda, though he denied entering Olupo Village, where Lawani Adeshina was killed. In his evidence at his trial the 1st appellant endeavoured to set up an alibi, but this was disbelieved by the learned trial Judge and we think, in the circumstances, this was right.

Having regard, therefore, to the considerable volume of evidence against the 1st appellant (apart from that of the eye-witnesses) implicating him in the crime we dismissed his appeal.

We come now to the 8th appellant. He is implicated first of all by the 7th prosecution witness who again was one of the eye-witnesses, and this woman says that she saw the 8th appellant fixing two pegs to the ground to which the feet of the deceased were attached to keep them in position while blows from matchets were being delivered on him. When he was arrested the 8th appellant was found to have in his possession some bloodstained clothing, but we do not think that this should weigh heavily against him because there is clear evidence that he sustained a cut on his hand during the attack and consequently the bloodstains may well have come from that source. In fact, the 8th accused told the 11th prosecution witness, a Police Constable, that the deceased actually inflicted this cut on his hand and he repeated this statement to the 14th prosecution witness another Police Constable. On that occasion he told the latter witness that he was one of the people who went to Olupo Village to kill the deceased. This statement was made prior to his being cautioned, but there again, there seems to have been no suggestion under cross-examination of this witness that this statement was not in fact made.

In his first statement made to the Police on his arrest, the 8th appellant repeated that the deceased cut him on his left hand, but in the second statement he denied having said that and averred that all he said was that it was in Adeshina's village that someone cut his hand. That second statement in any event is at the very least an admission that he was in the village at the time when the deceased was murdered and there is at

least that support for the stories told by the eye-witnesses. The first statement gives much more solid support. In his evidence at the trial, the 8th appellant endeavoured to set up an alibi and this was disbelieved by the learned trial Judge, we think, quite rightly in the circumstances. We considered that the sum total of the evidence against the 8th appellant was sufficient to warrant the conviction and we therefore dismissed his appeal.

Regarding appellants Nos 2, 3, 4, 5, 6, 7, 9, and 10, we were unable to find that on the evidence before the learned trial Judge the conviction of these appellants was justified. In the evidence of the 1st prosecution witness they are referred to merely as having been seen by this witness and as "all the remaining ten accused persons". The 4th prosecution witness again did not name these appellants and merely says: "I recognise the ten other accused persons" and he goes on to say: "I did not see the other ten persons attack Adeshina before I ran into the bush". The 6th prosecution witness, a Sub-Inspector of Police, conducted an identification parade at which some of these eight persons were identified, but the witness does not say what was the purpose of the identification, that is to say, what those identified were alleged to have done. The 7th prosecution witness to whom we have previously referred, states that the 3rd appellant did something to the deceased's foot, and she says that at the identification parade she identified the 1st, 2nd, 3rd and 6th appellants as people "who took part in the murder". But the witness did not say what part in the murder was taken by those appellants whom she identified. The 8th prosecution witness did not see the deceased murdered but merely saw a crowd in Olupo Village and says: "All the eleven accused persons were in the crowd". The 9th prosecution witness, another eye-witness, spoke about the crowd in Olupo Village where he lives and says: "I saw all the eleven accused persons among them" and this witness next said that he knew the names of some of the appellants which he then gave, but he did not say that any of them took any part in the murder. The 10th prosecution witness who also lives in Olupo Village says: "I saw all the eleven accused persons cudgelling and matcheting my father". A little later in his evidence he says the 2nd appellant hit his father with a cudgel and the 4th appellant matcheted him. The 12th prosecution witness, a Police Constable, said that when he was trying to arrest the 10th appellant he ran away into the bush, turned on the Constable and tried to matchet him.

This really is the total of the evidence against these eight appellants and we came to the conclusion that it was insufficiently specific as to the part played by each of them to warrant their conviction for murder. The statement each made on his arrest did not in any instance amount to a confession and indeed the only statements which admitted even their presence at the Village where the murder took place are those of the 2nd appellant and 4th appellant, and when each of the appellants gave evidence he endeavoured to set up an alibi. Although these alibis were disbelieved by the learned trial Judge that factor of itself is insufficient when added to the evidence, which we have summarised above, to justify their convictions and we, therefore, allowed their appeals.

The case of the 11th appellant is rather different and it is necessary first to mention that when the body of the deceased was examined at the post mortem examination it was found that the left foot was severed from the leg. In her evidence-in-chief, the 7th prosecution witness said that the 3rd appellant did something to the foot of the deceased. In cross-examination she said that the 11th appellant matcheted the deceased on the leg. Her deposition at the preliminary investigation which was put in evidence shows that she there merely mentioned the 11th appellant, but said nothing about his

cutting off the deceased's foot. The 10th prosecution witness said that he was coming out from the bush when he saw the 11th appellant matcheting the deceased on the foot. It will be observed that there is considerable conflict in the evidence of the part which the 11th appellant played in this murder, and we consider that these conflicts must be resolved in favour of this appellant. His statement to the Police denies presence at Olupo Village at the time and his evidence at the trial sought to retract this statement and set up an alibi. In all these circumstances we held that this appeal must be allowed.

Appeals of two appellants dismissed; those of nine others allowed.

CHIEF AMINU ARE ... ... *Petitioner*
(for himself and on behalf of the Are family)

v.

THE ATTORNEY-GENERAL, WESTERN REGION OF NIGERIA ... ... *Respondent*

[HIGH COURT OF JUSTICE: Doherty, J., 7th May, 1959.]

Petition of right—family land compulsorily acquired by Nigerian Government by virtue of Gazette Notices in 1938 and 1940—fiat to petition obtained in October 1958—preliminary objection that petition statute-barred by Public Lands Acquisition (Amendment) Law, 1958, Western Region Law No. 15 of 1958 amending section 10 of Public Lands Acquisition Ordinance, Cap. 185—amending Law construed as relating to practice and procedure and so retrospective in effect.

The plaintiff was claiming by petition of right, on behalf of himself and his family, compensation for his family's lands compulsorily acquired by the Nigerian Government by virtue of two Gazette Notices published in February 1938, and November 1940, respectively. The *fiat* of the Officer Administering the Government to the petition was obtained on the 9th of October, 1958. A preliminary objection was raised on behalf of the respondent that the Court could not entertain the petition because it was statute-barred by the Public Lands Acquisition Ordinance, section 10 as amended by the Public Lands Acquisition (Amendment) Law, 1958, Western Region Law No. 15 of 1958 by reason of the fact that more than twelve months had elapsed since the publication of the Gazette Notices by virtue of which the lands had been acquired. For the petitioner it was contended that in as much as the Public Lands Acquisition Ordinance affected vested rights of the petitioner, *i.e.*, lands belonging to his family, the 1958 amending Law could not be applied to affect the acquisitions because the amendment did not relate to procedure.

Held: that in so far as the Public Lands Acquisition (Amendment) Law, 1958, purported to set a limitation to the period during which the right conferred by section 10 of the Public Lands Acquisition Ordinance could be exercised, that Law affected practice and procedure and so operated retrospectively as to bar the petition in this case.

Petition dismissed.

Cases cited:

The Queen v. *The Governor, Western Region, ex parte Alasan Babatunde, Ajagunna II of Ikare*, 1959 W.R.N.L.R. 44.
Wright v. *Hale*, 3 L.T. 444.
Singer v. *Hasson*, 50 L.T. 326.

Ibadan Civil Suit No. I/104/58.

Okubadejo for Petitioner.
Oki, Senior Crown Counsel, for Respondent.

Doherty, J.: In this case which is a claim by Petition of Right the plaintiff, by himself and on behalf of the Are family, is claiming compensation for 282.9 acres of the family land compulsorily acquired by the Nigerian Government under the Public Lands Acquisition Ordinance, Cap. 185, by virtue of two Gazette Notices published respectively in February 1938 and November 1940. The *fiat* of the Officer Administering the Government was obtained on the 9th of October, 1958.

At the hearing on Thursday, the 16th of April, 1959, Mr Oki for the respondent raised a preliminary objection as a point of law that, by virtue of the amendment to section 10 of the Public Lands Acquisition Ordinance as contained in the Public Lands Acquisition (Amendment) Law 1958 (Western Region Law No. 15 of 1958), the court cannot entertain the petition because more than twelve months had elapsed from the publication of the Gazette Notices under which the lands were acquired. Counsel further submitted that the 1958 amendment is procedural and therefore affects the two acquisitions retrospectively.

For the petitioner it was contended by Mr Okubadejo that in as much as the Ordinance affected the vested rights of the petitioner, *i.e.*, lands belonging to his family, the 1958 amendment could not be applied to affect the acquisitions because the amendment does not relate to procedure.

Section 10 of the Public Lands Acquisition Ordinance as amended by the 1958 Law reads as follows:

"(2) Subject to the provisions of section 20, no claim to any estate, interest or right in or to any lands in respect of which a notice has been served and published in the Gazette in accordance with section 9, or to any compensation or rent in respect of any estate, interest or right, made after the expiration of twelve months from the publication of the notice, shall be entertained by any public officer whose duty it is to receive such claims or by any court".

The question as to whether an enactment is procedural or not was recently considered by the learned Chief Justice of this Region in the case of *The Queen* v. *The Governor, Western Region, ex parte Alasan Babatunde, Ajagunna II of Ikare*, 1959 W.R.N.L.R. 44.

The following passages occur in the decision given in that case:—

"It is a settled principle of law that an enactment relating to practice or procedure of the Court applies to all actions whether pending or otherwise when the enactment comes into force. In *Wright* v. *Hale*, 3 L.T. 444, Wilde, B. Observed:

'But when you are construing an Act of Parliament referring to the procedure and practice of the Courts, the words of the statute then apply to all cases, whether arising before or after its passing'.

"This principle was applied to the case and the plaintiff, whose action was pending when the Common Law Procedure Act, 1860, was passed, was deprived of his costs as he got judgment for less than £5 in a superior Court for wrong or injury alleged to have been done to his property.

"In *Singer* v. *Hasson*, 50 L.T. 326, section 19 of the Patents, Design, and Trades Marks Act, 1883, enacted after the plaintiff had taken action, was held to be applicable to the plaintiff's pending action for infringement of patent, when it came up for trial, to enable the plaintiff to amend his specification by way of disclaimer. In the case, Day, J., held the section of the Act to be a mere matter of procedure.

".....The question as to what way a person can or cannot seek his legal remedy and the form that the remedy is to take appears to me to relate to a matter of procedure. I am therefore, inclined to think that the applicant's counsel is right in his contention that section 24 of the Chiefs Law deals with procedure, and that it therefore applies to the pending proceedings in this matter".

The 1958 Amendment Law, in so far as it purports to set a limitation to the period of time during which the right conferred by section 10 of the Public Lands Acquisition Ordinance may be exercised, is an enactment which, in my view, affects practice and procedure. On the authority, therefore, of the decision on this point in *Ex parte Alasan Babatunde, Ajagunna II of Ikare*, I hold that the enactment affects this petition retrospectively, and as the period of more than twelve months had expired since the publication of either of the two notices before the petition was filed, I am bound to hold that it cannot be entertained by this Court. The petition is accordingly dismissed.

Petition dismissed.

JAMES ASHAKE ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Quashie-Idun, Ag.J., 11th May, 1959.]

Criminal law and procedure—holding oneself out as chief contra *section 20 (2) (a) of Chiefs Law, 1957, No. 20 of 1957, when someone else already approved for same chieftaincy by prescribed authority—performing rites and ceremonies and wearing regalia appertaining to office of approved chief as evidence of holding out—misdirection on evidence not amounting to miscarriage of justice—maximum punishment imposed on first offender by having regard to extraneous matters—law aims not only to punish but to prevent crime—excessive sentence varied.*

The appellant had been convicted and sentenced to six months' imprisonment on a charge of holding himself out as Chief Obadio, in Ife, a minor chieftaincy in respect of which the Oni of Ife as the prescribed authority under the Chiefs Law, 1957, No. 20 of 1957, had approved the appointment of someone else. The evidence against the appellant was that he had performed at the Shrine of the Oduduwa certain rites and ceremonies which could properly only be performed by the Obadio and that he had been seen about wearing the traditional regalia or insignia appertaining to that chieftaincy on the dates charged and on subsequent dates as well.

Held: (1) that section 20 (2) (*a*) of the Chiefs Law, 1957, contemplated two actions either of which could constitute an offence thereunder; the first being holding oneself out as a chief for instance by such conduct on the part of a person as would give the impression or the appearance to others that he was not merely regarding himself as or claiming to be a particular chief but that he was making others regard him or asserting himself as such chief; and the second was the wearing of a particular regalia or insignia appertaining to that chieftaincy;

(2) that on the evidence in this case the trial Magistrate was justified in his decision that the appellant had held himself out as the holder of the Obadio chieftaincy and had worn the regalia of that chieftaincy;

(3) that whilst the trial Magistrate had misdirected himself on a portion of the evidence by saying that the appellant had admitted the fact *inter alia* that he wore the regalia of the Obadio chieftaincy on the dates charged when in fact his admission related to subsequent dates this misdirection had occasioned no miscarriage of justice;

(4) that the law aimed not only to punish offenders but also to prevent them from repeating the commission of the offence and that the appellant being a first offender the trial Magistrate should not have allowed himself to be influenced by extraneous matters to impose the maximum punishment, these matters being the unfavourable and critical view which he had formed and expressed about the general conduct of the appellant before the appellant had been found guilty of the offence.

Appeal against conviction dismissed but sentence varied.

Ibadan Criminal Appeal No. I/40CA/59.

Kayode for Appellant.

Aguda, Senior Crown Counsel, for Respondent.

Quashie-Idun, Ag.J.: The appellant was charged before the Senior Magistrate, Ife, with the following offence:—

"That you James Ashake between the 2nd and 11th day of January, 1959, at Ife in the Ife Magisterial District held yourself out to be the Obadio and the said appointment had been approved by the prescribed authority to wit the Oni of Ife and have thereby committed an offence contrary to section 20 (2) (*a*) of the Chiefs Law, 1957, and punishable under section 20 (2) (*b*) of the said Law".

Section 20 (2) (*a*) of the Chiefs Law, Western Region Law No. 20 of 1957 reads as follows:

"Where the appointment of a person to a minor chieftaincy has been approved by the prescribed authority or by the Governor in Council—

"any other person who holds himself out as the holder of such Chieftaincy or wears the regalia of such chieftaincy shall be guilty of an offence."

The evidence led by the prosecution to prove the charge was the following:—

(1) The Obadio Chieftaincy was one of the Minor Chieftaincy in the Ife Division.

(2) The Oni of Ife was the prescribed authority for the approval of the appointment of the Obadio Chieftaincy.

(3) At the material period when the offence was alleged to have been committed the Oni of Ife, as the prescribed authority had approved the appointment of Chief Oloyede as the Obadio.

(4) That the Chief of Obadio wears a Mitre called "*Oro*" woven from straw and a necklace called "*Peke*" which was granted by the Oni in 1930 to distinguish them from the other ordinary Chiefs.

(5) An Obadio is the Senior of all the priests and his particular duty is to worship at the Oduduwa Shrine.

(6) Nobody has the right to perform rites at the Oduduwa Shrine unless permitted by the Obadio.

(7) That appellant was seen performing a ceremony at the Shrine three days after a ceremony had been performed by the authorised person "early this year" and that the appellant had slaughtered a sheep at the Shrine. At that time the appellant wore the Chiefs Mitre and *Peke*.

(8) That on the 2nd January, 1959, appellant was seen wearing *Peke* on the Oduduwa Street at Ife.

The appellant's defence before the Court clearly showed that he regarded himself as the Obadio as his people had made him Obadio.

He admitted that he performed rites at the Shrine after Chief Oloyede had made sacrifice on behalf of the Oni at the Oduduwa Shrine.

He said he was approached by his family to perform the family sacrifice. He did not wear *Peke* at that time. Although he said he could not remember when he wore *Peke* for the last time, he admitted that nine days previous to giving evidence in Court, he wore *Peke* to the Court and that up to that day he still regarded himself as the Obadio. He also admitted that the Oni had not approved his appointment as Obadio but had approved Chief Oloyede's appointment.

The learned trial Magistrate found the appellant guilty and sentenced him to six month's imprisonment. From the conviction, the appellant has appealed to this Court on the grounds: (*a*) that the learned trial Magistrate erred in law in holding that the accused held himself out to be the Obadio; (*b*) that the evidence did not prove the offence; (*c*) that the learned trial Magistrate erred in law and misdirected himself on the evidence by failing to consider the defence of the accused; (*d*) that the sentence is excessive.

In support of the 1st ground, it is submitted that there was no evidence that the appellant held himself out as a Chief and that there was no evidence that the appellant actually performed the ceremony at the Shrine. It is also submitted that if he did so without the permission of the Obadio then the appellant might be guilty of some other offence but not one with which he was charged.

It is my view that section 20 (2) (*a*) of the Chiefs Law contemplates two actions either of which is capable of being construed as constituting an offence under the Law. The first is holding oneself out as a Chief. This might be committed by such conduct on the part of a person as to give the impression or the appearance to other persons that he is not merely regarding himself as or claiming to be a particular Chief but that he is making others regard him or asserting himself as such Chief. The second is the wearing of the particular regalia or insignia of office appertaining to that Chieftaincy.

In view of the evidence that at the material time an Obadio had been appointed and approved, that the Obadio wears the Mitre and the *Peke* as insignia of office, that it is the particular duty of the Obadio to worship at the Oduduwa Shrine and that no person was entitled to perform rites at the Shrine without the permission of the Obadio, I think that the appellant could be properly convicted on the charge preferred against him if it was proved that he performed any rite or ceremony which could only be performed by the Obadio and without his permission or wore any insignia appertaining to that office. There was evidence that he was seen wearing *Peke* and Mitre and performing a ceremony at the Shrine. It is quite clear on the record that it was three days after the ceremony at the Shrine had been performed by the proper authority that the appellant and others went and slaughtered sheep at the Shrine and performed their own ceremony. When questioned about it the appellant replied that it was a New Year's ceremony and that everybody was doing his sacrifice. The evidence was that the proper rites were performed "early this year". There was evidence also that on the 2nd January, 1959, the appellant was seen wearing *Peke*. I hold therefore that the trial Magistrate was justified in coming to the conclusion, in effect that the appellant held himself out as the holder of the Obadio Chieftaincy and that he wore the regalia of that Chieftaincy. This disposes of the 1st and 2nd grounds of appeal argued.

In support of the 3rd ground of appeal, it is submitted that the trial Magistrate misdirected himself when he stated in his judgment that the accused admitted the facts. In his evidence the appellant denied that he wore *Peke* on the dates alleged although he admitted that he did so nine days before giving evidence. That was not the charge. He also said that he went to the Shrine to perform the rites which were different from worshipping Oduduwa. As far as the performance of the ceremony at the Shrine was concerned, I think the trial Magistrate was justified in stating that the appellant had admitted that fact. In respect of the wearing of the regalia there was no admission by the appellant in his evidence. I agree therefore that the trial Magistrate misdirected himself on that portion of the evidence.

However, having regard to the nature of the whole evidence, I hold that no miscarriage of justice has been caused by the misdirection. This ground of appeal fails.

The learned trial Magistrate imposed the maximum sentence prescribed by law and it is submitted that as the appellant was a first offender, the sentence was excessive. The trial Magistrate stated in his judgment what appears to be his reasons for imposing the maximum sentence—unfortunately, he did so before he found the appellant guilty of the offence. He stated as follows:

> "In the view of this Court, accused is a stubborn, reckless, adamant, irreconcilable and irresponsible man without respect for law and order. He was borne of confusion and was minded to confuse and muddle up affairs to such an extent that he could cause dissatisfaction among peaceful citizens in the way he is carrying on..... There is no doubt as to accused's guilt, he is therefore found guilty as charged."

What I have quoted could have been properly stated by the Magistrate after he had found the appellant guilty and if there was evidence or circumstances to warrant it. The appellant stated under cross-examination that in his family he was the Obadio and that as far as Ife was concerned Chief Oloyede was the Obadio. He also said he would have to go and think over the question of renouncing the Obadio Chieftaincy. The demeanour and attitude of the appellant at the trial gave the impression that he merited all the adjectives which the Magistrate applied to him, although, they were applied at the wrong time.

Although the appellant's offence was a continuous one in the sense that it was committed for a period of time and not on a specific date he was in law a first offender. The law aims not only to punish offenders but also to prevent them from repeating the commission of the offence.

Having regard to the circumstances of the case and my view that the trial Magistrate was influenced to inflict the maximum sentence by what appears to be extraneous matters I dismiss the appeal but vary the sentence imposed. The appeal is dismissed. The sentence of six months is varied and the appellant is ordered to enter into a bond in the sum of £300; two sureties in the sum of £150 each to be of good behaviour for two years. Sureties to be justified. In default of entering into the bond, appellant to serve the sentence of six months.

Appeal against conviction dismissed but sentence varied.

T. O. AKINRINLOWO ... ... *Plaintiff*

v.

GABRIEL ANWO AND ELEVEN OTHERS ... ... *Defendants*

[High Court of Justice: Taylor, J., 18th May, 1959.]

Customary land tenure—ownership of palm trees thereunder vests in grantor, not in grantee—grantor's present right to possession of palm trees—trespass for destruction of same by person let in by grantee without grantor's permission—grantee letting others build houses on land granted for agricultural purposes—whether such buildings constituted permanent injury to grantor's reversion.

The plaintiff as holder of the Osa Chieftaincy title belonging to his family claimed damages for trespass from the first defendant for having cut down four palm trees on his family land at Igbosa, Edunabon; also from the second and the other defendants in that the second defendant who had been granted part of the family land for farming purposes had given portions of the same to the other defendants some of whom have built houses thereon whilst others merely fenced the areas allotted to them.

Held: (1) that by the customary law of the area in which the land was situated palm trees on land were always the property of the owner thereof and not of his tenant or grantee;

(2) that as such owner the grantor had a present right to the possession of the palm trees and so was entitled to damages for trespass arising from a destruction of the same by the first defendant;

(3) that although the erection of houses on land which was originally granted for agricultural purposes could constitute such an injury of a permanent nature to the reversion as to entitle the grantor to sue for trespass, yet in the present case there was very little evidence from which the Court could have assessed whether or not there was such an injury to the reversion arising from the erection of houses on the land by some of the other defendants.

Judgment for plaintiff against first defendant; claims against other defendants dismissed.

Ibadan Civil Suit No. I/250/57.

Olagbaju for Plaintiff.

Oloyede for Defendants.

Taylor, J.: The plaintiff claims from the defendants the sum of £600 as general damages for the trespass alleged to have been committed by them on the plaintiff's land at Igbosa, Edunabon, sometime in October 1956, which trespass is of a continuing nature.

The pleadings filed in this suit as in many others that have come before me during this session at Ife are silent on many material matters which should have been averred. These matters were however adduced in evidence at the trial without objections being raised. It is not apparent in the plaintiff's Statement of Claim but it is his case as adduced in evidence that the area in dispute is the property of the Osa Chieftaincy and by virtue of the fact that the Osa Chieftaincy is a title belonging to his family of which he is the present holder, he says such property vests in him. The plaintiff is the seventh holder of that title in his family and he deposes that each holder was as such in possession of the area in dispute. He said that he had palm trees and cocoa planted on the land belonging to the Osa Chieftaincy and that the second defendant, by name

Gabriel Osuntoyinbo, came on the land and gave portions of it to the other defendants, some of whom built houses whilst others merely fenced the area so allotted to them. He saw all the defendants on the land with the exception of the eleventh defendant by name Dan Adeleke. On seeing them on the land he challenged the second defendant and told him in effect that before any building was erected on the land, his, the plaintiff's permission had to be sought. The only real act of wanton damage done on the land was done by the first defendant who is alleged to have cut down four palm trees on the land.

The plaintiff's plan Exhibit "A" shows the site of these palm trees and the houses erected by the first defendant on the site. Under cross-examination he admitted that the second defendant had cocoa on the land which would be about twenty-five years old and that this was the custom of a grant of a portion of the area in dispute to the second defendant by one Morohuntolu, the plaintiff's immediate predecessor to the title of Osa. He denied that any relationship existed between the second defendant and his family as he did the existence of any ties between one Laaro and the plaintiff's family. According to the defence, this Laaro is supposed to have been their ancestor. The plaintiff was supported in his evidence as to the boundaries and ownership of the area in dispute as well as the grant of land to the second defendant by Morohuntolu, by his next witness Chief Jagun, whose family is also a tenant or grantee of land from the plaintiff's family. The plaintiff's last witness Oke Dairo is a member of the plaintiff's family and he supported the plaintiff's evidence in every material particular and in addition to the names of the alleged trespassers on the land, he now supplies the name of the eleventh defendant as being one of them.

In answer to the case set up by the plaintiff only the second defendant was called to give evidence and in fact only the second, sixth and seventh defendants were in Court to answer to the plaintiff's case. The first defendant did not come to answer the allegation made against him that he cut the four palm trees on the land near to the houses shown against his name on the plaintiff's plan. The second defendant gave a most pathetic exhibition in the witness box. Although it is not averred in the Statement of Defence he would have me believe that all the defendants are related to the plaintiff's family, but when asked to trace such relationship he was patently in difficulties and could not. The reason for this falsehood lay in the fact that he was endeavouring to explain away why they were staying on Osa Compound, for in the absence of any ties between the two families the only other reasonable explanation lay in the fact that they were permitted by the plaintiff's family to stay and farm there. Nor was that the only matter on which he proved untruthful. He first stated that he had cocoa, kol nut and palm trees on the land though only the first two were pleaded in his Statement of Defence, paragraph 8. Later on he said that the four palm trees were behind the house of his younger brother as is shown on the plan. Now when asked for the name of his younger brother, he deposed as follows:

"I do not even know that there are palm trees on the land in dispute".

His evidence was unreliable and he himself was not a witness of truth. Wherever his evidence conflicts with that of the plaintiff and his witnesses, whose evidence I accept, I reject it. On one of the very few occasions when truth could be elicited from him he admitted that by the customary law of the area in which the land is situated palm trees on the land are always the property of the owner of the land not of the tenant or grantee.

Some difficulties still exist in spite of my acceptance of the case for the plaintiff as to whether on the evidence before me a case is made out against the second to twelfth defendants in trespass. As against the first defendant, the evidence of his cutting down the four palm trees belonging to the plaintiff coupled with the evidence as to Native Law and Custom in that respect as given by the second defendant is sufficient to found an action in trespass against him. That action is sustainable regardless of whether the trees were or were not on the area granted to the second defendant by the plaintiff's predecessor-in-title, for such trees are in the immediate possession of the grantor family by custom. As regards the other defendants, there is no evidence before me of the area of land allotted to them by the second defendant. There is no evidence as to whether he allotted to them the area granted to him or whether he went outside this area. Even if we accept the position most favourable to the defendants and say that he allotted only the area granted to him, the question arises whether the erection of houses by those who did so amongst these defendants on land which is proved to have been granted for purposes of agriculture is such a damage to the reversion of a permanent nature as to constitute an act of trespass entitling the grantor to sue in trespass.

One can readily imagine cases in which this question would be answered in the affirmative as where rich agricultural land let for that purpose is turned into a housing estate by the tenant or coming nearer home where cocoa or rubber yielding land is granted out to a tenant who destroys the trees and erects houses on the land. The fact that the grantor has another remedy in a claim for forfeiture would not affect his remedy in trespass in the damage to his reversion.

In the case before me I have very little to go on in assessing whether there is a permanent injury of this nature done to the plaintiff's land for, looking at exhibit "A", it would seem that only the northern portion of the plaintiff's land is used for planting cocoa, and, with the exception of palm trees and houses the rest of the land is featureless. The Statement of Claim was silent on this point of permanent injury to the reversion as it was on the important admission that the second defendant is the plaintiff's grantee of part of the land in dispute. The learned author of *Woodfall* on "*Landlord and Tenant*" in the 25th edition at page 877 states as follows:

> "The Statement of Claim should allege the injury (said) to have been done to the damage of the reversion, or at least state an injury of such a permanent nature as to be necessarily injurious to the reversion".

The word "said" appears in bracket as I believe it is an omission on the part of the learned author in not inserting some such word between "injury" and "to" in that sentence.

In view of what I have said above this action must be dismissed as against the second to twelfth defendants and I do so without any award of costs in their favour or against them taking into account all the circumstances of the case.

Why this action was not based on forfeiture I do not know unless of course learned counsel was ignorant of the position of the second defendant as the plaintiff's grantee. As against the first defendant against whom a present right to possession of the palm trees by the plaintiff and injury to same done by him were proved I do award the sum of £50 as general damages for the trespass. The plaintiff is entitled to his costs against him which I shall now assess.

Judgment for plaintiff against first defendant; claims against other defendants dismissed.

THE QUEEN
v.
LAWRENCE OLADEJO

[HIGH COURT OF JUSTICE: Taylor, J., 18th May, 1959.]

Criminal law—abduction contra section 361 of Criminal Code, Cap. 42—rape contra section 358—assault occasioning harm contra section 355—alleged payment of dowry and making of presents according to native law and custom prior to abduction not proved—reasonable doubt as to whether complainant persuaded to act of coitus after abduction.

The accused was charged with abduction, rape, and assault occasioning harm contrary to sections 361, 358 and 355 respectively of the Criminal Code, Cap. 42. The charges arose from the accused having, as it was alleged, lured the girl concerned out of her house before the accused, who was waiting for her in company of others, covered her face with his cloth, bundled her into a waiting car, took her first to his house and then to two other towns at both of which as well as in his house he had sexual intercourse with her against her will on several occasions. As a result of the struggle that ensued whilst the girl was being bundled into the car, her right forearm had been injured. In his defence the accused alleged that he had paid consent money and dowry on the girl and given her presents of money and articles as his prospective wife and that it was not against native law and custom for a husband to go to his wife's house and bring her to the matrimonial home himself. Both the girl and her father denied that any dowry had ever been paid on her by the accused.

Held: (1) that whilst the native law and custom might be as alleged the fact remained that the accused had not satisfactorily explained why the girl had not been welcomed by someone at his house as he himself had deposed to be customary for a newly wedded wife arriving at the matrimonial home.

(2) that on the evidence there was no doubt that the accused without having paid any dowry on the girl did take her away by force and against her will with an intent of carnally knowing her and that he was therefore guilty of abduction contrary to section 361;

(3) that there was however not clear evidence of whether or not after the abduction the girl had been persuaded to the act of coitus as could be inferred from the frequency of that act and that in the circumstances the accused must be given the benefit of the reasonable doubt so arising and found not guilty of rape contrary to section 358;

(4) that in respect of the injury sustained by the girl whilst she was being bundled into the car, the accused was guilty of assault occasioning bodily harm contrary to section 355.

Accused found guilty on first and third counts but not guilty on second count.

Ibadan Charge No. I/20c/59.

Aderemi for the Crown.

Oloyede for the Accused.

Taylor J.: The accused stands charged on three counts with abduction contrary to section 361 of the Criminal Code; rape contrary to section 358 and assault occasioning harm contrary to section 355, to all of which he pleaded Not Guilty on the 14th May, 1959.

It is the case for the Crown that about eight months ago on a Sunday, a message was delivered to the complainant in her house and as a result she went out of the house in answer to the call. As she got outside the house at Gbongan, the accused, who was waiting for her in company of others, covered her face with his cloth and bundled her into a waiting car. As a result of the struggle that ensued the complainant, a young girl of about sixteen or seventeen, injured her right forearm. She shouted for help and her half-brother Zacheus Olasunkanmi came out of the same house but not before the car had proceeded on its way to the house of the accused's father at Gbongan. On arrival the accused is said to have taken the complainant to his room, undressed and had sexual intercourse with the complainant, a virgin, and against her will on two occasions. She says that she bled and that her chemise was stained with the blood. The experience she described as painful. She says further that she wore no knickers on that day and that the accused had intercourse with her fully clad as she was though he himself was in a state of undress.

On the same day he took her again against her will to Modakeke, Ife, and kept her there for three days. During that time he had sexual intercourse with her on three occasions on a mat on the floor. On the third day the parties returned to Gbongan to the accused's house and later on the accused took the complainant to the Police Station at Oshogbo. Under cross-examination she endeavoured to make her relationship with the accused prior to the incident seem as casual as possible and that this had been going on for only three months before then, but when exhibit "A", a photograph taken of the two was produced she had reluctantly to admit that they had known each other for three years before the incident and not three months. I must not however be misunderstood as in any way implying that the parties had prior to the incident known each other sexually for the medical evidence which I accept is to the effect that this girl was a virgin prior to the incident complained of, and this evidence was not challenged either by cross-examination of the Doctor or by the evidence-in-chief of the accused. The complainant denied that any dowry of any kind was ever paid on her with her knowledge. Her evidence when read with the evidence of her brother Zacheus Olasunkanmi is conflicting on one material point when she said that while she was at the accused's house at Gbongan, her brother came there and tried to take her away from the accused. The brother denied this, but the accused himself admits in his statement to the Police as well as in his evidence on oath that in fact the third prosecution witness, Zacheus Olasunkanmi, did go to the house of the accused in search of his sister and that it was as a result of the struggle between the complainant and her brother that the former sustained injuries to her arm. I do not know why the third prosecution witness should have perjured himself in this manner but suffice it to say that I find his testimony unreliable and I reject it wherever it is in conflict with that portion of the evidence of the complainant accepted by me.

The last material witness called by the Crown was the father of the complainant, the fourth prosecution witness Jacob Abodunde, who as a result of a report made to him while at his farm came to Gbongan in search of his daughter. He went to the house of the accused's father, the Balogun of Gbongan, but had to beat a retreat when the children of the Balogun armed with sticks were about to flog him. He went to the Local Government Police to make a report but as they were reluctant to act he went to the Nigeria Police at Oshogbo who took up the matter immediately. He denied ever having received any dowry from the accused.

That is the case for the prosecution apart from the statement of the accused made to the Police which I propose to take with the evidence of the accused. On quite a

number of points the case presented by the Crown and that for the defence ran along parallel lines varying only on the material ingredients that make up the offence in each count. The accused admits going to the house of the complainant on the day in question in a car, but denies ever forcing her into a car. According to him she came willingly. Again he admits taking her to all the places referred to by the complainant, Gbongan, Modakeke, Gbongan again and finally Oshogbo Police Station as he does having sexual intercourse with her at Gbongan and Modakeke, but he says that she was a consenting party on all occasions. He deposes to his having paid all that was required by him under Native Law and Custom for the marriage to the complainant and that he had received the consent both of the father and the girl. That by arrangement with the girl he went for her in a car on the day in question to begin their married life together. That is the defence in its abbreviated form and it is noticeable that with all the persons mentioned by the accused in his evidence to wit: his father who is alleged to have paid the dowry and all expenses; the two ladies who acted as some sort of messengers or intermediaries in carrying the dowry from the accused's father to the complainant's father or grandmother; one Esha a lady who is alleged to have pleaded with the complainant's father on behalf of the accused in order that the marriage might take place; and finally one Lasisi who took a message on one occasion from the accused's father to the fourth prosecution witness, not one was called to support his story.

The offence contained in the first count is that the accused with intent to carnally know the complainant took her against her will. The evidence of the intent can be gathered from the surrounding circumstances and is rarely the subject of direct evidence. The material evidence led on this count both by the prosecution and the defence can be put under three heads to wit:

1. Payment or absence of dowry.
2. The act of taking away.
3. Surrounding circumstances taking place before or after the taking.

On the first head, the complainant and her father denied any payment of dowry. The accused gave an elaborate story of payment of consent money and of dowry enumerating the specific sums and articles that were paid as well as the sum paid to obtain the consent of the complainant and finally the gift of £20 paid to the complainant. It is noteworthy that in the evidence of the accused he said that he gave the complainant the sum of £20 as a present and that she took it. In his statement to the Police however this is what he said—

> "I gave the girl the sum of £20 twice but she refused to take it or accept it from me. She told me she would not take money from me.....I gave her the money myself but refused to accept it, this was in the presence of her grandmother called Odewunmi."

The 4th prosecution witness, Jacob Abodunde, struck me as a reliable witness and this in spite of the one contradiction in his evidence over his knowledge of one Esharun. I accept his evidence that no dowry was in fact paid by the accused or his father. The accused, on the other hand as will be seen when I come to deal with the other contradictions in his evidence and his statement to the Police was a thoroughly unreliable witness and a most untruthful one. I find it hard to reconcile the accused's evidence of payment of dowry and the consent of both the father and of the complainant

having been obtained with the latter actions of the complainant's father. It is not the action of a rational, straightforward and simple farmer such as the 4th prosecution witness struck me as being.

As for the act of taking away, the accused said that it was not against Native Law and Custom for the husband to go to his wife's house and bring her to the matrimonial home himself. That may be so, but he went on to say that by Native Law and Custom it is customary for a newly wedded wife arriving in the matrimonial home to be welcomed by someone, but he gave no satisfactory reason why his wife, a virgin, on whom his father had according to him paid so much should receive such a cold reception from the relatives of the accused who be it noted was taking his first wife. Not only was there no one to welcome her but within a short time of her arrival and long before the hour of retiring he was having sexual intercourse with her. I accept the evidence of the complainant that the accused and others forcibly put her in the car against her will having lured her outside her house. From the demeanour of the complainant she appeared most indignant at the shameful way in which she was just whisked away by some one who had proposed marriage to her and without payment of dowry at that, and rightly so.

Finally on the third head I have to ask myself why did the accused in his statement to the Police endeavour to show that the complainant was not a virtuous girl, even though he did not maintain that line of defence in Court? Again I ask why did he in his evidence before me say that when the complainant's brother came to look for her and shouted for her the complainant remained silent in his room when he had told the Police as follows:

"The day she came to my house her brother came to our house at about 8.30 p.m. Her brother was shouting for her and she too was shouting in the room."

Further in his evidence before me he said that when her brother came for her, he pulled her outside but the complainant ran back inside the room and that it was during the ensuing struggle between the complainant and her brother that the former grazed her fore-arm. Looking at the brother of the complainant and the wisp of a girl that the complainant is, I find it hard to believe that she could present any difficulty that could not be easily crushed to her brother if the latter was determined to take her away. In the accused's statement to the Police however this is what he said:—

"When both myself and her brother were dragging her."

On the evidence before me I have no doubt that the accused did take this girl away by force and against her will with an intent of carnally knowing her and I find the accused guilty on the first count.

On the second count of having carnal knowledge of the complainant without her consent, I am always impressed in trials for offences of this nature by a complainant who is able to relate her story of what took place step by step as from the time she enters the room of the accused or where the act is committed. It was not the case with the complainant. Her evidence of what happened as from the time she entered the accused room at Gbongan had to be wrung from her and even then as my record shows her evidence on that point was a jumble of sentences with little pattern or sequence. I have not before me a sufficiently clear picture of whether after the abduction she was later persuaded to the act of coitus. Its frequency as given by her may support this view. I must in accordance with established principles give the accused the benefit of a reasonable doubt existing in my mind and I find him not guilty on the second count.

On the third count the issue is whether the complainant injured her arm while the accused was endeavouring to get her into the car as the complainant deposed or at the house of the accused's father as the accused deposed. I have already commented on the unreliability of the accused's evidence and rejected it and as for the complainant I have equally commented that her evidence I found reliable on events taking place before her arrival in the house of the accused's father. I believe her story that she injured herself while the accused and others were trying to force her against her will into the car. The medical evidence is to the effect that her injury is compatible with a grazing as a result of a struggle. I therefore find the accused guilty on the third count.

Accused found guilty on first and third counts but not guilty on second count.

GABRIEL FADIRE ... ... *Plaintiff*

v.

ABRAHAM ABIRI ... ... *Defendant*

[HIGH COURT OF JUSTICE: Taylor, J., 18th May, 1959.]

Customary land tenure—customary law whereby native could convert vacant communal land to his by cultivation—whether land so acquired or acquired by grant—alleged customary law that ownership of palm trees and other economic trees vested in grantor not proved—grantee's title to cocoa trees on land not disputed.

In an action which was originally instituted in the Ife Lands Court before being transferred to the High Court, the plaintiff, said to be a nephew of the defendant, claimed a declaration that he was entitled as owner under customary law to cocoa trees, palm trees and other economic trees on three areas of land at Ifewara, Ife; damages for cocoa alleged to have been wrongfully reaped by the defendant and an injunction to restrain him from committing further acts of trespass. The issue before the Court was whether the three areas were bush communal land cut and cultivated by the plaintiff after leaving the defendant's service or whether those areas were in the defendant's ownership and possession before he gave one of them to the plaintiff in recognition of his services.

Held: (1) that it was admittedly Ifewara customary law that a native of that place might cultivate vacant communal land which by virtue of such cultivation would become his but that the evidence adduced as to the method of taking possession of such land and the extent of the area that might be possessed was vague and inconclusive and so the Court would refrain from coming to any finding one way or the other on that phase of the customary law in question;

(2) that the evidence in this case however showed that two of the areas claimed pid not belong to the plaintiff and that the third was granted to him by the defendant after his fourteen years' services to the former;

(3) that as regards this third area the defendant did not really join issue as to the plaintiff's title to the cocoa trees thereon and that in the absence of proof of a customary law alleged by the defendant as existing locally and vesting the ownership and possession of palm trees in the grantor of land, the plaintiff was entitled to a declaration of title under customary law to the cocoa and palm trees and all other economic trees on the third area;

(4) that the claims for damages and injunction must fail in so far as it had not been proved that the defendant had wrongfully reaped cocoa on the third area but that an injunction would be granted to restrain him, his servants or agents from operating on that area in respect of the palm trees.

Plaintiff's claims partly upheld and partly dismissed.

Ibadan Civil Suit No. I/312/57.

Omisade for Plaintiff.

Olagbaju for Defendant.

Taylor, J.: This action was instituted in the Ife Lands Court and has come before me by way of transfer. The claim as appears in the Statement of Claim read in the light of the amendment made at the trial is of a threefold nature to wit:

1. A declaration that the plaintiff is entitled as owner under Native Law and Custom to cocoa trees, palm trees and other economic trees on the land at Abiri marked "A", "B", and "C" on the plan attached.

2. £100 general damages for cocoa wrongfully reaped by the defendant on the said land.

3. An injunction to restrain the defendant from committing further acts of trespass.

Both parties to this action are farmers residing and farming at Ifewara, Ife, and are related to one another through the plaintiff's mother which relationship of plaintiff to defendant the pleadings say is one of nephew and uncle. The defendant at the hearing says that such a relationship as exists between the parties is one of cousins. This contradiction is not however of any importance. It is further common ground between the parties that the plaintiff served the defendant for a period of fourteen years on the latter's farm and it is after this period that the dispute arose and as from then the parties vary in their relation of the events that took place. The plaintiff on the one hand states that after this period of service, the defendant offered him land with 100 cocoa trees on it as a reward for the fourteen years service rendered, but that he refused to accept same as in his view the consideration was unworthy of the services rendered. When this offer was refused, the plaintiff was then told by the defendant to go and cut his own bush and cultivate it on Ifewara community land. This the plaintiff did and as a result he cut the areas marked "A", "B", and "C" in three successive years and planted his cocoa and other economic trees and crops on the land. The defendant on the other hand avers and deposed that after the plaintiff's fourteen years of service he gave the latter 800 and not 100 cocoa trees and virgin forest shown as "A" on the plaintiff's plan on which to farm. Further that he, the defendant is the owner of portions "B" and "C" and has always been in possession thereof.

It is admittedly Ifewara customary law that a native of Ifewara may cultivate vacant Ifewara communal land and on such cultivation the land becomes his but the evidence adduced as to the method of taking possession of such area and the extent of the area that may be possessed is vague and inconclusive and I refrain from coming to any finding one way or the other on that phase of such custom. The defendant in paragraph 3 of the Statement of Defence avers that the plaintiff's father is an Ijebu man and as such the plaintiff was unable to take advantage of Ifewara Native Law and Custom as to community land. At the hearing no evidence was led by the defence to establish this with the result that I find that the plaintiff is an Ifewara man and as such entitled to the benefits of the customary law of that community.

The only real issue before me is whether the areas "A", "B" and "C" were bush land cut and cultivated by the plaintiff after leaving the defendant's service or whether those areas were in the defendant's possession and ownership and he gave area "A" to the plaintiff in recognition of his services. On this point the plaintiff stated that about thirty-eight years ago he cut area "A" and planted cocoa, kola and palm trees on it. The next year he went on and cut area "B" and likewise planted economic trees on it and finally in the third year he cut area "C" and cultivated it. On all these areas the plaintiff says that he built a hut and on area "A" after cultivation he planted all along its eastern boundary plantains and kola-nut trees; further, that when he cut area "B" he cut it right up to the boundary with Joseph Otun forgetting that Joseph Otun's farmland did not at that time exist as deposed to by Joseph Otun himself for he arrived only two months after the plaintiff is alleged to have cleared his land. The plaintiff

went on to say that the hut on area "C" had to be pulled down owing to the street which passed through the site. He was positive that both the street and the hut were enclosed within area "C" which is the third area farmed by him. When however one looks at the plaintiff's plan one finds that this is not the case and that in fact both of these features are enclosed within area "A". These inconsistencies were never satisfactorily explained or reconciled by the plaintiff. He further said that five years after he entered area "A" the defendant began to disturb his, the plaintiff's, possession and suggested that the farmlands should be shared out in the proportion of two to th defendant and one to the plaintiff. The plaintiff refused to accept this suggestion and as from then the defendant is said to have been reaping the cocoa on areas "B" and "C" jointly with the plaintiff.

Now if in fact the plaintiff was the rightful owner or in rightful possession of areas "B" and "C", would he tolerate a position whereby the defendant continually came on those areas to reap the cocoa for a period of thirty-three years before action taken. It is true that if the plaintiff's version is accepted this equally applies to the defendant. Finally the plaintiff says that one Emanuel Loye, his father-in-law, was granted a portion of the area marked "A" by him and for which he pays *Ishakole* of two bushels of cocoa yearly. It was as a result of this evidence that the plaintiff amended his claim for a declaration of title to the cocoa as distinct from one to the area on which the cocoa is planted.

The plaintiff's witness Joseph Otun supported him on the major issues and went on to admit that the defendant was the headman over the area in dispute. This witness is a friend of the plaintiff and according to him the plaintiff is his neighbour, and yet he had not heard of this dispute until four and a half years ago whereas on the plaintiff's showing it began thirty-three years ago and has continued since. The evidence of this witness on Native Law and Custom was unsatisfactory and unconvincing. According to him he is not a member of the plaintiff's and defendant's community though they are all natives of Ifewara. His own community land is separate from that of the parties to this action but there is no boundary between them so that it was by sheer coincidence that the plaintiff, if his story is accepted, cut as far as he did and no further. The plaintiff's last witness was one Joshua Olokore who by the plan exhibit "A" is shown on the plaintiff's southern boundary and it was on this point that he was called to support the plaintiff, which he did.

With the close of the plaintiff's case two important matters had not been satisfactorily established. The first was as to the boundary between areas "A" and "C" which would naturally have an effect on area "B". This would not have been necessary in a claim relating to the whole area edged red were it not for the evidence of Emmanuel Loye. The importance of this first point is brought out by the second point as to the extent of the farm granted to Emanuel Loye for it is obvious that even if I were to accept the case for the plaintiff I cannot make a declaration in his favour which would include the farm of Emanuel Loye. Before going further on this point let us turn to the evidence of Emanuel Loye, second witness for the defendant, whose evidence I accept without reservation. He deposed to the grant of land to him by the plaintiff under customary law about twenty-five years ago; the land was bounded by the farms of the defendant on two sides, by Ajomale's farm on another and on the fourth side by the farm of the plaintiff. Turning to the plaintiff's plan and bearing in mind the evidence of this witness just related and the further fact that it is common ground that Loye's land is within the area edged red his evidence would make his land fit in perfectly in the small

area to the south of area "A" between the road to Ogudu and area "C". He has cocoa, kola, plantain and walnuts on his land and he pays two bushels of cocoa to the plaintiff yearly as *Ishakole* for the grant which he said was for life and not for any determinable or temporary period as the plaintiff would have me believe. Finally Emmanuel Loye deposed that on the day of the grant the plaintiff took him to the land, showed him his boundaries and showed him the defendant's land as abutting on the area granted to him on two sides. This witness had everything to gain by supporting the plaintiff to whom he is also related and which relationship he said has not been impaired before action taken. The defendant was an old man whose memory was fast failing as some of the contradictions in his evidence showed. I accept only that portion of his evidence that is borne out by the evidence of Emanuel Loye either directly or by inference and as for the plaintiff's case I accept only those parts of it that are not in conflict with the evidence of Emanuel Loye. On the evidence before me I find as a fact that area "A" as shown on the plan was the area granted to the plaintiff by the defendant after the former's fourteen years' service to the latter. I believe that the plaintiff in succeeding years went beyond his boundaries. How far he did go I am not prepared to say on the evidence before me and it is of little importance to the outcome of the case for as the evidence of the plaintiff shows the defendant promptly objected to it. The plaintiff must therefore fail in respect of areas "B" and "C" in all the three claims in respect thereof and I dismiss the action to that extent.

As regards area "A" it is true that the defendant does not really join issue as to title to the cocoa trees thereon, but the plaintiff's claim includes one for a declaration to the palm trees and other economic trees on the land and the defendant did contend the plaintiff's rights to the palm trees on the land, by virtue of an existing native law and custom which vests the possession and ownership in such trees in the grantor. The onus was on the defendant to prove this custom. I am aware that such a custom exists amongst the Aworis and that the Court has judicially accepted it as such.

The defendant has not in my view discharged such onus and I make a declaration of title under Native Law and Custom in the plaintiff's favour to the cocoa and palm trees and all other economic trees found on the area marked as "A" in exhibit "A" and bounded on the west by the Eleru stream, on the south by the road to Ogudu, on the east by the defendant's land and on the north by the land of Jacob Fawole. The claim for damages for the cocoa reaped must fail in so far as it is not proved with respect to this area "A". On the claim for an injunction I refrain from making such an order in respect of the cocoa trees in so far as there is no trespass to or danger of future trespass to the cocoa, but I do make an order for an injunction to restrain the defendant, his servants or agents from operation on area "A" as claimed in paragraph 15 (*c*) of the Statement of Claim in respect of the palm trees.

When all is considered the plaintiff has failed on the major issues and the defendant is entitled to his costs which I shall now proceed to assess.

Plaintiff's claims partly upheld and partly dismissed.

S. P. EKUN AND FIVE OTHERS (as Administrators of Alhaji Adegoke Adelabu) ... *Plaintiffs*

v.

1. MESSRS A. YOUNAN AND SONS ... ...
2. THE ROYAL EXCHANGE ASSURANCE COMPANY LIMITED ... ... *Defendants*

BUSARI ALARAPE LAWAL AND THREE OTHERS (as Administrators of Adeleke Aremu) *Plaintiffs*

1. MESSRS A. YOUNAN AND SONS ... ...
2. THE ROYAL EXCHANGE ASSURANCE COMPANY LIMITED ... ... *Defendants*

[HIGH COURT OF JUSTICE: Quashie-Idun, J., 18th May, 1959.]

Civil procedure—motion to clarify order awarding costs—whether costs awarded in favour of a successful defendant in a consolidated suit were receivable from another unsuccessful defendant in same suit—no power in High Court to review or discharge final orders made—section 44 of Western Region High Court Law, 1954, No. 3 of 1955 inapplicable—disrection of Court under Order 30, Rule 1 of High Court (Civil Procedure) Rules, 1958, as to persons to pay costs exercisable only at time order made.

On a motion by the plaintiffs in two consolidated suits asking the Court to clarify its order awarding costs in favour of the successful second defendants against the plaintiffs and to include the said costs in the costs receivable from the unsuccessful first defendants by the plaintiffs, it was—

Held: (1) that the plaintiffs, before sueing both defendants, having been in doubt as to the driver of which of them was negligent the Court would have ordered that the costs awarded in favour of the second defendants should have been paid by the first defendants;

(2) but that a specific and final order had been made that those costs should be paid by the plaintiffs themselves and that there was no power in the Court to review that order since section 44 of the Western Region High Court Law, 1954, No. 3 of 1955 applied only to orders made in Chambers and did not relate to costs and further since the discretion given to the Court under Order 30, Rule 1 of the High Court (Civil Procedure) Rules, 1958, as to the person by whom costs should be paid could only be exercised at the time that the order was made.

Application for costs dismissed.

Cases cited:

Sanderson v. *Blyth Theatre Company* [1903] 2 K.B. 535.

Besterman v. *British Motor Cab Company Limited*, [1914] 3 K.B. 181.

Bullock v. *London General Omnibus Company Limited and Others*, [1907] 1. K.B. 264.

Marsden and Wife v. *Lancashire and Yorkshire Railway Company*, (1880-1881) 7 Q.B.D. 641.

Ibadan Suits Nos I/326/58 and I/324/58.

G. Agbaje, for Plaintiffs-Applicants.

Cole, for first Defendants.

Omotosho, for second Defendants.

Quashie-Idun, Ag. J: This is a Ruling on a Motion by the plaintiffs in the two consolidated suits asking the Court to (1) clarify the order made by the Court awarding costs in favour of the second defendants against the plaintiffs in the suits; and (2) include the said costs awarded in favour of the second defendants in the costs receivable from the first defendants by the plaintiffs.

The plaintiffs in both suits had claimed damages on behalf of the dependants of two deceased persons who had been killed as a result of the collision of two cars belonging to the defendants and driven by their respective drivers. The plaintiffs alleged negligence on the part of both or either of the two drivers. On the 27th April, 1959, I gave judgment in favour of the plaintiffs against the first defendants and ordered the first defendants to pay cost to the plaintiffs. I also entered judgment for the second defendants on the plaintiffs' claims and awarded costs in favour of the second defendants against the two plaintiffs respectively.

The present application is based on paragraph (*ii*) of the Motion Paper which is for an order that the costs awarded in favour of the second defendants and payable by the plaintiffs be recovered from the first defendants by the plaintiffs.

In support of the Motion, Mr G. Agbaje has referred to the writs of summons filed by the plaintiffs which clearly showed that the plaintiffs were in doubt as to which of the servants of the two defendants was negligent. He has also referred to the case of *Sanderson* v. *Blyth Theatre Company* [1903] 2 K.B. 535, in which it was held by the Court of Appeal that in an action in the King's Bench Division claiming relief against the defendants in the alternative, the Court has jurisdiction in a proper case to order the unsuccessful defendant to pay the costs of the successful defendant or to order the plaintiff to pay the cost of the successful defendant and then add those costs which the unsuccessful defendant is ordered to pay to the plaintiff. Mr Agbaje has also referred to the case of *Besterman* v. *British Motor Cab Company Limited*, [1914] 3 K.B. 181. In that case the plaintiff who was injured in a collision between a motor cab and an omnibus joined the owners of both vehicles as defendants in an action to recover damages for injuries sustained. He obtained a verdict with damages against the Motor Company but the Omnibus Company obtained a verdict in their favour. The Judge made an order for payment to the plaintiff by the Motor Cab Company of the plaintiff's costs against the Omnibus Company recovered against the plaintiff. On appeal against the order the Court of Appeal held that the Judge had a discretion to make the order although before the issue of the writ the Motor Cab Company had not intimated to the plaintiff their intention to throw the responsibility for the accident on other defendants.

In the present case in respect of which this application has been filed the two defendants blamed each other for the accident.

It is contended further by Mr Agbaje that Order 30, Rule 1 of the High Court Rules, 1958, gives discretion to the Court as regards the person by whom costs are to be paid.

The application is opposed by the first defendants whose Counsel, Mr J. A. Cole has submitted that this Court has no jurisdiction to entertain the application on the grounds: (1) That the order sought is one laid down in practice known as the *Bullock*

Order under the Rules of the Supreme Court in England, Order 16, Rule 7, and based on section 5 of the Supreme Court of Judicature Act, 1890. (2) That although the order could have been made by virtue of the authorities cited and by virtue of the decision in the case of *Bullock* v. *The London General Omnibus Company and Others* [1907], 1 K.B. 264, yet as the order awarding costs to the second defendants was a final order, this Court cannot vary that order. In support of the last submission Mr Cole has referred the Court to the case of *Marsden and Wife* v. *Lancashire and Yorkshire Railway Company*, [1880-1881] 7 Q.B.D. 641. In that case a jury found for the plaintiffs a sum exceeding the amount which the defendants had paid into Court. The Judge thereupon gave judgment for the plaintiffs without costs. The High Court of Justice afterwards made an order that the plaintiffs should have their costs. The defendants appealed to the Court of Appeal to annul the order of the High Court after the time had elapsed for appealing against an interlocutory order.

The Court of Appeal held that the order of the High Court was made on appeal from a *final judgment* and that the application to the Court of Appeal was not too late, but that the High Court had no jurisdiction to entertain an appeal from a final judgment, and that the order giving the plaintiffs their costs must be annulled. In the course of his judgment, Lord Selbourne, L.C., stated as follows:

"One point is sufficient to dispose of this case.....It is that the Judge not only expressed his opinion as to the order which ought to be made as to costs, but he also gave judgment for £105, without costs; and no authority has been cited which points out that a Divisional Court is entitled to vary or annul that judgment. The application of the plaintiffs ought to have been made to the Court of Appeal in the first instance....."

In my judgment which was delivered on the 27th April, 1959, I stated that the costs awarded to the second defendants in both suits should be paid respectively by the plaintiffs in both suits. I must admit that if my attention had been directed to the cases of *Sanderson* v. *Blyth Theatre Company* and *Besterman* v. *British Motor Cab Company* I would have ordered that the costs awarded in favour of the second defendants should be paid by the first defendants, the facts of the cases in those authorities being similar to the facts in the present cases namely, that the plaintiffs were in doubt as to which of the defendants' drivers was negligent. After I had read the portion of my judgment awarding costs in favour of the second defendants Mr Agbaje stated that he wished to be heard on the question of costs and submitted that the costs awarded in favour of the second defendants should be paid by the first defendants. I then said that as the plaintiffs had failed in their claim against the second defendants I was of the opinion that the plaintiffs should pay the costs awarded to the second defendants. I intimated however that I would be willing to consider the matter again on a motion. I confess that at that time I was not aware that the Rules of the High Court contain no provisions for review or discharge of orders made by the Court except as laid down in section 44 of the Western Region High Court Law, 1954, No. 3 of 1955, to which Mr Omotosho, Counsel for the second defendants, has directed the Court's attention. That section applies only to an order made in Chambers by a Judge and does not relate to costs.

Order 30, Rule 1 gives a discretion to the Court to make an order as regards the person by whom costs should be paid. It is my view that that discretion can only be exercised at the time the order is made. In other words if I had merely stated in my judgment that the second defendants were entitled to costs without specifying by whom they should be paid, I would have been entitled to state at a later date that such costs should be paid by the first defendants to the second defendants. As my order was specific and final, and as there is no jurisdiction vested in me to review it, I hold that this application is not properly before me. It is therefore dismissed. No order as to costs.

Application for costs dismissed.

SHITTU LAYIWOLA AND THREE OTHERS ... *Appellants*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Abbott, Ag.F.C.J., Brett and Mbanefo. F.JJ., 22nd May, 1959.]

Criminal law—murder—unsatisfactory identification of accused persons by eye-witnesses of the crime—insufficiency of evidence of such witnesses to warrant conviction—admissions by accused persons as evidence in support of testimony of such witnesses.

At the trial of the appellants for murder committed by supporters of a political party in the course of attacks upon their political opponents, the trial Judge not being satisfied with the evidence of identification of the appellants (and four other persons tried with them) by eye-witnesses of the crime, had decided not to rely solely on the evidence of those witnesses and finding no support for that evidence in respect of the four persons last mentioned above, had acquitted them, and convicted the appellants. On an appeal—

Held: (1) that appellants Nos 1 and 2 had been rightly convicted in view of the fact that they had made to the Police statements which amounted to admissions of their individual fore-knowledge of and participation in the riots in the course of which the deceased had been killed and so provided evidence in support of the testimony of the eye-witnesses;

(2) that in respect of appellants Nos 3 and 4 there was no evidence to support the testimony of the eye-witnesses and that as the trial Judge had on that ground acquitted the other four persons tried with the appellants, the convictions of appellants Nos 3 and 4 could not stand.

Appeal of appellants Nos 1 and 2 dismissed and those of appellants Nos 3 and 4 allowed

FSC. 270/1958.

M. Agbaje for Appellants.

E. A. Ademola, Senior Crown Counsel, for Respondent.

Abbott, Ag.F.C.J. : On the 15th May, 1959, we dealt with an application by each of the four appellants for leave to appeal from his conviction for murder by the Ibadan High Court.

We then granted leave to appeal to each of the applicants and, treating the applications as appeals, allowed the appeals of appellants Nos 3 and 4, quashed their convictions, set aside their sentences, and directed that a verdict and judgment of acquittal be entered in respect of each. We reserved judgment regarding appellants Nos 1 and 2 and now state our conclusions regarding them and our reasons for allowing the appeals of the other two appellants.

This is another of the cases arising out of the death, in a motor accident, of one Adegoke Adelabu who was the leader, in the Western Region, of the National Council of Nigeria and the Cameroons, the political party in opposition in that Region's legislature. Members of that party, in the quite erroneous belief that Adelabu's death was brought about by the Action Group, the political party in power, made various attacks on members of the Action Group living in villages in the environs of Ibadan.

In this case the learned trial Judge was not fully satisfied with the evidence of identification of the appellants (and of four other persons tried with them) by the eye-witnesses, each of whom implicated those persons and each of the four appellants, and quite properly held that he was not prepared to rely, in coming to his decision, solely on the evidence of those witnesses. He found no support for that evidence in respect of the four persons last above mentioned and acquitted them.

In convicting the four appellants, the learned trial Judge found support for the evidence of the eye-witnesses in the statement made by each appellant to the Police.

So far as appellant No. 1 is concerned, he makes the following admissions in the two statements which he made (Exhibits "G" and "H"): (*a*) he was there when the deceased was shot by one of his companions; (*b*) he then held a matchet (but did not use it); (*c*) he accompanied those who killed the deceased; (*d*) persons known to him told him—"there would be war tomorrow" and that "we members of the National Council of Nigeria and the Cameroons are going to fight all the members of the Action Group tomorrow at Babalola Lakondoro" the deceased's village.

We consider that these admissions clearly show that appellant No. 1, well knowing what was the object of the enterprise, joined others in going to the deceased's village to kill "all the members of the Action Group" of which party the deceased was a member, and that these admissions, added to the evidence of the eye-witnesses, justified the learned trial Judge in convicting appellant No. 1.

Appellant No. 2, in his statement, says: "After the death of Adelabu we the members of the National Council of Nigeria and the Cameroons said that Adelabu was killed by the members of the Action Group, and as such we agreed to kill all the members of the Action Group. We the members of the National Council of Nigeria and the Cameroons who went to Babalola Lakondoro's village to go and fight were nearly 200 in number. We were all armed with dane guns and sticks..... It was in my presence when Olose knocked Babalola Lakondoro with stick. I was there when they shot Babalola Lakondoro with guns." In the case of this appellant also, we think that the learned trial Judge was right in accepting these admissions as sufficient support for the evidence of the eye-witnesses to warrant his conviction.

The appeals of appellants Nos 1 and 2 are therefore dismissed.

We come to the conclusion that, in respect of appellants Nos 3 and 4, there was no evidence to support the testimony of the eye-witnesses and that as the learned trial Judge had on that ground acquitted the other four persons tried with the four appellants, the convictions of appellants Nos 3 and 4 could not stand. Neither of these men makes any admissions in his statement which could be called in support of the evidence of the eye-witnesses and there is no other evidence against them at all.

There is one other matter to which we would refer. The learned trial Judge saw fit, in his judgment, to pass adverse comment on the action of the prosecuting authorities in charging ten of the rioters in this case before a Magistrate with malicious damage and stealing and charging the eight persons before the learned trial Judge with murder. The Judge expressed the view that all the persons identified as taking part in the riot should, in view of the provisions of section 8 of the Criminal Code, have been charged with all the offences which flowed from the riot, and he goes on: "In my opinion it was not open for the prosecution to elect or select which of the accused persons should be charged with the minor offences and which with the graver. The fact that only

one witness identified some of the persons charged is, in my view, beside the point. That is a matter which relates to proof and it is the province of the Court". With due respect to the learned trial Judge, we find ourselves quite unable to agree with this view. It is without question the province of the Law Officer of the Crown (in this case the Director of Public Prosecutions) to decide, in the light of what the public interest requires in any particular case, who shall be charged, and with what offence. It is entirely a matter for this Officer's quasi-judicial discretion and, in our view, in order to secure the proper administration of justice, he must be left to exercise this discretion according to his own judgment, neither acting on any rule of thumb nor taking into account any other consideration than the public interest.

Appeals of appellants Nos 1 and 2 dismissed and those of appellants Nos 3 and 4 allowed.

ADEDEJI ALABI AND SEVEN OTHERS ... ... *Appellants*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Abbott, Ag.F.C.J., Brett and Mbanefo, F.JJ., 22nd May, 1959.]

Criminal law—murder—evidence of eye-witnesses implicating accused persons—sufficiency of such evidence to warrant conviction—enhancement of evidence by statements made to the police by the accused—applicability of section 8 of Criminal Code, Cap. 42.

The first and third to eighth appellants had been convicted of murder arising from attacks made in the course of a riot by members of the political party of which they were supporters upon their political opponents. The trial Judge, believing the evidence of eye-witnesses which clearly implicated each of the appellants, had convicted them.

Held: that having regard to the circumstances of the riot, each of the applicants for leave to appeal was equally guilty by virtue of section 8 of the Criminal Code, Cap. 42; that it did not matter which of them did what; that the evidence of the eye-witnesses was ample and that, in respect of appellants Nos 1, 4 and 5, that evidence was enhanced by the statement which each of them had made to the police.

Leave to appeal refused.

Cases cited:

Sunday Kala Alagba v. *The King*, 19 N.L.R. 128.

FSC. 287/1958.

M. Agbaje for Appellants.

E. A. Ademola, Senior Crown Counsel, for Respondent.

Abbott, Ag.F.C.J. : On the 15th May, 1959, we dealt with the applications for leave to appeal of all eight applicants.

We granted leave to appeal to the second applicant, and, treating the application as the appeal, allowed his appeal, quashed his conviction, set aside his sentence, and directed that a verdict and judgment of acquittal be entered in his case. Our reason for that decision appears in the Record Book.

We refused leave to appeal to all the other applicants and now give our reasons for so doing.

This is yet another of the cases following upon riots embarked upon by members of the National Council of Nigeria and the Cameroons (the political party in opposition in the Western Region) as a result of a mistaken belief that the death of their leader had been caused by his political opponents (the Action Group) against whose members and their property the activities of the rioters were directed.

The learned trial Judge, in his judgment, made a careful and exhaustive analysis of the evidence against each of the seven applicants whose applications we refused, and believing, as he was fully entitled to do, the evidence of the eye-witnesses which clearly implicated each of them in the crime, convicted them. Having regard to the circumstances of the riot, each of the applicants was equally guilty, by virtue of section 8 of the

Criminal Code (Cap. 42), which the learned Judge invoked, and in the words used by Bairamian, J., and approved by the Judicial Committee of the Privy Council in *Sunday Kala Alagba and Others* v. *The King*, 19 N.L.R. 128: "it does not matter which of the accused did what". The evidence of the eye-witnesses was ample, and in the case of applicants Nos 1, 4 and 5, was enhanced by the statement each of these three men made to the Police. We were quite satisfied that the convictions of all the applicants whose applications we refused, were right and we therefore refused leave to appeal.

Leave to appeal refused.

JIMO AMOO AND FIVE OTHERS ... ... *Appellants*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Abbott, Ag.F.C.J., Brett and Mbanefo, FJJ., 22nd May, 1959.]

Criminal law, evidence and procedure—murder in the course of riot—variance between depositions of witness and testimony at trial—whether deposition could be read to witness to refresh memory—section 215 (1) of Evidence Ordinance, Cap. 63—criminal responsibility for joining crowd with full knowledge of intent to kill—applicability of sections 8 and 316 of Criminal Code, Cap. 42.

The appellants who were supporters of a political party had been convicted and sentenced to death for the murder of a member of an opposing political party by members of a crowd composed of supporters of the former party. On appeal it was argued *inter alia* that the trial Judge should not have allowed a witness whose evidence differed from his deposition to refresh his memory with that deposition and also that he had misdirected himself in law in having held that all persons who were seen in the crowd which attacked and killed the deceased were guilty of murder.

Held: (1) that having regard to the provisions of section 215 (1) of the Evidence Ordinance, Cap. 63, the deposition in this case taken five weeks after the event in question should not have been allowed to be read over to the witness in order to refresh his memory and that for this reason the evidence of that witness must be disregarded in considering the case against those appellants implicated thereby;

(2) that in the absence of any other evidence connecting the sixth appellant with the crowd that killed the deceased, the conviction of that appellant could not stand;

(3) that in accordance with the provisions of sections 8 and 316 of the Criminal Code, Cap. 42, any person who joined a crowd with knowledge of its common intention or purpose to attack and kill persons was equally guilty of murder, it being immaterial which of the crowd did what;

(4) that in this case there was overwhelming evidence that the first to fifth appellants were not only amongst the crowd but were also armed and that each of them had been identified by witnesses as being amongst the crowd that attacked and killed the deceased, and that they had therefore been rightly convicted.

Appeals of first five appellants dismissed, appeal of sixth appellant allowed.

Cases cited:

R. v. *Williams*, 6 Cox's C.C. 343.

Sunday Kala Alagba and Others v. *The King*, 19 N.L.R. 128.

FSC. 313/1958.

M. Agbaje, for Appellants.

George, Assistant Director of Public Prosecutions, for Respondent.

Mbanefo, F.J.: The six appellants were amongst the ten persons charged with the murder of Gbadamosi Oshuntoki. At the conclusion of the trial four of them were acquitted and discharged and the appellants were found guilty. The appellants have appealed against their convictions. It is not in dispute that the deceased was a member of the political party known as the Action Group and the appellants were members of the opposing political party known and referred to as the National Council of Nigeria and the Cameroons. About the 28th March, 1958, Alhaji Adelabu a prominent leader of the National Council of Nigeria and the Cameroons was killed in a motor accident. Some of his supporters in and around Ibadan believing that he was killed by their political opponents decided to avenge his death on members of the Action Group. It was in evidence and accepted by the learned trial Judge that on the 28th March, 1958, between 10.00 and 11.00 a.m. a group of National Council of Nigeria and the Cameroons members, numbering about sixty, approached Arulogun Village shouting their party slogans. They were armed with guns, cutlasses, axes and cudgels. They went into the market and there attacked two men, Salawu Aboderin and Napoleon; the latter subsequently died of the injuries received by him at the hands of the crowd. Salawu Aboderin ran to his house and locked himself up in a room. The crowd chased him there and set fire to his house. When he could not bear the suffocation caused by smoke from the fire he jumped down from the ceiling and ran. The crowd caught hold of him and cut and beat him with cutlasses and cudgels and only left him when they thought that he was dead. As it happened he did not die, but subsequently recovered from his injuries. After they left Aboderin they went to the deceased's house which was nearby and there attacked the deceased. His left hand was completely severed from the body and as he ran they chased him and inflicted more wounds on him with cutlasses. He ran into the house of one Alfa, where he fell down and died. It is not in dispute that a crowd of National Council of Nigeria and the Cameroons members attacked and killed the deceased. The learned trial Judge found that the appellants were amongst the crowd who attacked and killed the deceased and found them guilty accordingly.

The Judge's finding has been attacked in this appeal on six grounds. The first point argued (ground 2 of the additional grounds) was that "the learned trial Judge erred in law in granting the prosecution leave for the deposition to be read to first prosecution witness to refresh his memory". The incident complained of occurred when the first prosecution witness was giving evidence in chief. He said he saw the sixth, eighth, ninth and tenth accused in the crowd and added that he also saw the seventh and all the other accused. This statement seemed to the counsel leading him not to agree with his deposition taken by the Magistrate during the preliminary enquiry and so he applied to the Court to read a portion of the witness's deposition to him in order to refresh his memory, and cited as authority for the application the case of *R.* v. *Williams* 6 Cox's C.C. 343. Relying on that authority and with defence counsel not objecting the Judge granted the application. The relevant portion of the deposition was then read to the witness, after which he said that he recognised the seventh, eighth, ninth and tenth accused. The difference from his former evidence was that whilst he mentioned the sixth accused before the deposition was read to him, after it was read he dropped his name from those he said he recognised in the crowd. *R.* v. *Williams* was cited in *Phipson* on "*Evidence*", ninth Edition, at page 491. In dealing with the question of refreshing memory, *Phipson* says:

"A witness may refresh his memory by reference to any writing made or verified by himself concerning, and contemporaneously with, the facts to which he testifies; but such documents are no evidence *per se* of the matters contained."

The reason for this rule is that a witness should not suffer from a mistake due to lapse of memory. After citing the principle, *Phipson* goes on to set out and discuss what conditions must exist before a witness could be allowed to look at the statement to refresh his memory. The first condition dealt with is under the heading: "By whom document may be written". It says that a statement must have been written by the witness himself or others, providing in the latter case that it was read by him when the facts were fresh in his memory and he knew the statement to be correct. As authority for the proposition that the deposition of a witness taken down by a Coroner or Magistrate come within the principle enunciated above, *Phipson* cites *R.* v. *Williams*. Therefore he goes on to discuss the question of contemporaneousness which he says is another condition which must be fulfilled before a witness can be allowed to look at his statement to refresh his memory. It is not unusual that the deposition of a witness could be taken down by a Coroner or Magistrate so soon after the event as to be considered contemporaneous with it and in that case the witness may be allowed by the Court to look at the deposition. If that was the position in *R.* v. *Williams* there can be no objection to the principle of that case. But if the principle of the decision is that it does not matter how long after the event the deposition is taken the witness could still be allowed to look at it to refresh his memory then the decision would be in violent contradiction of the provisions of section 215 (1) of the Evidence Ordinance (Cap. 63), which reads as follows:

"A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory".

This provision is clearly in line with the principle enunciated above by *Phipson*. Where there is a conflict between the provisions of the Evidence Ordinance and a decision of a Court in England the Courts in this country would be bound to follow the Evidence Ordinance. It may, however, be mentioned that in the report of the case of *R.* v. *Williams* referred to above, it is not stated how much time elapsed between the event about which the witness was speaking and the taking of his deposition. The deposition in that case might very well have been within the rule of contemporaneousness. In this country it must be shown that the statement comes within the provisions of section 215 of the Evidence Ordinance before the witness could be allowed to look at the document to refresh his memory. In this case the deposition was taken five weeks after the event in question and the Assistant Director of Public Prosecutions, Western Region, who appeared before us conceded that the deposition could not be brought within section 215 of the Evidence Ordinance. We, therefore, agree with appellant's counsel that the Judge acted in error in allowing the first prosecution witness to look at his deposition before the Magistrate to refresh his memory. As it is not clear from the record how much of the deposition was read to the witness we cannot say how much of the evidence of the first prosecution witness, after the deposition was read to him, was affected by it. The incident happened very early in the witness's evidence and the material part of his evidence affecting the appellants was given after the incident. The result of this ruling, therefore, is to exclude the evidence of the first prosecution witness when we come to consider the strength of the case made out against the appellants referred to in his evidence, namely, the fourth, fifth, and sixth appellants.

Another question of law argued by appellants' counsel was ground 6—

"The learned trial Judge misdirected himself in law when he held that all persons who were seen in the crowd which attacked the villagers and the deceased on that day are guilty."

In finding the appellants guilty the Judge relied on section 8 of the Criminal Code. That section reads as follows:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

It has not been and cannot be disputed that there is evidence from which the inference could be drawn that those who constituted the crowd that invaded Arulogun Village on the 28th March, 1958, had a common purpose. They were members of the same party and the motive was to avenge the death of their leader. They were armed with lethal weapons and attacked and wounded or killed their opponents at sight. According to the sixth prosecution witness, Layewola Ajage, when the crowd arrived at the village they said: "Kill anybody in the village". The fifth prosecution witness, Adebanjo Orekoya, who was himself attacked and wounded, said that as he ran he heard some of the crowd shout: "Papa Ijebu is not dead—bring his head". It is clear that the intention of the crowd whoever composed it, was to kill. The defence has not suggested any other reason for the behaviour of the crowd. Indeed, appellants' counsel in the Court below opened his final address by saying that the illiterate members of the National Council of Nigeria and the Cameroons wrongly believed that Adelabu, a leader of the National Council of Nigeria and the Cameroons, was murdered by his political opponents after they had conspired to do so and in that belief began to attack their political opponents. Anybody who knew the purpose of such a crowd and joined it could not escape responsibility for its criminal action. The Judicial Committee of the Privy Council dealing with sections 8 and 316 of the Criminal Code in *Sunday Kala Alagba and Others* v. *The King*, 19 N.L.R. 128, said—

"It is clear that if two or more persons have formed a common intention to attack another or others with intent to kill or do grievous harm or in a manner likely to endanger human life and have in fact taken part together in such an attack on others resulting in death as a probable consequence, all are guilty of murder."

The Privy Council also approved the statement of the trial Judge in that case to the effect that once a common design is formed "it does not matter which of the accused did what". The crowd in the present case having formed a common design to attack and kill members of the Action Group, their political opponents, any member who joined it with full knowledge of the common intention was equally guilty of the murder of the deceased who was killed in the attack. The learned trial Judge did not, therefore misdirect himself on the law when he held that anybody who joined this hostile crowd with that knowledge was as guilty as the actual perpetrator of the crime.

Having disposed of these two points of law it remains to consider what evidence there was against each appellant. Disregarding the evidence of the first prosecution witness for the reasons already stated there is no other evidence to connect the sixth appellant with the crowd that killed the deceased. He was not mentioned by any of the other witnesses.

There is, however, overwhelming evidence that the first, second, third, fourth and fifth appellants were not only amongst the crowd, but were also armed. Each of them was identified by at least two witnesses as being amongst the crowd that descended on the village and attacked and killed the deceased.

Mr Agbaje, for the appellants, referring to the evidence of the second prosecution witness, submitted that there were two crowds and that that being so the members of one crowd could not be held responsible for what the other crowd did. On a careful examination of the evidence it is clear that the appellants were identified as being amongst the crowd that attacked the village at the time and place in question and that some members of the crowd in fact killed the deceased. The two crowds, if in fact there were two, were composed of members of the National Council of Nigeria and the Cameroons; their purpose was the same—to attack their opponents—and they were operating in the same village at the same time. On that evidence without more the Court could be justified in presuming that it was one crowd split into two. Be that as it may it is clear from the evidence that the appellants were in the same crowd. This is borne out in the evidence of the second and fourth prosecution witnesses who identified the first, second, third, and fourth appellants as being in the same crowd; the fifth prosecution witness who saw the second and fifth appellants in a crowd; the ninth prosecution witness who saw the third and fourth appellants in the same crowd and the tenth prosecution witness who identified the fourth and fifth appellants as being in the same crowd. These witnesses were talking of the crowd that killed the deceased. It is, therefore, an inescapable inference to be drawn from the evidence of these witnesses taken together that the first, second, third, fourth and fifth appellants were operating together with the same crowd. We are satisfied that there was ample evidence to justify the learned trial Judge in reaching the conclusion he did about the guilt of these appellants and their appeals were accordingly dismissed.

As regards the sixth appellant his appeal was allowed and his conviction and sentence set aside and he was acquitted and discharged.

Appeals of first five appellants dismissed; appeal of sixth appellant allowed.

IGBINUKPO INNEH ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Thomas, J., 27th May, 1959.]

Criminal law—obtaining by false pretences contra *section 419 of Criminal Code, Cap. 42—part-payment of purchase price of bicycle with post-dated cheque not honoured as payer had overdrawn account at Bank—representation did not relate to past or present fact within meaning of section 418 but to future.*

The appellant had been convicted of obtaining by false pretences, contrary to section 419 of the Criminal Code, Cap. 42, a motor bicycle in part-payment of the purchase price of which he had issued a post-dated cheque which when presented had been dishonoured as his account at his Bank had already been overdrawn. On appeal it was argued for the respondent that the appellant knew at the time that he issued the cheque that he had no means of meeting his obligation in respect thereof.

Held: that whilst it was patent that the appellant did make some representation to the complainant which induced the latter to part with the motor bicycle, such representation did not relate to the past or present but to the future and so was outside the definition of "false pretence" under section 418 of the Criminal Code and that the complainant having knowingly accepted a post-dated cheque had elected to take the risk of payment in the future.

Appeal allowed.

Benin Criminal Appeal No. B/33.CA/59.

Appellant in person.

Eboh, Senior Crown Counsel, for Respondent.

Thomas, J.: The appellant was charged with obtaining a motor bicycle from one Patrick Obi by false pretences contrary to section 419 of the Criminal Code.

The short facts of the case were that on the 10th July, 1958, the appellant approached the complainant for the purchase of a motor bicycle valued at £102. He paid a £5 deposit and issued a cheque which was post-dated to the 12th July, 1958 and drawn on the Bank of West Africa. He further gave the sum of £6 for licensing fees to the complainant who on the following day delivered the motor bicycle to the appellant's brother. On the 11th, the complainant paid the cheque into his Bank Account in Benin. On the 14th July, 1958, the complainant was contacted by the Police, who took him to the Bank where he was told to return on the 18th July. When he called at the Bank that day, he found that the payment of the cheque had been stopped, as the appellant had an overdraft at the Bank. The complainant then reported to the Police whereupon the appellant was arrested and charged for obtaining the machine under false pretences.

The appellant in the Court below admitted issuing the cheque for £97; explained that he had an account with the Bank which had been overdrawn to the sum of £226 0*s* 9*d* and that he did not stop the cheque.

It is quite clear from the Record that payment was stopped by the Bank because, the appellant's Account had been overdrawn.

The respondent's Counsel has argued that the appellant knew that on the 12th July, he had no means of meeting his obligation in respect of the sum of £97 and that by issuing that cheque at that material time, he had induced the complainant to part with the motor bicycle.

Although the appellant has not been represented by Counsel in the argument of this appeal, Counsel did file the Grounds of Appeal.

The first ground reads as follows:

"The decision is erroneous in point of law. The learned trial Magistrate erred in law in holding that the circumstances under which the appellant obtained the motor bicycle from the owner amounted to a felony or that the motor cycle was obtained by false pretences."

It is patent that the appellant did make some representation to the complainant which induced him to part with the motor bicycle, but such representation must be such as is defined and contemplated in our Criminal Code. Section 418 defines it as—

"Any representation made by words, writing, or conduct, of a matter of fact, either past or present which representation is false in fact and which the person making it knows to be false or does not believe to be true, is a false pretence".

Now the appellant approached the complainant on the 10th July, and gave him a post-dated cheque for the 12th July, which the complainant knowingly accepted. He was thus not influenced to part with the machine by any representation relating either to the past or present but by one relating to the future and which is clearly outside the definition in section 418 of the Criminal Code.

The complainant elected to take the risk of payment in the future and he might quite properly have some other remedy.

But it is clear that a prosecution under section 419 cannot succeed against the appellant on the facts disclosed in this appeal.

The appellant had been convicted in the lower Court and sentenced to eighteen months imprisonment with hard labour and ordered to receive ten strokes of the cane. He was also placed under Police supervision for eighteen months as he had had three previous convictions.

For the reasons given above I hereby set aside the conviction and sentence of the Court below and order that the appellant be discharged and acquitted. The Court below to carry out the Order.

Appeal allowed.

LAWRENCE ALONGE ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Quashie-Idun, Ag.J., 28th May, 1959.]

Criminal procedure—conviction on charge of failing to put on parking light while lorry stationary contra regulation 102 of Road Traffic Regulations—whether sentence of imprisonment in default of payment of fine conferred right of appeal under section 68 of Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955—exercise of Magistrate's power under section 389 of Criminal Procedure Ordinance, Cap. 43, to order imprisonment in default of payment of fine.

The appellant had been convicted on a charge that he being driver of a lorry had failed to put on a parking light while the lorry was stationary contrary to regulation 102 of the Road Traffic Regulations. He had been fined £5 and ordered to serve a month's imprisonment in default of payment of the fine. It was argued for the respondent that having regard to section 68 of the Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955, the appellant had no right of appeal.

Held: (1) that under regulation 102 of the Road Traffic Regulations the offence charged was punishable by a fine only, an offender being liable under the regulation to a fine or imprisonment only for a second or subsequent offence;

(2) that under section 389 of the Criminal Procedure Ordinance, Cap. 43, the Magistrate had jurisdiction to order a sentence of imprisonment in default of payment of a fine;

(3) that giving proviso (*a*) to section 68 of the Magistrates' Courts (Western Region) Law, 1954, its ordinary meaning, the words "other than a sentence of imprisonment imposed in default of payment of the fine" must mean and could only mean that an order of imprisonment made by a Magistrate in default of a payment of a fine for an offence committed did not create that offence one punishable by imprisonment if the provision contravened did not itself make imprisonment a punishment for the offence;

(4) that therefore the appellant had no right of appeal.

Appeal struck out.

Case cited:

Commissioner of Police v. *Loeb*, 6 W.A.C.A. 9.

Ibadan Criminal Appeal No. I/48.CA/59.

Craig for Appellant.

Aguda, Senior Crown Counsel, for Respondent.

Quashie-Idun, Ag.J.: The appellant was convicted by Mrs A. Oguntoye, Magistrate, Ibadan on a charge that he being a driver of a lorry had failed to put on parking light while the lorry was stationary. He was fined £5 and ordered to serve a month's imprisonment in default of payment of the fine. From the conviction he has appealed to this Court.

Mr Aguda, Senior Crown Counsel, has submitted that the appellant has no right of appeal and has referred the Court to section 68 of the Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955.

The section reads as follows:

"Any person aggrieved by a conviction or order of a Magistrate in a criminal case in respect of any charge to which he pleaded 'Not Guilty' or of which he did not admit the truth, may appeal to the Appeal Court for such conviction:

Provided that no such appeal shall lie—

(*a*) in respect of any such conviction for an offence punishable by fine only and not by imprisonment other than a sentence of imprisonment imposed in default of payment of the fine, where the fine imposed does not exceed the sum of five pounds."

It is contended that as the trial Magistrate did not impose a fine of more than £5 the fact that she ordered the appellant to go to prison for a month in default of payment of the fine does not give the appellant a right of appeal against the conviction.

The wording of the proviso to section 68 of the Magistrates' Courts (Western Region) Law does not make easy reading and I think the question is whether the legislature intended to give a right to a convicted person to appeal where a Magistrate has not merely imposed a fine of not more than five pounds but had proceeded to order a sentence of imprisonment in default of a payment of the fine. If such is the contention then the following is my reading of the proviso, namely:

"Provided that no such appeal shall lie in respect of any such conviction for an offence punishable by fine only and not by imprisonment, except a sentence of imprisonment imposed in default of payment of a fine, where the fine imposed does not exceed the sum of five pounds."

The proviso might also be interpreted to mean (as contended by Mr Aguda, Counsel for the respondent) that, where a Magistrate is only empowered to impose a fine and not imprisonment but has also a power to impose a sentence of imprisonment in default of payment of the fine, there is no right of appeal vested in the convicted person.

If the second interpretation is the correct one then it means that if the section creating the offence does not say that a person convicted of an offence shall be fined or imprisoned, then, in spite of the Magistrate having ordered a sentence of imprisonment in default of the payment of a fine of five pounds, or less, the convicted person has no right of appeal.

In the course of the arguments in this case I referred Counsel to the case of *Commissioner of Police* v. *Loeb*, 6 W.A.C.A. 9, and intimated that in my view the interpretation given by the Court of Appeal to section 313 (1) of the Gold Coast Criminal Procedure Code (Cap. 10) should be given to the proviso to section 68 of the Magistrates' Courts (Western Region) Law. After a more careful consideration of both enactments, I have changed my mind.

Section 313 (1) of the Gold Coast Criminal Procedure Code (Cap. 10) reads as follows:

"Where a Magistrate's Court orders a conviction or order ordering any of the following things that is to say—

(*a*) Payment of a penalty not less than five pounds;

(*b*) The doing or not doing of some act other than the payment of money or the entering into of recognisance to keep the peace without sentence and that in case of default in the doing of such act the defendant be imprisoned and kept to hard labour; or

(*c*) Imprisonment with or without hard labour; or

(*d*) Corporal punishment.

The party against whom the conviction or order is made may appeal to the Supreme Court against such decision."

It is my considered opinion that while in the Gold Coast (now Ghana) the right of appeal in a similar case is determined by other matters apart from the amount of fine imposed, *e.g.*, an order of sentence of imprisonment in default of payment of a fine, in this Region, the right of appeal is determined by the following:—

(*a*) Whether the fine is £5 or more;

(*b*) Whether the section creating the offence provides for a fine only as a punishment;

(*c*) Whether the section creating the offence provides as a punishment an imprisonment.

Giving the proviso to section 68 its ordinary meaning the words "other than a sentence of imprisonment imposed in default of payment of the fine" must mean and can only mean, that an order of imprisonment made by a Magistrate in default of a payment of a fine for an offence committed does not create that offence one punishable by imprisonment if the section contravened does not provide a punishment other than a fine only. According to regulation 102 of the Road Traffic Regulations the offence with which the appellant was charged is punishable by a fine only and it is only for a second or subsequent offence that an offender can be sentenced to a fine or to imprisonment. There is nothing in the record of proceedings to show that the offender had been convicted previously for a similar offence.

Under section 389 of the Criminal Procedure Ordinance (Cap. 43) a Magistrate has jurisdiction to order a sentence of imprisonment in default of payment of a fine imposed. The fact that the Magistrate ordered a sentence of imprisonment in default in this case does not make the offence one punishable by imprisonment. If the fine imposed had been more than five pounds then irrespective of whether or not the Magistrate ordered an imprisonment in default, there would be a right of appeal.

For the above reasons, I uphold the submission of the Senior Crown Counsel that the appellant has no right to appeal. The appeal is therefore struck out.

Appeal struck out.

WILLIAM OMOSIVBE ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Kester, Ag.J., 1st June, 1959.]

Criminal law, evidence and procedure—stealing from a cupboard contra *section 390 (4) (g) of Criminal Code, Cap. 42—essence of charge not cupboard but stealing of money therefrom—evidence of child under seven given on oath required no corroboration in law—practice not to convict on such evidence uncorroborated except with extreme care—sections 154 and 182 of Evidence Ordinance, Cap. 63, on procedure prior to admitting child's evidence on oath not fully followed—no material corroboration of evidence irregularly admitted—miscarriage of justice.*

The appellant had been convicted by the Senior Magistrate, Sapele, of stealing a sum of money contrary to section 390 (4) (*g*) of the Criminal Code, Cap. 42, the evidence against him being that of a girl under seven years of age that he had first lured her out of her father's house and then proceeded to steal the amount in question from a locked cupboard in the house. The accused appealed on a number of grounds in respect of which the High Court—

Held: (1) that although the particulars of the offence charged had stated that the money had been stolen from a locked cupboard, the essence of the charge was not the cupboard which it was therefore not necessary to have produced in Court as an exhibit but the stealing of the money itself, the inclusion of the place from which it had been stolen being only as to the punishment to be inflicted if the charge was proved;

(2) that the evidence of the child under seven given on oath did not as a matter of law require corroboration although it was not the practice to convict on such uncorroborated evidence except after weighing it with extreme care;

(3) that the reception of the evidence of a child of tender years is regulated by sections 154 and 182 of the Evidence Ordinance, Cap. 63, and that the statement in the trial Magistrate's judgment that after hearing the evidence of the child in the witness box he had come to the conclusion that she was mentally capable of understanding and giving an intelligent account of the case to his satisfaction could not satisfy the statutory condition precedent that before the reception of the child's evidence on oath she should have been examined by the Magistrate as to whether she was aware of the responsibility of speaking the truth and of the obligations of an oath;

(4) that having regard to this serious omission and to the absence of any material corroboration of the child's evidence by independent evidence which might have helped to abate the irregularity, it must be held that a miscarriage of justice had occurred in the case.

Appeal allowed.

Cases cited:

R. v. *Reynolds*, 34 Cr.A.R. 63

R. v. *Surgenor*, 27 Cr.A.R. 175.

R. v. *Dunne*, 21 Cr.A.R. 176.

Warri Criminal Appeal No. W/3.CA/59.

Appellant appears.

Ogbe for the Crown.

Kester, Ag.J.: The appellant was convicted by the Senior Magistrate, Sapele, of stealing a sum of £60 from a locked cupboard contrary to section 390 (4) (*g*) of the Criminal Code. The facts as found by the Senior Magistrate are briefly as follows: On the 11th of May, 1958, the accused visited the house of the second prosecution witness when the latter was away at his farm. His daughter, the first prosecution witness, a child under seven years of age, was in the house. She told the accused that her father had gone to the farm. Accused sat down in the house and later gave the first prosecution witness a sum of 6*d* to go out to buy groundnuts; she went out and on her return found the accused had opened her father's cupboard in the house and was taking some papers from there. Accused left. When her father returned she told him what had happened. The matter was reported to the police and the accused was arrested and charged. The accused admitted visiting the second prosecution witness's house. He said he did not enter the house when the first prosecution witness told him that her father was not in. He denied giving the child 6*d* for groundnuts, and said it was one Okoyoma who gave her 1*d* for groundnuts.

In all five grounds of appeal were filed. At the hearing, Counsel for the appellant abandoned one of the grounds and did not argue it. The other four grounds argued were—

(*a*) That the decision is altogether unwarranted, unreasonable and cannot be supported having regard to the weight of evidence.

(*b*) That the learned trial Magistrate did not fully direct himself to the danger of convicting on the uncorroborated evidence of a child of tender years.

(*c*) That the learned trial Magistrate misdirected himself in holding that: "The accused never realised that the first prosecution witness would return in time having decoyed her away from the house, to see him ransacking the cupboard," and thus occasioning a miscarriage of justice.

(*d*) That the learned trial Magistrate erred in law in not applying the principle of examining a child of tender years before she was sworn.

The arguments adduced in respect of (*a*) are the same as in respect of (*c*), and the chief complaint by counsel in respect of these two grounds was that the cupboard from which the appellant was alleged to have stolen £60 was not produced in court and tendered as an exhibit. He further argued that the policeman who investigated the case, the third prosecution witness, said nothing about the cupboard. On these bases the counsel drew the conclusion that the learned trial Magistrate based his judgment on an imaginary cupboard. He submitted that the decision of the Magistrate on this point was imaginary and was not supported by evidence. Apart from the evidence of the first prosecution witness which I shall deal with later, there is the evidence of the second prosecution witness about the cupboard in his house from which he said £60 and some documents were missing. The trial Magistrate no doubt believed this evidence before coming to the conclusion that the money was stolen from the cupboard. Although the particulars of the offence charged stated that the money was stolen from a locked cupboard, the essence of the charge was not the cupboard, but the stealing of the money itself. The inclusion of the place (locked cupboard) from which the money was stolen was only as to the punishment to be inflicted if the charge of stealing was proved. There is no substance in the argument on these two grounds.

As to ground (*b*) in the opening part of his judgment when dealing with the evidence of the first prosecution witness, the learned trial Magistrate made it abundantly clear that she was a girl of tender age and that as such he had given careful consideration to her evidence. Further on in the judgment he said that he was satisfied that her evidence could be relied upon and that she was a witness of truth. Her evidence was on oath and did not require corroboration, although as a matter of practice it is customary for judges to warn juries not to convict on such uncorroborated evidence of a child except after weighing it with extreme care.

The learned trial Magistrate no doubt directed his mind to this principle of law in dealing with the evidence of the first prosecution witness. He said: "Having given the evidence of this witness a most careful scrutiny I am satisfied that she is a witness of truth". That is a sufficient warning. The argument on this ground must fail.

As to ground (*d*) that the learned trial Magistrate erred in law in not applying the principle of examining a child of tender years before she was sworn, the reception of the evidence of a child of tender years is regulated by sections 154 and 182 of the Evidence Ordinance, Cap. 63. Section 182 is identical with the provisions of the Children and Young Persons Act, 1933, in England. The law in this respect is explicitly made clear by Lord Goddard, C.J., in *R* v. *Reynolds*, 34 Cr.A.R. 63. In his judgment the Lord Chief Justice stated as follows:

> "What had the Chairman to decide first of all? That is provided in section 38 (1) of the Children and Young Persons Act, 1933 which reads: 'While, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the Court understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth? The child's evidence in such a case has to be corroborated by other evidence on oath. When a child is put into the witness box, the presiding Judge has to decide first whether the child in his opinion, understands the nature of an oath. If the child does not possess sufficient intelligence to understand the nature of an oath, the Judge must further consider whether the child is possessed of sufficient intelligence to justify the reception of unsworn evidence on the ground that it understands the duty of speaking the truth."

From the foregoing it is clear that before a child of tender years is allowed to give evidence, it is the duty of the presiding Judge to satisfy himself as to whether or not the child is in a position to be sworn: *R.* v. *Surgenor*, 27 Cr.A.R. 175. In order to form this opinion preliminary questions must be put to the child in open Court in the presence of the accused and the jury. In *R.* v. *Dunne*, 21 Cr.A.R. 176 it was held that the examination of the Judge out of Court of a child to determine competency to take an oath was illegal and sufficient to invalidate a conviction.

In the present case the learned trial Magistrate in his judgment admitted that the first prosecution witness was a girl of tender age. The notes of evidence merely state: "P.W. 1—OMATIE ANUMAMU; (aged under seven years sworn on the matchet ..... ".". There is nothing on the record to show that an investigation was first made in Court to justify admitting the child's evidence on oath. This is a serious omission. It is more serious than in *Dunne's* case where the investigation took place but not in open Court before the accused and the jury. The fact that in his judgment the learned Magistrate said that after hearing the evidence of the child in the witness box he came to the

conclusion that she was mentally capable of understanding and giving an intelligent account of the case to his satisfaction, cannot satisfy this condition precedent nor cure the irregularity. The next question to decide is whether the irregularity occasioned a miscarriage of justice as would invalidate the conviction of the appellant. The evidence of a child of tender age on oath does not require corroboration, although if uncorroborated it is customary to warn juries not to convict on such evidence of a child except after weighing it with extreme care.

The learned trial Magistrate failed as a condition precedent to satisfy himself that the first prosecution witness was aware of the responsibility of speaking the truth and of the obligations of an oath, before proceeding to record her evidence on which he principally acted in convicting the appellant. There was no material corroboration of the first prosecution witness's evidence, by an independent witness which might have helped to abate the irregularity. I hold that there is a miscarriage of justice here, and that the appeal should be allowed.

Appeal allowed. Conviction and sentence quashed.

Appeal allowed.

SALAWU OYETONA
OSENI OYETONA
IBILOYE OYETONA } ... ... *Plaintiffs*

v.

THOMAS AJANI ... ... *Defendant*

[HIGH COURT OF JUSTICE: Taylor, J., 8th June, 1959.]

Customary land tenure—whether land was communal land or Stool or Chieftaincy property attaching to Stool or family property of ruling houses—before ascending throne second ancestral ruler walled town land and so "earmarked" same as his family property later dealt with as such by him and his successors in title—the unpartitioned town land not Stool but family property of all his descendants—land granted by reigning Chief to stranger—members of ruling houses have no present exclusive possessory title entitling them to sue for trespass—contrary to customary law for reigning Chief as family head and trustee of land to dispose of part thereof to stranger without knowledge and/or consent of other members of ruling houses—appropriate remedy not trespass against his grantee whose grant not yet set aside.

The plaintiffs who were descendants of an Ataoja, the ruler of Oshogbo, claimed from the defendant damages for trespass alleged to have been committed by the defendant in erecting a mud building on their land at Oshogbo; they also asked for an injunction to restrain the defendant from further acts of trespass on the land. The evidence showed that the land of the present Oshogbo town was settled upon by the second ancestral ruler of the town after the death of his father who as Ataoja was the first ruler. This second Ataoja had sometime before he ascended the throne, and after he had led his people away from the land where his father had died, walled the new Oshogbo where he had settled and old Oshogbo as well. Subsequently he and his successors as Ataoja farmed on land at Oshogbo (not partitioned) and disposed of the same by way of temporary and absolute grants to indigenes, strangers and members of their own ruling families. The defendant in the present case had been granted the land in dispute, a portion of old Oshogbo, by the present reigning Ataoja of Oshogbo.

Held: (1) that the land in dispute was not communal land which was land belonging to the community and did not attach itself to a Stool or title;

(2) that the main issue was whether the land in dispute formed a portion of the Stool or Chieftaincy property of the Ataoja of Oshogbo and attached to his title or whether it was the family property of all the ruling houses of Oshogbo who were descended from the original Ataoja;

(3) that in order to maintain an action for trespass the plaintiffs must have a present possessory title—an owner of land who is legally entitled to possession not being competent to maintain an action for trespass before entry—and that bare assertions by the plaintiffs as members of a branch of the ruling houses of Oshogbo without evidence of some physical expression of ownership or possession over the land in dispute were not sufficient to prove a right to its present and exclusive possession;

(4) that, as regards the contention that even if the plaintiffs *qua* representatives of their father's branch of the ruling families of Oshogbo were not alone entitled to possession but were so entitled only jointly with the other members of families, then the action would still be sustainable in so far as any member of a family which is in possession might sue to protect the possession of the family, the evidence had shown that the second Ataoja by walling the old and the new towns of Oshogbo some time before he was installed as Chief, had "earmarked" the land in both places as his property which he and his successors in title later dealt with as such and which, in contradistinction to a royal estate or Stool land held by a Chief in his representative or constitutional capacity, vested in himself and his family or descendants beneficially;

(5) that according to the well-known principle of customary law the present Ataoja of Oshogbo as Chief and head of the ruling families held the land in question as trustee for the use and benefit of those families and so could not validly deal with the same without the knowledge and/or consent of the principal members of the families;

(6) that the present reigning Ataoja of Oshogbo in having granted the land in dispute to the defendant without as much as a word to any member of the ruling families had acted contrary to customary law;

(7) but that the way to challenge such a grant was not by an action for trespass against the grantee as long as the grant subsisted and had not been set aside by those members of the ruling families entitled to do so.

Judgment for defendant.

Cases cited:

Oyekan v. *Adele*, 14 W.A.C.A. 209.

F. B. Awooner Renner and others v. *J. E. Annam and others*, 2 W.A.C.A. 258.

Will v. *Will*, 5 N.L.R. 76.

Amodu Tijani v. *Secretary, Southern Nigeria*, [1921], 2 A.C. 399.

Ibadan Suit No. I/81/56.

Ayoola, for Plaintiffs.

Olukoya, for Defendant.

Taylor, J.: The plaintiffs' claim against the defendant is for the sum of £550 being general damages for the trespass alleged to have been committed by the defendant on the plaintiffs' land at Oshogbo Bye-pass by the erection of a building on the land in spite of warnings and protests from the plaintiffs. A further claim is made for an injunction to restrain the defendant from trespassing further on the said land.

The plaintiffs assert their claim to the area in dispute by virtue of the original ownership of the same by Laomi Oyipi, their ancestor, more than 100 years ago and from whom the plaintiffs' father by name Oyetona inherited the same. The plaintiffs succeeded their father and inherited the land from him. The first plaintiff at the hearing gave evidence of the traditional history of the land in dispute as well as deposing to acts of ownership exercised by his predecessors-in-title and the present members of his family over the land in dispute. It is the plaintiffs' case both in the matter of traditional history and acts of ownership that Laaro and Oyipi both came to Oshogbo together and founded it. That at a later period of time Oyipi became an Ataoja and it was during this period that he is alleged to have given this piece of land to his son Oyetona. After

the death of Oyetona the three plaintiffs are said to have planted cocoa, yams, plantains and other crops on the land. The land in dispute is however only a small portion of the area originally settled on by Oyipi. Another portion of this area measuring some twenty acres was acquired by the Native Administration for the establishment of a fuel plantation and for this the plaintiffs were duly paid compensation after due action taken in Court to establish their rights to the area. The plaintiffs being descendants of an Ataoja are members of the ruling families in Oshogbo, and while asserting that each ruling family has its own property he (the first plaintiff) denies that all the land within the town walls of Oshogbo was stool property, admitting only that unoccupied land fell within such description. He denied under cross examination that Ontoto was the founder of Oshogbo and the first Ataoja. I was impressed by the way this witness frankly and genuinely admitted errors in his evidence in chief on the issue o the traditional history relating to the land and the way he was adamant where he felt his own version of such history was the correct one. It is his case that the present town of Oshogbo is the property of the descendants of both Laaro and Oyipi the original settlers thereon but that each branch had its own separate property from which its descendants received grants, and, in respect of the land in dispute as a portion of that owned by Oyetona, he says that he has been farming on it for the past thirty years. Now throughout the cross-examination of this witness as indeed throughout the case for the plaintiffs and part of that for the defence there was no suggestion or hint that one Adedotun Akanni, the fifth witness for the defendant, was the person in physical possession of the area in dispute let alone the grantee of such land. In fact the Statement of Defence on that point states in paragraph 15 as follows:

> "That all the members of the ruling houses desiring to do so have acquired portions of the said Old Oshogbo land, as well as other private individuals, deriving title from the ruling Ataojas for farming purposes only, but this particular piece of land in dispute did not include that acquired by Oyetona family or by the plaintiffs or by anybody else".

Raji Akinlade, the second witness for the plaintiffs, deposed to being a grantee of the plaintiffs' family on the land in dispute and to his planting yams, cocoa, cassava and *pakaia* on such land. His father was on the land before him and the grant was a life's grant renewable by the descendants of the grantee. The surveyor who was the next witness did not however support the evidence of the last witness or that of the first plaintiff for he did not see any cocoa trees or plantation of any sort on the land in dispute, though he saw that the land had been recently cleared and the building the subject matter of this action had been erected at the time he did his survey of the land.

The defendant on the other hand gave evidence that the land in dispute was stool property and that it was granted to him by the present Ataoja of Oshogbo about five years ago and on it he had erected a mud building which took him three months to complete. In spite of the admission of paragraph 10 of the Statement of Claim by paragraph 8 of the Statement of Defence with the exception of the word "unlawfully" contained therein, he now says that the building was completed before he received any warning. He openly admitted that before he went into occupation he made no enquiries as to whether the land was occupied or not. The grant to him he says was a free and absolute grant of an area of land 100 feet × 100 feet and yet in spite of this absolute grant he says that in the next year the area granted to him was reduced by the Ataoja to 100 × 60 feet. The next witness was Samuel Adenle, the present Ataoja of Oshogbo.

His evidence of the traditional history of Oshogbo varies from that of the first plaintiff as regards the original settler in Oshogbo whom he said was Ontoto and not Laaro or Oyipi as also on the point of who were the succeeding Ataojas. They are both however agreed that Oyipi, the plaintiffs' ancestor, was at one time an Ataoja.

The real and main issue in this case is whether the land in dispute formed a portion of the stool property of the Ataoja of Oshogbo or whether the plaintiffs' family were the grantees of such land or thirdly whether it was the family property of the ruling houses of Oshogbo. It is true that this is an action for trespass and an injunction but the plaintiffs' claim to possession or right to possession cannot be divorced from the traditional evidence as to the original nature of this land *vis-a-vis* the original settler thereon and once we accept that then the matter set out by me as being the main issue must play a part in the eventual outcome of this case. On this point the second witness for the defendant continued as follows:

> "The land in dispute is communal land under the trusteeship of the Ataoja and the Chiefs. The whole of Oshogbo belongs to every reigning Ataoja who can apportion it to anyone".

By this I take it that he is in effect stating that well-known principle of Native Law and Custom on land tenure that the Oba, Chief or Head of a family holds land to the use of or for the benefit of the people or family and that he may not in any way deal with the land without the knowledge and/or consent of the principal Chiefs or principal members of the family, *i.e.*, of course, where the land is communal land or family land. But this evidence that the land is communal land is in conflict with paragraph 12 of the Statement of Defence which states that—

> "When the new Oshogbo town was founded, the old Oshogbo town became stool property and it was and still is the custom that all lands falling within the town walls are held for life by any ruling Ataoja remainder over after his demise to the successor-in-title".

Paragraph 13 goes on to state that the land in dispute was a portion of the Old Oshogbo town and is therefore the property for life of the present Ataoja. But we know that communal land, as the word denotes is land belonging to the community, village or family and never to an individual nor does it attach itself to a title. Stool land on the other hand attaches itself to the title or stool or as it is described in the case of *Oyekan* v. *Adele*, 14 W.A.C.A. 209, it is a "royal estate". Leaving that point of contradiction and continuing with the evidence of this witness he deposed as follows:

> "Laaro built a wall round the old and the new Oshogbo town and made it his own property. From there he used to apportion and give land to anyone who migrated to Oshogbo. The people of Oshogbo used to farm there for Laaro and any proceeds from the farm they pay to Laaro and this they do up to today. The Ataoja reaped the palm fruits on all this area within the town walls. Anyone coming to Oshogbo to build a house is granted land by the Ataoja."

The evidence of this witness throughout his evidence-in-chief and cross-examination has been one of a continuous shifting of his ground from an assertion that the property is stool property and then that it is communal property and an occasional bold assertion that it is the personal property of the Ataoja. He gave evidence of various grants made by some Ataojas, as for example land on the East, said to have been made by Ataoja Latona to the Baptist Mission and land shown as O.D.C. School said to have been granted by Ataoja Gbeja to the C.M.S. Mission and others. He then gave evidence

of the grant by the Council, of which he is the president, of land 100 feet by 100 feet to the defendant within that in dispute and a later derogation of grant by cutting this area down as a portion of the power house fell within this area. This is not however correct for from the defendant's outhouse, in an easterly direction, to the front of the house, by the scale shown therein, is about 120 feet long and from the northern end of the building to the northern portion of exhibit "A" is about 90 feet long. There is another 100 feet or more in that direction before one comes to the area shown on the plans exhibits "D", "G" and "G1" and "J" as the electric power house. It is not therefore true that any portion of the area 100 feet by 100 feet within and around the house of the defendant from whatever angle one looks at it contains any portion of the power house.

Then comes exhibit "H". I am not sure what was the object of tendering this document in the sense that I am not sure whether the defence tendered it genuinely believing that it had a bearing on this case and this area in dispute in particular or whether the intention was not to draw a red herring across the trail. The second witness for the defendant deposed that the area in dispute and other areas nearby have since 1954 been made the subject matter of an allotment for the purpose of erecting buildings thereon. It is however clear to me that the area covered by the allotment plan is much to the South of the land in dispute and is shown in exhibits "D", "G" "G1" and "J" from the southernmost tip of the Awopa Stream to or by the bridge across the Oshogbo-Ede road under which the Apun Stream flows. The layout plan therefore does not cover the area in dispute. One can go on pointing out the inconsistencies in the evidence of the second witness for the defendants for I regret to say that they are many and though as it will be seen when I come to sum up and tabulate the facts accepted by me I have taken quite a great deal from his evidence as to the traditional history of the land yet on other matters again I regret to say that his evidence has been made to suit the case and not independent of it. This witness went on to say that—

> "Each ruling house in Oshogbo has not its own separate property within the town wall",

and yet in suit No. I/78/56 where he was defendant, his Statement of Defence exhibit "E", paragraph 3 reads as follows:

> "The defendant has obtained the order of Court to file a plan and this is attached hereto showing the portion claimed by the defendant as stool's property and that belonging exclusively to other ruling families of Oshogbo".

Exhibit "J" is the plan referred to therein and "D" is the amended plan.

Now it is peculiar that if his evidence as opposed to his Statement of Defence exhibit "E" is correct and no ruling house had separate property within the town wall, the plaintiffs should have been awarded compensation on the acquisition of the area edged green in exhibits "J" and "D" on the basis of title being in them. On this same point this witness further deposed that—

> "Other families than the plaintiffs' owned land at the time of the acquisition. These other parties were also descendants of Ontoto."

The time referred to therein is the time of the acquisition of the area edged green in exhibits "D" and "J" and we know further that the whole area of some 196 or 198 acres acquired fell within the area depicted in these exhibits. Finally he says that the whole of the land in exhibit "D" is still Ontoto family land as those on the land have only temporary occupation and that the land has not been partitioned. Now if the land is

Ontoto family land, it can obviously not be stool property. The existence of the twenty acres in respect of which compensation was paid to the plaintiffs and the existence of the other 176 or 178 acres edged brown in exhibit "J" and in respect of which this witness further deposed that—

"The other families granted the remaining acres beyond the plaintiffs' twenty acres" has led me to the conclusion, in addition to other matters, which is contained at the conclusion of this judgment. Now up to this stage of the defence and the evidence of the Council Clerk who was the next witness, but whose evidence was of no importance, there was no evidence led by the defence of any grant of this area in dispute, and shown in exhibit "A", to anyone. After the adjournment it would seem that a futile attempt was made to bolster up the defence and the first witness called on the following day, to wit, the fourth witness for the defendant, Lawani Adegboye, deposed to a grant about forty-eight years ago to one Oyedotun who is alleged to have been using the land since and to have planted cocoa and koia, etc., on the land which are still there today. When asked for the boundary of the land given to Oyedotun, he gave a boundary which cannot be traced from any of the plans tendered in Court and which undoubtedly existed only in his own imagination. He did not even know the name of the alleged grantee for the fifth witness for the defendant, Adedotun Akanni, says that he was the grantee but that he was never known as Oyedotun. Now to make confusion—the confusion created by the evidence of the second witness for the defendant was confounded—Adedotun states that the area in dispute, and which is alleged to have been granted by the second witne s for the defendant to the defendant without consulting any member of the ruling classes, was in fact granted, to his second witness for the defendant's father, Lawale, an Ataoja, absolutely. He too gave evidence of a fictitious boundary of the land alleged granted to his father and the imaginary crops like cocoa, kola, etc., which existed on the land in dispute. The evidence of the last and sixth witness for the defence, Lawani Oyeriyi which supported that of fourth and fifth witnesses for the defendants was as worthless as that of the two witnesses just referred to, on the subject of the grant to Adedotun.

Such was the evidence led at the trial, a great deal of which was false and completely unreliable and this not so much on matters of tradition where one would by the very nature of traditional evidence expect a variance, but on events taking place within living memory. In such a case as this one has to look at the facts as they exist today as pictured by the plans tendered in evidence, and the evidence of witnesses on both sides with a view to seeing which version is the more probable one or as in this case which portions in the evidence of the witnesses are more likely to be true and then to endeavour to piece them together as much as is possible into a complete whole.

This would I think be a convenient stage to examine the evidence in the light of the plans exhibits "A", "D", "G", "G1" and "J", the last four being as near as is necessary for the purposes of this case carbon copies of each other. Taking first exhibit "A", the plaintiffs' plan of the land in dispute, we find that such land is said to be bounded by the Oshogbo-Ede Bye-Pass on the east, and on the other three boundaries by the land of the plaintiffs' family in addition to a stream on the western boundary. The first plaintiff and the second witness for the plaintiffs gave evidence of the crops existing on the land in dispute as did the defendant's witnesses, but the plan does not show that any crops or trees exist on the land and the surveyor also testified to this. If there had been any on the land in dispute and any damage had been done to them I would have been greatly surprised not to have found a claim for special damages or in the case of the second witness for the plaintiff, he would have mentioned the damage done to his trees, etc. I therefore find that no plantation of any kind in fact exists on the land in dispute.

If however the plaintiffs are able to show that the surrounding land as shown on the plan is their land on which acts of ownership have been exercised, then it is my view that the land in dispute which is surrounded by such land can be said to be as a result, in the possession of the plaintiffs even if they have planted nothing on it and provided there is no evidence of a grant of it to any one. On this point too exhibit "A" is of no assistance and it is necessary to look at the other exhibits. The area now in dispute is shown on the north-east of all these plans and a long arrow specifically pinpoints it on exhibit "J" and shows the house erected thereon. In all these plans, again, we find nothing by way of economic trees or crops or farming of any sort on the land to the north, south or west of the land in dispute. In fact on land to the south and to the north, and at regular intervals we find the existence of electric poles and in addition we find on land to the north a building described as an electric power house. If this land to the north and south of that in dispute were therefore in the plaintiffs' possession evidence would or should have been forthcoming as to the circumstances leading to the erection of this power house and electric light poles on the land. In fact the evidence as to the existence of the power house and the grant of land in respect thereof came from the second witness for the defendant.

In the case of *F. B. Awooner Renner and others* v. *J. E. Annan and others*, 2 W.A.C.A. 258, Deane, C.J., stated the well known principle of the law of trespass as follows:

> "A trespass to land is an entry upon land or any direct and immediate interference with the possession of land.....and it follows that in order to maintain an action for trespass the plaintiff must have a present possessory title an owner of land who is legally entitled to possession not being competent to maintain an action for trespass before entry".

The plaintiffs have not in my view showed that right which is described by Webber, J., in *Will* v. *Will*, 5 N.L.R. 76, as a right to the exclusive possession of real or corporeal property and which right of title must be a present possessory one. Bare assertions without the garment of evidence of some physical expression of ownership or possession over a portion or portions of land in dispute or in its neighbourhood and adjoining it is insufficient. The plaintiffs' case as it stands must be and is dismissed, but Mr Ayoola in his address endeavoured to prop his case on a second leg which is not contained in either the writ or the Statement of Claim, but to which I intend to give due consideration in view of the evidence led at the trial, the fact that this second leg if I may so call it is as it were a lesser right than that contained in the writ and finally in view of the relationship existing between the parties, *i.e.*, the plaintiffs' and the defendant's grantor. Mr Ayoola contended that even if I find that the plaintiffs *qua* representatives of the Oyetona family are not alone solely entitled to possession, but are entitled to possession jointly with the other members of the ruling families in Oshogbo, then the the action is still sustainable in so far as any member of a family in possession may sue to protect such possession of the family. This of course depends on whether I find as a fact that the land in dispute is stool property or whether it is property belonging to the descendants of Ontoto *qua* Ontoto or Laaro *qua* Laaro and not in both cases as Ataoja of Oshogbo. After a full consideration of the evidence before me I have come to the following findings of fact:—

> "That Ontoto migrated from Ipole with his supporters to the Banks of the River Oshun where they settled and Ontoto later became the Ataoja. At some period of time the river Oshun flooded its banks and the houses and properties of Ontoto and his followers were destroyed and Ontoto himself died sometime after. It was now left to his son Laaro to lead the people across the banks of the Oshun to the site where the present Oshogbo town is situated. Laaro at a later time became Ataoja having

been installed after the death of his father. The evidence before me is vague as to the time he was actually installed as such, whether it was before he led his party across the Oshun or sometime after. Subsequent events convince me that it was sometime after that he was installed as Ataoja. Now before that time he walled the old and new Oshogbo and on the words of the present Ataoja, the second witness for the defendant, "made it his own property". There is no need for me to relate the line of succession of the various Ataojas after Laaro for it is not important from the point of view of this case and suffice it to say that I find that Oyipi was a descendant of Laaro and that he too in due course became an Ataoja. Now the area shown in exhibit "D" which also includes the smaller area in dispute was within the area walled by Laaro and which he made his own property and from which, to use the words of the second witness for the defendant again "he used to apportion and give land to anyone who migrated to Oshogbo".

Is such property therefore stool property or property belonging to Laaro and members of his family? In the case of *Amodu Tijani* v. *Secretary, Southern Nigeria* [1921] 2 A.C. 399, at p.410, Lord Haldane observed as follows:

> "Their Lordships doubt whether any really definite distinction is connoted by the expression 'Stool Lands'. It probably means little more than lands which the Chief holds in his representative or constitutional capacity as distinguished from land which he and his own family hold individually".

The learned Chief Justice, Sir John Verity, in the case of *Oyekan* v. *Adele*, 14 W.A.C.A. 209, at p.214, and from which the above statement is culled went on to comment as follows:

> "It would appear therefore that the estate or interest vested in the ruler in royal estates or stool land is to be distinguished on the one hand from land vested in him beneficially as absolute owner alienable by him at will and on the other hand land vested in himself and his family beneficially and of which the Chief as head of the family is sometimes referred to as a trustee".

The plaintiffs and the second witness for the defendant and the princes of Oshogbo being all descended from Laaro who, in order to "earmark" this property walled it, are all in my view beneficially entitled to this property in dispute and the second witness for the defendant by virtue of his position as the head of the family is the "Trustee" of such land for his family. The area covered by the wall was not partitioned, but various Ataojas used it for farming, and from the evidence available it would seem that they made grants to indigenes, strangers, bodies corporate and to members of their own ruling families. Some of these grants were temporary and some were absolute. I reject the evidence of the fourth, fifth and sixth witnesses for the defendant for I do not believe that the area in dispute previous to the alleged grant to the defendant was ever made the subject of a grant to anyone. In view of what I have said as to the nature of this property in dispute there can be no doubt that the action of the second witness for the defendant in making the grant to the defendant without as much as a word to any member of his family or should I say any member of the family of Laaro is certainly contrary to Native Law and Custom and therefore wrong, but further than that I cannot go, on the claim before me. The way to challenge such a grant is not by way of an action for trespass against the grantee as long as the grant still subsists and has not been set aside by those members of the family entitled to do so. On this alternate leg too the plaintiffs must fail and I do dismiss this action with costs to be assessed in favour of the defendant.

Judgment for defendant.

CHIEF AWODIYA, ODOLE OF ILESHA ... ... *Plaintiff*

v.

1. JOHN APOESHO
2. AYENI TOGUN ... ... *Defendants*

[HIGH COURT OF JUSTICE: Taylor, J., 15th June, 1959.]

Customary land tenure—acquisition of landed property by Chief after his installation as Chief—whether property belonged to Stool or chieftaincy or to the chief as an individual —interest of successive chiefs only for life—mode of user of property after acquisition incapable of converting same to absolute family property of chief as an individual.

The plaintiff as Chief Odole of Ilesha claimed a declaration of title to a piece of land within Oshun District and an injunction to restrain the defendants from committing further acts of trespass thereon. It was proved that the defendants who were brothers were themselves members of the Odole Chieftaincy family and that the land in question had been given by the then Owa of Ilesha to the then Chief Odole after the latter's installation as one of his subordinate Chiefs.

Held: that in Nigeria and particularly in the Western Region thereof property acquired by a Chief while on the Stool, provided it was not acquired with funds from his personal estate which should be "earmarked" before he came on the Stool, was Stool property; that while he was on the Stool his title as Chief was in the forefront and his individual capacity was relegated with the result that property given to him while a Chief was given to him because of the position he held unless the contrary was specifically made clear, and that therefore at the time of the grant to Chief Odole the property in question in this case became the Stool property of the Odole Chieftaincy.

Obiter: There is no known custom or case law which would support a contention that even if originally property was Stool property subsequent user by members of the Chieftaincy family could make it family property for once property is Stool property, the interest of the occupier of that Stool in the property is a life one and such occupier cannot by his user and that of the subsequent holders of the Chieftaincy title convert his life estate into a larger one of absolute ownership vested in himself and his family.

Judgment for plaintiff.

Cases cited:

Nana Ayirebi Acquah II v. *Nana Tawia Ababio*, 12 W.A.C.A. 343.

Yamuah IV v. *Sekyi*, 3 W.A.C.A. 57.

Ibadan Suit No. I/317/57.

Adeyefa for Plaintiff.

Olowofoyeku (*Omisade* with him) for Defendants.

Taylor, J.: The plaintiff as the Odole of Ilesha claims a declaration of title to the ownership of a piece of land within Oshun District, and an injunction to restrain the defendants from committing further acts of trespass.

At the hearing of the case quite a great deal of needless evidence was adduced for as agreed by both Counsel on my suggestion, the issues arising from the pleadings are two fold and may be stated as follows:

1. Is the property in dispute Stool property of the Odole of Ilesha or is it Odole property?

2. Are the defendants members of the Odole Chieftaincy Family?

I will take the second of these issues first and dispose of it shortly as follows: I am satisfied on the evidence before me that the defendants are members of the Odole Chieftaincy Family. Further I hold that the matter has already been adjudicated upon by a competent Court in suit No. 71/53 in the Ilesha Lands and Civil Court where the Odole family sued the present first defendant for, *inter alia*, a declaration that the first defendant is not a member of the Odole family and that Court held as follows:

"Court declare that defendant Apoesho family is a member of Odole family according to the evidence in the Court".

It is true that the present second defendant was not specifically a party to that suit though at page 2 of the record he was amongst the ten members of Apoesho family present in Court. There can be no doubt that, from a glance at the record and particularly at pages 1 and 2, the action was between the Odole and the Apoesho families. But be that as it may, on the evidence before me in these proceedings that both the defendants are brothers, the second defendant must *ipso facto* also be a member of the same family as the first defendant.

I will now proceed to deal with the evidence relating to the first issue as to the nature of the property in dispute with reference to the Odole family or Stool. The evidence led in this respect was of a two fold nature to wit:

1. The mode of acquisition of the property, and
2. The use to which the property was put after acquisition.

On the first point the plaintiff deposed that Ologore Edu was the first settler on the land in dispute. That Ologore Edu came to Ilesha from Ife with the first Owa of Ilesha. That before he became the Odole of Ilesha he had only acquired a farm at Igun and after he became Odole he had seven others at—Ita Ogbogi, Ilaje, Odo, Oko Igbo, Eringan and the one in dispute at Iloba. How he acquired these farms he did not say, nor were the next two witnesses of any assistance on this point. Jeje Ladele, the fourth witness for the plaintiff, deposed that after the Owa and Ologore Edu arrived in Ilesha, the Owa had first choice as to the area he desired to settle on and after his choice, he then gave land adjoining his to his subordinate, Ologore Edu. He supported the plaintiff as to the farm acquired by the Odole before his installation as such and differed from the plaintiff as to the number of farms acquired by the Odole after his installation. He put the latter at six whereas the plaintiff said that it was seven. They are however at one as to the acquisition of the area in dispute by the Odole after his installation. He was the only witness for the plaintiff who gave evidence of the acquisition of this land by Ologore Edu by a grant from the Owa though supported by the plaintiff as to the time of the acquisition, *i.e.*, after the installation of Ologore Edu as Odole.

The first defendant is in agreement with the evidence of Jeje Ladele on this point for he states as follows:

"The Odole was given this land in dispute by the Owa after he became Odole. The Owa gave the land to the Odole because they live in the same town".

The second defendant as will be seen from the record was the type of witness that one is unfortunately meeting with too often in these Courts in land matters; the type to whom the oath he took was a mere cloak for the false testimonies he was to give later.

He was in no way abashed at or averse to making two attempts to answer a question, the one attempt being the exact converse of the other. In one unguarded moment he admitted that the property in dispute together with four others belonged to the Odole Stool. The only witness called in support of the defence did not give any evidence on this matter under consideration.

At this moment it is pertinent to ask how is Stool property acquired and whether there is any evidence before me of the mode of acquisition of this property from which one can infer that it is Stool property? In short when evidence is led that property is acquired by a Chief after his installation as such, does such property become *ipso facto* Stool property descending to each successive holder of the title for life? I have been unable to secure a reported Nigerian case on this point and I therefore turn to the only Ghanaian case that I have been able to lay my hands on for guidance. I refer to the case of *Nana Ayirebi Acquah II* v. *Nana Tawia Ababio*, 12 W.A.C.A. 343. M'Carthy, J.'s judgment on that page reads as follows:

> "In *Antu* v. *Bueda*, Gardiner Smith, J., in the Divisional Court accepted as a general principle of Native Customay Law that property acquired by a Chief, while on the stool belongs to the stool."

At page 344 the judgment continues in this strain:

> "The rule that property acquired by a Chief while on the stool becomes the property of the stool is subject to qualification, as is shown in *Yamuah IV* v. *Sekyi*, 3 W.A.C.A. 57".

The qualification need not crave out attention here. I have no doubt that in Nigeria and in particular the Western Region of Nigeria with which we are here concerned, property acquired by a Chief while on the stool, provided it is not acquired with funds from his personal estate which should be "earmarked" before he comes on the Stool, is Stool property. While he is on the Stool his title as Chief is in the forefront and his individual capacity is relegated with the result that property given to him while a Chief is so given to him because of the position he holds unless the contrary is specifically made clear. In this case before me the evidence, and overwhelming it is, adduced by the plaintiff, and it would seem supported by both defendants, is that the Owa of Ilesha gave this property to one of his subordinate Chiefs, the Odole, after the latter's installation as such. In addition we have the evidence of the plaintiff and Jeje Ladele and the second defendant that this property in dispute is Stool property. I find therefore that at the time of the grant to the Odole the property became the Stool Property of the Odole Chieftaincy.

A consideration of the second point, *i.e.*, the user to which this property has been put since the grant to the Odole can now serve no useful purpose in determining the nature of the property at the time of the grant in view of my findings above, but if I understand Mr Olowofoyeku's contention fully, he went so far as to submit that even if originally such property was Stool property, subsequent user by members of the family has made it family property.

I desire to make it abundantly clear that prior to the entry of the two defendants with their Urhobo tenants around 1955, I do not believe that the defendants farmed on the land in dispute. I reject the evidence of the two defendants—the first defendant to the effect that his father put the tenants on the land in dispute and collected *ishakole* from them which he shared only amongst his family—and the second defendant to the effect that his father was put on the land one hundred years ago by the head of the Odole

family. In short I reject the defence wherever it conflicts with the case for the plaintiff as contained in the evidence of the plaintiff, the third, fourth and fifth witnesses for the plaintiff on this point now under consideration. I fully realise that some discrepancies exist in the evidence of those witnesses and in some when their evidence is read together with their evidence given in exhibit "B", but on the facts necessary for the determination of the first point their evidence was more or less consistent. These findings of fact also dispose of the second point raised by the learned Counsel for the defence.

I would add however as *obiter* that I know of no custom or case law which would support the second contention of the learned Counsel for the defence for once property is Stool property, the interest of the occupier of that Stool in the property is a life one and I fail to see how he could by his user and that of the subsequent holders of that title in effect convert his life estate into a larger one of absolute ownership vested in himself and his family.

In my view the plaintiff is entitled to succeed on the first part of his claim for a declaration of title under Native Law and Custom to the area shown in exhibit "A" and edged pink therein as the Stool property of the Odole Chieftaincy and I so grant him such a declaration.

The second part of his claim in his writ reads: "an injunction to restrain the defendants from trespassing into the land" whereas the Statement of Claim reads just a bare injunction. In view of the pleadings in this suit and the main body of the evidence on this point which was directed at the acts of the defendants in disturbing the tenants of the Odole on the land and placing their own tenants on the land, there will be an injunction to restrain the defendants, their servants and agents from disturbing in any way the tenants placed on the land by the Odole without the latter's permission or consent. The injunction will also be to restrain the defendants from putting tenants on the land or collecting *ishakole* from tenants on the land or farming thereon without the consent and permission of the Odole. On this point of injunction, Mr Olowofoyeku for the defendants contends that such injunction should not be granted because it is possible that the defendants may themselves become the Odole. If and when that takes place they obviously become vested with the ownership of the property for life and the injunction made against them in another capacity ceases to have any effect. The defence to the first part of the claim is in my view most frivolous on the evidence of the two defendants themselves. The plaintiff is entitled to his costs to be assessed.

Judgment for plaintiff.

CHIEF G. O. OWEH ... ... *Plaintiff*

v.

THE AFRICAN PRESS LIMITED ... ... *Defendant*

[HIGH COURT OF JUSTICE: Hedges, Ag.C.J., 24th June, 1959.]

Defamation—libel—damages already recovered in different suit against other defendants for substantially same libel—damages against present defendants to be mitigated accordingly—applicability of English law (Law of Libel (Amendment) Act, 1888, section 6) on which section 9 of Defamation Law, 1958, No. 42 of 1958 based.

In an action for libel the defendant admitted liability but pleaded in mitigation of damages the fact that the plaintiff had recovered damages in an action brought in the High Court of Lagos against other defendants but for substantially the same libel.

Held: that the plaintiff having vindicated his character in the previous case it would not only be inequitable to award him damages on the same scale as in that case but also contrary to express statutory provisions in force in the Region at the date of the writ, *viz.*, section 6 of the Law of Libel (Amendment) Act, 1888, upon which was based section 9 of the Defamation Law, 1958, No. 42 of 1958 which came into operation after that date.

Judgment for plaintiff.

Ibadan Suit No. I/168/57.

Ogunsanya for Plaintiff.

Akerele for Defendant.

Hedges, Ag.C.J.: This is an action in which the plaintiff claimed £30,000 damages for libel in respect of an article published in the "*Nigerian Tribune*" on 4th August, 1955, under the caption: "Serious Allegation against Mr Oweh".

The defendant admitted liability, but the parties could not reach any agreement on the question of damages and that is the only issue before this Court. It was admitted on both sides that the plaintiff had brought an action in the High Court of Lagos against the Amalgamated Press of Nigeria Limited and others in respect of defamatory words of substantially the same nature and had been awarded damages amounting to £1,750. The judgment in that case was upheld on appeal to the Federal Supreme Court.

Mr Ogunsanya, Counsel for the plaintiff, argued that the damages should be at least as high as those awarded in the High Court of Lagos.

Mr Akerele, Counsel for the defendant, argued that the plaintiff had already vindicated his character in a previous action and that this should be taken into account in assessing damages.

No reference was made by either side to section 9 of the Defamation Law, 1958, Western Region Law No. 42 of 1958, which is as follows:

"In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages or has brought actions for damages for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded or has received or agreed to receive compensation in respect of any such publication".

Although that Law was not in force at the date of the writ, the English law on which it was based was in force thoughout the Federation.

In my view, not only would it be inequitable for me to award damages on the same scale as those awarded in the previous case, but also I am precluded from doing so by the express terms of statutory legislation in force in Nigeria.

There is another reason why damages should be considerably less in the present case. In giving judgment in the case against the Amalgamated Press of Nigeria Limited, de Lestang, Ag.F.C.J., said:

"In assessing the damages the learned trial Judge rightly, in my view, took into consideration the conduct of the appellants, the fact that they pleaded justification without good cause, and their attempt at the trial to attack the character of the respondent".

In the present case these considerations do not apply.

Having regard to the fact that the plaintiff has already vindicated his character and to the clear directions of the law in such cases I assess the damages at £100.

Judgment will be entered for the plaintiff and I award the sum of £100 as damages together with costs which I will now assess.

Judgment for plaintiff.

COMMISSIONER OF POLICE ... ... *Appellant*

v.

H. ATAMIEN ... ... *Respondent*

[HIGH COURT OF JUSTICE: Thomas, J., 30th June, 1959.]

Criminal law—stealing—contra *section 390 (6) of Criminal Code, Cap. 42—sections 198, 201 and 202 of Local Government Law, 1957, Western Region Law No. 12 of 1957 not relevant to charge—issue was only whether stealing as defined in section 383 (f) of Criminal Code proved—misdirection on point of law—contrary to public policy to apply section 201 of Western Region Law No. 12 of 1957 in instant case in absence of express legislation to that effect.*

On a charge of stealing contrary to section 390 (6) of the Criminal Code, Cap. 42, against the respondent, a Tax Clerk employed by a local government council, the trial Magistrate had acquitted and discharged him on the ground that by virtue of section 201 of the Local Government Law, 1957, Western Region Law No. 12 of 1957, the respondent was not liable either civilly or criminally even though he had admitted using money which had been collected by him and which should have been paid into the Treasury. On appeal it was argued that the trial Magistrate had, in taking the view that he did, misdirected himself on a point of law since section 201 of Western Region Law No. 12 of 1957 did not apply to a criminal prosecution.

Held: (1) that it was clear from the terms of section 201 of the Local Government Law, 1957, that its provisions referred only to the repayment of money surcharged, etc., by an auditor in accordance with the provisions of section 198 of that Law, which surcharged amount could be recovered under section 202 as a civil debt;

(2) that there was no express provision anywhere in the Local Government Law to the effect that an employee of a council could not be prosecuted under the Criminal Code for stealing council property and that in the absence of such an express provision it would be contrary to public policy to apply the provisions of section 201 so as to exempt the respondent from criminal liability;

(3) that the issue before the trial Magistrate was really whether the facts of the case showed beyond reasonable doubt that the offence of stealing with the intent defined in section 383 (*f*) of the Criminal Code had been committed;

(4) that in the circumstances the trial Magistrate had misdirected himself on a point of law and that therefore his order of acquittal and discharge must be set aside.

Appeal allowed.

Benin Criminal Appeal No. B/27.CA/59.

Eboh, Senior Crown Counsel, for Appellant.

Ogbe for Respondent.

Thomas, J.: The respondent, who was a Tax Clerk employed by the South Ishan District Council was charged with stealing £911 7*s* 6*d*, the property of the Council contrary to section 390 (6) of the Criminal Code.

At his trial, he was discharged and acquitted by the learned Senior Magistrate who held that by virtue of section 201 of the Local Government Law, 1957, Western Region Law No. 12 of 1957, the respondent was not liable either civilly or criminally.

Against this decision the appellant has appealed on the following ground:—

"The learned trial Magistrate misdirected himself on a point of law by discharging the accused person on the ground that section 201 of the Local Government Law, 1957, had not been complied with, when the section does not apply to criminal prosecution."

The books of the respondent were checked in July 1957, when he produced the the sum of £48 9*s* 11*d* as money collected and not yet paid into the Treasury. It was pointed out to him that, the amount of money remaining unpaid to the Treasury was £962 7*s* 11*d* collected between the 2nd of April, and the 19th of July, 1957.

He explained that he was unable to produce the difference of £913 18*s* as he had actually used it and on the 2nd September, 1957 confirmed it in writing. He was therefore charged as stated above.

I will refer to sections 198, 201 and 202 of the Local Government Law, 1957—

"Section 198. It shall be the duty of an auditor at every audit held by him—

(*a*) to disallow any item of account which is contrary to law or Financial Memoranda issued under section 119, or is unsupported by proper records or accounts, or which he considers unreasonable;

(*b*) to surcharge the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure;

(*c*) to surcharge any sum which has not been duly brought into account upon the person by whom that sum ought to have been brought into account;

(*d*) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred;

(*e*) to certify the amount due from any person upon whom he has made a surcharge; and

(*f*) to certify, at the conclusion of the audit, his allowance of the accounts subject to any disallowances or surcharge which he may have made:

"Provided that no expenses incurred by a Council shall be disallowed by the auditor, if they have been sanctioned by the Governor in Council or the Minister.

"Section 201. Every sum certified by the auditor to be due from any person shall be paid by that person to the Treasury of the Council concerned within sixty days after it has been so certified or, if an appeal with respect to that sum has been made, within thirty days after the appeal is finally disposed of or abandoned or fails by reason of the non-prosecution thereof.

"Section 202. Any sum which is certified by the auditor to be due and has become payable shall, on complaint made or action taken by or under the direction of the Minister, be recoverable as a civil debt."

It is clear that section 201 refers to surcharges, etc., in respect of section 198. These sums have to be certified by the auditor and can only be recovered in a civil action.

There is no express provision anywhere, in the Law to the effect that an employee of a council cannot be prosecuted under the Criminal Code for stealing council property.

Section 201 of the Law cannot just be presumed in favour of the respondent. There is no evidence that his account was audited for any of the purposes of section 198 and that the auditor gave him a certificate in terms of section 198 (*f*).

The learned Magistrate in his judgment, *inter alia* stated as follows:

"The accused was charged under section 390 (6) of the Criminal Code and it will appear that he comes within the definition of stealing as contained in section 383 (*f*)—

> in the case of money, an intent to use it at the will of the person who takes or converts it although he may intend afterwards to repay the amount to the owner."

That was the issue before the learned Magistrate and his duty was to consider whether the prosecution had proved their case beyond reasonable doubt in the light of the evidence before him.

No contract of service of the respondent was ever tendered showing that he had a right to keep and use the money. It would be contrary to public policy to apply the provisions of section 201 in the instant case in the absence of express legislation to that effect as the Criminal Code is of general application.

I will therefore uphold the submission of the appellant's Counsel on the ground of appeal filed and allow the appeal.

The order of discharge and acquittal is hereby set aside. The Court below to carry out the order.

Appeal allowed.

CYRIL AREH ... ... *Accused/Appellant*

v.

COMMISSIONER OF POLICE ... *Complainant/Respondent*

[HIGH COURT OF JUSTICE: Kester, Ag.J., 10th July, 1959.]

Criminal law—conduct likely to cause breach of peace contra *section 249 (d) of Criminal Code, Cap. 42—no proof that place where offence alleged committed was "public place" within the definition of section 1 of Cap. 42—whether Court could take judicial notice under section 73 (1) of Evidence Ordinance, Cap. 63, that the General Hospital, Warri is a "public place"—presumption of innocence casts on prosecution burden of proving every ingredient of offence—failure to prove any ingredient vitiated conviction.*

The appellant, a Policeman, had been convicted of the offence of conduct likely to cause a breach of the peace contrary to section 249 (*d*) of the Criminal Code, Cap. 42, in that he had on a specified date conducted himself as aforesaid "at the General Hospital, Warri.....in a public place". On appeal it was argued that the trial Magistrate's decision was erroneous in law since it was not established that the General Hospital, Warri, was a "public place" within the meaning of the definition of that expression in section 1 of Cap. 42 and since the fact in issue did not come within what the Court could have taken judicial notice of under section 73 (1) of the Evidence Ordinance, Cap. 63.

Held: (1) that it is a principle of law that the burden of proof lies upon the party who substantially asserts the affirmative of the issue and that generally in criminal cases (unless otherwise directed by statute) the presumption of innocence casts on the prosecution the burden of proving every ingredient of the offence charged;

(2) that a conduct likely to cause a breach of the peace, if not in a "public place", as defined in section 1 of the Criminal Code is not an offence within section 249 (*d*);

(3) that when certain elements go to constitute an offence, they must be strictly proved and the Court could not take judicial notice of such facts or action on its own private knowledge;

(4) that the failure of the prosecution to prove an essential ingredient of the offence charged, *viz.*, that the conduct took place in the public place, vitiated the conviction in this case.

Appeal allowed.

Warri Charge No. W/13.CA/1959.

Irikefe for Accused/Appellant.

Ogbe for Complainant/Respondent.

Kester, Ag.J.: The appellant, a Policeman, was charged along with another Policeman before the Magistrate at Warri, thus:

"That you on the 5th day of November, 1958, at General Hospital, Warri, in the Warri Magisterial District, in a public place conducted yourselves in a manner likely to cause a breach of the peace, and thereby committed an offence punishable under section 249 (*d*) of the Criminal Code".

The other accused policeman pleaded guilty and was dealt with. The appellant pleaded not guilty and stood trial. At the trial three witnesses were called by the prosecution. The accused gave evidence and denied the charge. He too called three witnesses to support his case.

At the end of the trial the learned trial Magistrate in his judgment found the charge proved and convicted the appellant. The Magistrate, however, took a lenient view of the case and ordered the appellant to enter into recognisance in the sum of £10 to be of good behaviour for six months. It is against this conviction that the appeal is brought.

The facts of the case are clear and need not be set out here. Two grounds of appeal are filed and only one, "Error in law", was argued. It was contended that the decision of the learned trial Magistrate was erroneous in point of law because the established facts did not disclose an offence under section 249 (*d*) of the Criminal Code as charged. The chief point of complaint is that there was no proof before the Magistrate that the General Hospital, Warri, is a public place within the meaning of a "public place" as defined in section 1 of the Criminal Code, Cap. 42, and that failure to prove that essential ingredient of the offence is fatal and that the conviction cannot stand. Counsel for the appellant also submitted that the Court cannot take judicial notice of the fact since it is not one of the facts stated in section 73 (1) of the Evidence Ordinance, Cap. 63, which the Court shall take judicial notice of.

All the witnesses called by the prosecution gave evidence only as to the conduct or behaviour of the appellant at the hospital on the day in question. There was no evidence called by the prosecution to prove that the General Hospital, Warri, is a public place so as to bring it within the section of the Code. It is a principle of law that the burden of proof lies upon the party who substantially asserts the affirmative of the issue; and generally in criminal cases (unless otherwise directed by statute) the presumption of innocence casts on the prosecution the burden of proving every ingredient of the offence. It is only at the close of the evidence that a verdict of guilty can properly be found, and then only if the evidence justifies it.

A conduct likely to cause a breach of the peace, if not in a public place, is not an offence within section 249 (*d*) of the Criminal Code; and like other acts which if done in a public place will amount to an offence, *e.g.*, affray, to support an indictment, the prosecution must prove among other things, the essential ingredient that it took place in a public place. *Roscoe's Criminal Evidence* (16th Ed.) p.345.

When certain elements go to constitute an offence, they must be strictly proved and the Court cannot take judicial notice of such facts or action on its own private knowledge. It is therefore wrong for the learned trial Magistrate in the absence of proof of an ingredient of an offence, to proceed to conviction.

The failure to establish by proof that the General Hospital, Warri, is a public place within the Ordinance vitiates the conviction. The appeal is allowed. The conviction is quashed and the sentence is set aside. A verdict of acquittal is entered and the appellant is discharged.

Appeal allowed.

THOMAS ALOZIEUWA AHURONYE ... ... *Plaintiff*

v.

THE UNIVERSITY COLLEGE, IBADAN ... ... *Defendant*

[HIGH COURT OF JUSTICE: Hedges, Ag.C.J., 13th July, 1959.]

Master and servant—alleged wrongful dismissal—head printer employed at a salary per annum—presumption, if any, of general or indefinite hiring meaning hiring for a year certain and then from year to year determinable by notice expiring at end of year—rebutted by evidence that servant belonged to class of employees subject to one month's notice.

In an action claiming damages for wrongful dismissal in having been given only one month's notice of termination of services in September 1957, it was proved that the plaintiff had been employed in May 1950 by the defendant first as an assistant head printer and later as head printer at a salary of £144 per annum paid in practice at the rate of £12 per month. It was argued for the plaintiffs that employment at a salary per annum represented a general or indefinite hiring meaning a hiring for a year certain and then from year to year and determinable only by a notice expiring at the end of the year.

Held: that the old rule as to general or indefinite hiring as stated above originated with the hiring of agricultural labourers before becoming of general application and that the presumption of a yearly hiring, if it still existed, was rebutted in the present case by the evidence which showed that the plaintiff belonged to a category of employees whose services were terminable by one month's notice.

Judgment for defendant.

Cases cited:

Fairman v. *Oakford* (1860) H. and N. 635.

Jackson v. *Hayes Candy Company*, [1938] 4 All E.R. 587.

Ibadan Civil Suit No. I/20/58.

Ayoola for Plaintiff.

Craig for Defendant.

Hedges, Ag.C.J.: The facts of this case may be stated quite briefly. The plaintiff was appointed on 14th May, 1950, to be assistant head printer at the University College, Ibadan, at a salary of £144 per annum. Although the Statement of Defence states that the salary was £12 per month, the evidence was quite clear that the salary was £144 per annum although it was payable and in fact paid monthly. Later the plaintiff became head printer. In September 1957, the plaintiff was given one month's salary in lieu of notice.

The issues, apart from the question of damages (if any), are quite simple and were agreed upon by Counsel for the parties as follows:

(1) Was the plaintiff given proper notice or payment in lieu?

(2) If not, were there grounds for teminating the appointment without notice?

With regard to the first point at issue, the plaintiff was engaged, as I have said, at a salary of £144 per annum. It was argued that this represented a general hiring, meaning in effect a hiring for a year certain and then from year to year and determinable

only by notice expiring at the end of the year. The origin of that rule is that agricultural labourers in England were usually hired at a busy season of the year, and it was thought to be "natural equity that the servant shall serve and the master maintain him throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not". *Blackstone's Com. 425.* This old rule, having its origin in the hiring of agricultural labourers, came to be regarded as a rule of general application in the absence of circumstances which might be taken as rebutting the presumption of a yearly hiring.

There is a wealth of case law and legal literature on this subject. In *Fairman* v. *Oakford* (1860) 5 H. and N. 635, Pollock, C. B., said:

> "There is no inflexible rule that an indefinite hiring is a hiring for a year. Each particular case must depend upon its own circumstances".

This statement of the law has been the subject of judicial approbation on many occasions. Some judges have held on the facts before them that the general rule was rebutted by the facts; others have said that no such general rule now exists.

In *Jackson* v. *Hayes Candy Company*, [1938] 4 All E.R. 587, du Parcq, L.J., held that in the absence of rebutting circumstances the general rule still applied, although, he added that this "would probably surprise a good many people".

The learned editors of *Chitty on "Contracts"* (21st ed., Volume 2, page 543) have gone so far as to suggest that the general rule no longer exists. They point out, rightly in my view, that when a servant is engaged for an indefinite time it is common knowledge that neither the master not the servant contemplates an engagement for a year certain. I will not pursue this matter further, but there are conflicting authorities.

In the case before me there is evidence that the plaintiff was a member of the "intermediate and subordinate staff" of University College. This was admitted by the plaintiff himself. In the absence of any formal contract it must be presumed that he was employed on the same terms as other employees within that category. I am satisfied on the evidence and I find as a fact that employees within that grade were subject to one month's notice.

The presumption of a yearly hiring in this case, if it exists at all is in my opinion rebutted by the evidence of the College Librarian which I accept. It is unfortunate that there was no formal letter of appointment but the College Registrar informed the court that this omission will in future be rectified.

I hold that the plaintiff was entitled only to one month's notice or to payment in lieu. It is therefore unnecessary for me to consider whether or not there were grounds upon which the plaintiff could be dismissed without notice.

There will be judgment for the defendant with costs and it is ordered accordingly.

Judgment for defendant.

SUNNY BLUES ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Kester, Ag.J., 13th July, 1959.]

Criminal law, evidence and procedure—charges of being reputed thief having no visible means of subsistence and unable to give good account of self contra *section 250 (4) of Criminal Code, Cap. 42—wandering in public place in circumstances suggesting presence for illegal purpose*—contra *section 250 (6)—mode of proving previous convictions—sections 224 (1) and 224A (4) (a) of Evidence Ordinance, Cap. 63—contents of certificate of convictions not put to accused in open Court for him to admit or deny—misdirection on evidence—no evidence proving ingredients of offence beyond reasonable doubt—moving about in canoe on river aimlessly and in suspicious circumstances amounted to wandering in public place for illegal purpose—analogy of interpretation of section 4 of Vagrancy Act, 1824.*

The appellant had been convicted and sentenced by the Magistrate at Sapele, on two counts. The first count was one of being a reputed thief with no visible means of subsistence and unable to give a good account of himself contrary to section 250 (4) of the Criminal Code, Cap. 42; the second count was one of being found wandering in a public place under such circumstances as to lead to the conclusion that he was there for an illegal purpose contrary to section 250 (6) of Cap. 42. He appealed on a number of grounds in respect of which it was—

Held: (1) that whilst section 224 (1) of the Evidence Ordinance, Cap. 63, provided for the modes of proving previous convictions by certificates signed by certain authorised persons, section 224A (4) (*a*) of the same Ordinance, inserted by the amending Ordinance No. 6 of 1955, provided for additional modes of proof by the certificate of a police officer as had been done in the present case;

(2) that the proper method of proving previous convictions as evidence of antecedent conduct was not merely by the production of a certificate of such convictions but by going further to put the same to the accused in open Court for him to admit or deny and that in the present case there was nothing on the record to show that this latter procedure was ever carried out at the trial, no attempt having been made also to identify the appellant as the person with the aliases mentioned in the certificate of convictions which had merely been produced and placed before the trial Magistrate who misdirected himself on the evidence by stating that the appellant had not denied the contents of the certificate;

(3) that apart from the statement of a prosecution witness that the appellant had a record for stealing, wandering and smuggling—a statement not really proved—there was no evidence that the appellant had no visible means of subsistence or that he did no work and that simply because a man had a prison record and the Police did not know his occupation could not make him to be a person without visible means of subsistence, the onus not lying on him to prove that he had visible means of support but on the prosecution to prove that he had not;

(4) that "a good account" within the meaning of section 250 (4) must be "good" in the sense that it negatived the existence of the other ingredients of the offence but that there was nothing in the record of the proceedings to show that the appellant had ever been asked by the Police to give an account of himself and that he had failed to give a good and satisfactory one;

(5) that in these circumstances the trial Magistrate was wrong to have convicted the appellant on the first count;

(6) that as to the second count, proof that the appellant had been found one morning in a canoe on the Sapele River moving about aimlessly without legal occupation or pursuit and in suspicious circumstances amounted to wandering in a public place for an illegal purpose within the meaning of section 250 (6).

Appeal allowed on first count but dismissed on second count; sentence reduced.

Cases cited:

R. v. *Ibrahim Bauchi*, 4 W.A.C.A. 30.

Commissioner of Police v. *G. A. Ankrah and Others*, 5 W.A.C.A. 180.

R. v. *Turner*, 18 Cr.A.R. 161.

R. v. *Amadu Adamu*, 10 W.A.C.A. 162.

Carnill v. *Edwards and* [*Others*] 1953, 1 All E.R. 282.

Bridge v. *Campbell* (1947), 63 T.L.R. 470.

Warri Criminal Appeal No. W/10 CA/1959.

Ekeruche for Appellant.

Akpofure for Respondent.

Kester, Ag.J.: On the 10th of January, 1959, the appellant was charged before the Magistrate at Sapele on two counts for being a rogue and vagabond. The charge reads:

"(1) That you on the 4th day of January, 1959, at about 4.15 a.m. at the Sapele River, in the Sapele Magisterial District, being a reputed thief who has no visible means of subsistence and cannot give a good account of yourself; and thereby committed an offence punishable under section 250 (4) of the Criminal Code.

"(2) That you, at the same time and place, were found wandering under such circumstances as to lead to the conclusion that you were there for an illegal purpose; and thereby committed an offence punishable under section 250 (6) of the Criminal Code."

The appellant pleaded not guilty to both counts. He was tried, convicted and sentenced to six months' imprisonment with hard labour on each of the two counts, the sentences to run consecutively. The accused gave oral notice of appeal. One ground of appeal was first filed, *viz.*

"That the judgment is altogether unwarranted and unreasonable and cannot be supported having regard to the weight of evidence."

Later on two additional grounds were filed thus:

"(1) That the copy of Exhibit "A" (*i.e.*, record of previous convictions) was not served on me before the trial of the case.

(2) That Exhibit "A" was not put to me for me to admit or deny the contents thereof before same was admitted in evidence and throughout the whole proceedings I had no opportunity of sighting the said record of alleged previous convictions."

The two additional grounds were taken first and argued together in respect of the first count of the charge.

Counsel for appellant argued that in order to prove the first count of the charge it is necessary for the prosecution to prove previous convictions of the appellant before they can succeed; and that if the previous convictions are proved against him, he is liable to an enhanced punishment of one year's imprisonment as against one of three months prescribed for a first offender. Counsel referred to section 224 (1) of the Evidence Ordinance, Cap. 63, and cited the case of *Rex* v. *Ibrahim Bauchi*, 4 W.A.C.A. 30, and the case of *Commissioner of Police* v. *G. A. Ankrah and others*, 5 W.A.C.A. 180, and submitted that the production of exhibit "A", record of alleged previous convictions, did not comply with the law in that (*a*) exhibit "A" is not a certificate signed by the persons authorised under section 224 (1) of the Evidence Ordinance, Cap. 63, but by a police officer, an Assistant Superintendent of Police; (*b*) the previous convictions were not put to the appellant to admit or deny. As to (*a*), the answer is section 224 (4) (*a*) of the Evidence (Amendment) Ordinance, No. 6 of 1955, which provides for additional modes of proof, in criminal proceedings, of previous convictions by a certificate purporting to be signed by a police officer who has had custody of any person charged with an offence in connection with any such proceedings. For a conviction under section 250 (4) of the Criminal Code it must be proved that the person charged (*i*) is a suspected person or a reputed thief; (*ii*) has no visible means of subsistence; and (*iii*) he cannot give a good account of himself.

A reputed thief is one who has acquired that character by reason of antecedent conduct and previous record apart from his behaviour on the particular occasion in question which caused him to be arrested. To prove his antecedent conduct and previous record, evidence of previous conviction is admissible and the proper method of proving this will be by production of the certificate of conviction the contents of which must be put to the accused in open court for him to admit or deny. Where he denies it evidence will be led to identify him as the person referred to in the certificate.

In *R.* v. *Turner*, 18 C.A.R. 161, it was held that before previous convictions are relied on for any purpose in a trial they must be either (*i*) proved by lawful evidence or (*ii*) expressly admitted by the accused person.

It was also held in the case of *Commissioner of Police* v. *G. A. Ankrah and others*, 5 W.A.C.A. 180, that when previous convictions are alleged the admission thereof by the accused should be recorded; and that in the absence of such admission they should be proved and a record made of such proof.

In this case there is nothing in the record of proceedings before the trial Magistrate that exhibit "A" was at any time put to the appellant to admit or deny, although in a portion of his judgment the learned trial Magistrate said that accused did not deny the contents of exhibit "A", the previous convictions. This is a misdirection on the part of the magistrate.

It would appear that all that was done at the trial in purporting to prove appellant's previous convictions was that the first prosecution witness, a police constable, produced a written statement, exhibit "A", and placed it before the Magistrate. There was even no attempt to identify the appellant as the person with the aliases mentioned therein.

It is a well established principle of criminal law that the onus is always on the prosecution to prove its case beyond all reasonable doubt. It is not for the accused to establish his innocence, and the onus is not laid on him to prove that no crime had been committed even though such proof rested upon facts peculiarlyw ithin his knowledge. *R.* v. *Amadu Adamu*, 10 W.A.C.A. 162.

Apart from the statement under cross-examination by the first prosecution witness that he kept a record of the conviction of the appellant and that he was noted for stealing, wandering and smuggling (facts not proved) there is no evidence that the appellant had no visible means of subsistence; that he does no work. In fact in his evidence in chief, the first prosecution witness stated: ".....I know the accused. I know him since 1948. I do not know his occupation now. I do not know how he earns his living.....". Simply because a man has a prison record and the police do not know his occupation cannot make him to be a person without visible means of subsistence. It is not for the appellant to prove that he has visible means of subsistence. The onus is on the prosecution to prove that he has not.

"A good account" within section 250 (4) of the Criminal Code must be "good" in the sense that it negatives the existence of the other ingredients of the offence. But whether the account given is satisfactory in relation to the other two ingredients—reputed thief and having no visible means of subsistence—can be determined only by the conditions apparent to the police and the knowledge available to them at the time the account is given: *see* the *English and Empire Digest*, Volume 15, page 921. Throughout the record of proceedings there is no evidence that the appellant was asked by the police to give an account of himself and he failed to give a good and satisfactory one.

From the evidence of the second prosecution witness, the constable who took appellant's statement, exhibit "B", it is clear that no such account was asked for; and it would appear that when the appellant was arrested, charged and cautioned, all that the police had in mind was that he boarded a ship without a permit.

In the circumstances of the case therefore, and in the absence of evidence that appellant is a reputed thief with no visible means of subsistence and who cannot give a good account of himself, the learned trial Magistrate is wrong in convicting him under the first count of the charge. The appeal as to that count will be allowed.

Ground 1: that the judgment of the learned trial Magistrate is altogether unwarranted, unreasonable and cannot be supported having regard to weight of evidence. This ground of appeal relates to the second count of the charge—Wandering. The facts of the case are briefly that the appellant went on board the *s.s. Cambray* in the Sapele River at about 11.00 p.m. on the 3rd of January, 1959. The third prosecution witness, a Port Security Guard, did not allow the appellant to enter the ship. He waited at the gangway and later left with a sailor. That was the first time the third prosecution witness was seeing the appellant. The third prosecution witness did not know him prior to that time. At about 3.30 a.m. on the 4th of January, 1959, while the third prosecution witness was still on duty patrolling the fore-part of the ship, he saw the appellant coming up through the anchor holes. He raised an alarm and the appellant jumped into the river. A few minutes later the third prosecution witness saw the appellant and another man in a canoe. They were rowing towards another ship, the *m.v. Temple Lane*, in the river and wanted to board her. This time the fourth prosecution witness had joined the third prosecution witness and they both raised alarm and the appellant and his companion rowed away. Later a police launch came to the *s.s. Cambray* and the third prosecution witness made a report to the police.

Counsel for appellant submitted that a river is not a place contemplated by section 250 (6) of the Criminal Code where the offence of wandering can be committed. He further argued that since the word "wandering" means moving from place to place on *foot*, a person moving about in a car, or in a canoe in the river cannot be said to be

wandering under the Vagrancy Act. He based his argument on the decision in the case of *Carnill* v. *Edwards and others*, [1953] 1 All E.R. 282. What *Carnill's* case decided was that a woman sitting in a motor car when acts of indecency were committed, could not be said to be wandering in a public highway. In fact the act of indecency in that case was committed in a car on a waste land not frequented by the public at the time.

The decision did not say that a person moving about in a car cannot be held to be wandering. In *Bridge* v. *Campbell*, (1947) 63 T.L.R. 470, where a man was seen on several occasions to drive a motor van along behind a carrier's van as it made its calls, stopping when it stopped and starting again when it started, he was held to have "loitered" under the Vagrancy Act, 1824, section 4 as amended, al hough he was at all times in the motor van. Similarly a person in a canoe on Sapele River, moving about aimlessly without legal occupation or pursuit, and in suspicious circumstances can be said to be wandering in a public place within section 250 (6) of the Criminal Code.

There is evidence that the appellant was first seen at 11.00 p.m. when he was turned back from entering the ship by the third prosecution witness. About four hours later the appellant was again seen on the river by the third prosecution witness trying to enter the ship through the anchor hole. When an alarm was raised, he jumped into the water and was later seen in a canoe with another man rowing towards another ship, which they wanted to board. These are clear indications that the appellant's conduct on the morning in question on the Sapele River was such that can lead to no other conclusion than that he was on the river for an illegal or disorderly purpose. In my opinion he was rightly convicted by the Magistrate.

The other points argued by counsel for ppellant relate to question of facts, and there is no substance in the argument.

The appeal as to the second count is dismissed. In view of the fact that because of exhibit "A" an enhanced sentence of six months' imprisonment with hard labour was passed by the Magistrate, and in view of my decision as to the first count, the sentence of six months' imprisonment with hard labour passed on the second count will be reduced to one of three months' imprisonment with hard labour.

The appeal is allowed as to the first count and the conviction and sentence quashed. Appellant is discharged and acquitted on that count. The appeal is dismissed as regards the second count. The conviction is affirmed but the sentence of six months' imprisonment with hard labour is reduced to one of three months imprisonment with hard labour.

Appeal allowed on first count but dismissed on second count; sentence reduced.

ECONOMIC EXPORTS LIMITED ... ... *Plaintiffs*

v.

JIMOH A. ODUTOLA
(trading as J. Odutola and Company) } ... ... *Defendants*

[HIGH COURT OF JUSTICE: Jibowu, C.J.—Judgment read by Taylor, J., 20th July, 1959.]

Contract for the sale of goods—breach of—measure of damages—whether damages to be assessed according to s. 50 (2) or s. 50 (3) of Sale of Goods Act, 1893—shops not "available market" within s. 50 (3)—losses flowing directly and naturally from breach recoverable—obligation to accept yardage extra to order under custom of textile trade known as "Tolerance"—items for which general and special damages recoverable.

In an action by the plaintiffs for general and special damages for breach of a contract for the sale of goods ordered it was proved that the defendant had been in breach and the remaining issue was the measure of damages recoverable.

Held: (1) that the measure of damages was no to be assessed according to s. 50 (3) of the Sale of Goods Act, 1893, since the term "available market" in that section did not mean shops in which goods were sold but a place like the Corn Exchange or the Coal Exchange where goods of the type in question were continuously being sold; that there were no such markets in Lagos or Ibadan and that it was reasonable and proper for the plaintiffs to have sent the goods to a reputable auctioneer to sell;

(2) that the damages must be assessed according to s. 50 (2) of the Act and that the plaintiffs were entitled to recover all losses flowing directly and naturally from the defendant's breach;

(3) that the defendant's contention that more goods than he had ordered had been shipped to him could not be upheld in view of the fact that he knew of the custom of the textile trade for the customer to take up goods ordered with a margin of allowance known as "Tolerance' for the extra length put into the loom as it was impossible to make the exact yardage ordered;

(4) that as special damages the plaintiffs were entitled to recover the c.i.f. value of the yardage of textile actually shipped; interest at the rate agreed by the parties to be payable on the Bill in respect of the goods, in effect as part of the price therefor, though not for two years as claimed by the plaintiffs but for one year during which they had kept the contract open and after which they should have sold the goods in order to minimise their own losses; the amount paid by the plaintiffs for extending the insurance on the goods pending the time the defendant would take delivery; the amount of the customs duties and charges which the plaintiffs had to pay when the defendant failed to take delivery; the Bank rent and charges for keeping custody of the goods; and the cost of the Lloyd's survey made by the plaintiffs which was not only reasonable but a so necessary in the interest of both parties after the goods had been lying in the Bank's store for about eighteen months;

(5) but that there was no substance in the item of general damages claimed for the alleged dislocation of the plaintiff's business by reason of the time taken up by staff in correspondence relating to the transaction owing to the delay in payment, and that as to the further similar claim for the amount of money locked up in the shipment of the goods and so not available for financing other business and for the consequential restriction of the plaintiffs' Bank facilities, the parties had contemplated the

possibility of the goods not being taken up in time and so had arranged for the payment of interest on the purchase price and that in these circumstances the amount of special damages already awarded should be regarded as sufficient compensation for the plaintiffs.

Judgment for plaintiffs.

Cases cited:

Re Vic Mills Ltd., [1913] Ch.D. 183.

Sally Wertheim v. *Chicontimi Pulp Co.*, [1911] A.C. 301.

Farr v. *Ward*, 3 M. & W. 25.

Marshall and Another v. *Poole and Another*, 13 East 98.

Ibadan Suit No. I/219/56.

Impey (*Okubadejo* with him), for Plaintiffs.

Bernstein, for Defendant.

Judgment of the late Jibowu, C.J., read by Taylor, J.: In this action the plaintiffs claim from the defendant the sum of £1,779 10*s* 11*d* being special and general damages sustained by the plaintiffs in consequence of the defendant's breach of contract by wrongfully neglecting or refusing to accept and pay for goods ordered, as per particulars:

"PARTICULARS OF CLAIM"

	£	*s*	*d*
Special Damages:			
1. C.I.F. value of goods covered by Bill No. 1783 of 4 bales containing 36 bundles Worsted Stripe Serge shipped to the defendant from England to Lagos in January 1954	1,372	13	1
2. Two years' interest at 6 per cent per annum	164	15	2
3. Insurance premium on extension, 2*s* 6*d* per month per £100	43	5	6
4. Custom's Duty and Charges	2 4	0	2
5. Bank rent and charges	65	7	1
6. Lloyds survey certificate	4	4	0
General damages	500	0	0
Less net amount realised from resale of the goods	434	14	1
Less defendant's Deposit with plaintiffs ...	200	0	0
Balance due	1,779	10	11
	£2,414	5	0
	£2,414	5	0

Balance due £1,779 10 11

The facts of the case shortly are that the General Manager of the plaintiffs and Mr Jimoh Odutola met in London in 1953, and as a result of their business discussions the defendant placed order for goods shown on exhibits "A" and "A1" from Messrs Hudson and Co., Ltd., through the plaintiffs. He confirmed the orders by letter, exhibit "B", dated the 25th April, 1953. There were other contracts placed by the defendant with the plaintiffs. The Bills in respect of some of the shipments made to the defendant were not met, so the plaintiffs wrote letter, exhibit "C", suggesting variation of the terms of contract, exhibits "A" and "A1".

The plaintiffs then wrote the defendant letter exhibit "U", dated the 2nd December, 1953, in reply to defendant's letter of the 22nd November, 1953. In paragraph 4 of exhibit "U" the plaintiffs explained that they delayed shipment because the defendant had not met the Bil s on previous shipments.

By cablegram, exhibit "D", the defendant accepted the offer of sixty days D/A terms offered by the plaintiffs, and the goods were to be shipped on five monthly basis commencing from December 1953.

On receipt of exhibit "D", the plaintiffs wrote the defendant the letter, exhibit "U", to inform the defendant, *inter alia*, that efforts were being made to put a bale of the goods ordered on the *s.s.* "*Fulani*".

The contract as varied was therefore complete by the acceptance in exhibit "D" of the varied terms.

The defendant by cable, exhibit "E", asked for shipment of all the goods before 31st December, 1953, and he was told in letter, exhibit "F", from the plaintiffs that the terms of the contract could not, at that stage, be further varied.

The defendant then sent cablegram, exhibit "G", to which the plaintiffs replied by letter exhibit "H". The defendant then wrote another letter on the 5th January, 1954, to which letter exhibit "J" is the reply showing that the defendant had agreed to have the goods shipped out by five instalments. Some of the goods were shipped, while the arguments were proceeding, by *s.s.* "*Fulani*" and *s.s.* "*Cambray*" as per Invoice, exhibits "V", "V1", "V2" and "V3". The last shipment was made by *s.s.* "*Koyan*" as per Invoices exhibits "V4" and "V5", dated the 28th December, 1953.

The goods consigned by *s.s.* "*Fulani*" and *s.s.* "*Cambray*" were taken by the defendant and paid for, but the defendant would not accept the Bill, exhibit "S1", drawn in respect of the shipment by *s.s.* "*Koyan*" nor would he take delivery of the goods which were covered by Invoices, exhibits "V4" and "V5", although he, the defendant, admitted in his evidence that he was notified of the arrival of the goods. He stated further that he refused to accept the Bill when presented and that he did not take delivery of the goods.

The reason given by the defendant for not accepting the Bill and for not taking delivery of the goods was that he was asked to pay cash down contrary to his sixty days D/A terms, a defence which he did not raise in his Statement of Defence, in which he stated that he rejected the goods because they were not shipped in time. He even denied that the original contract was varied, although in his evidence he was obliged to admit that fact in view of the correspondence tendered in evidence by the plaintiffs. The new defence is obviously an afterthought.

I shall now consider the new defence to see if the defendant was justified in refusing to perform his side of the contract after the plaintiffs had performed their own side of the contract by shipping the goods ordered, and informed the defendant of the arrival of the goods and presented to him the Bill, exhibit "S1", drawn in respect of the price of the goods for his acceptance.

The defendant's story that he was asked to pay cost when the Bill was presented to him sounds very incredible. If the Bill had been a sight Bill, one would have no alternative but to accept the defendant's story, but the Bill, exhibit "S1", required the defendant at sixty days after sight to pay the value of the Bill to the order of the plaintiffs

with interest at 6 per cent per annum for value received. It is inconceivable that any Bank on present ng the Bill for the first time to the defendant would ask him to pay value of the Bill at sight.

There is evidence in exhibit "W" that the Bill was protested on the 26th February, 1954, when the defendant stated that his firm would accept the Bill in two weeks' time. It appears to me that a mistake was made in the Protest, exhibit "W", where the Bill was shown as having been presented for payment. The Bill could not have been presented for payment until after it had been accepted and the statement made by the defendant on that occasion is evidence that the Bill was then presented for acceptance. The defendant in cross-examination admitted that he did not accept the Bill and there can be no doubt that the Bill was presented to him for acceptance and he would not accept it. The defendant obviously failed to accept the Bill two weeks after the 26th February, 1954, because on the 17th May, 1954, he wrote letter, exhibit "X", to the Manager of the Bank of British West Africa Limited, Ibadan, as follows:

> "Will you please write to your London Office asking them to contact Economic Exports Limited, telling them that we are prepared to pay this Bill providing they authorised a reduction of £200 being the deposit which they held on our behalf."

By letter, exhibit "Y", the defendant was to be told that this request had been granted, yet in spite of this, he did not accept the Bill or pay for the goods.

On the 13th July, 1954, according to exhibit "Z", the Bill was again protested and the defendant promised payment in the month of August 1954. On the 20th August, 1954, the defendant wrote the letter, exhibit "K", paragraph 2 of which reads:

> "We would do our best to clear the goods by splitting the Bills into two parts which will enable us to pay one part and another part at intervals of some weeks, but before we would place our hands on this project, we would like to suggest to you to grant us allowance of 20 per cent to cover part of the losses which we are going to sustain on this business. It is more or less unreasonable to go into litigation, if we can settle the matter between ourselves amicably".

Needless to say the plaintiffs in their letter, exhibit "L", refused the defendant's request and he was asked to see their solicitors, Lambrou and Rosiji, to whom the matter had been handed so that he could effect a settlement with them.

On the 22nd December, 1954, the defendant sent the telegram, exhibit "N", to report that the Bank and the Solicitor had refused to release on sixty days' terms and repudiated the contract. He wrote the letter, exhibit "M", to the plaintiffs on the same date.

On the 26th January, 1955, plaintiffs' solicitor wrote the letter exhibit "P" to the defendant informing him that the goods would be sold and he would be sued for damages for breach of contract unless he took immediate steps to take delivery of the goods and pay for them as arranged with the Bank in December 1954.

The defendant did nothing and the plaintiffs' solicitor instructed Chief Ben Oluwole, a licensed auctioneer of 170 Clifford Street, Yaba, to sell the goods. He sold the goods for £472 16*s* 0*d* according to the Account Sale, exhibit "Q" from which he deducted £5 cost of advertisement and his own commission of £33 1*s* 11*d* at 7 per cent leaving a balance of £434 14*s* 1*d*.

The defendant is an untruthful and unreliable witness and he has no regard for truth. He obviously took advantage of the fact that the Bank Manager, Mr Barn, with whom he dealt in connection with this transaction, had returned and left Nigeria to lie against him.

His evidence with regard to the shipments by *s.s.* "*Fulani*" and *s.s.* "*Cambray*" are untrue. The Bills in respect of the shipment were not honoured when presented but were ultimately paid. His evidence that he was asked to pay cash at once is untrue and so is his evidence about the Bill, exhibit "S1". In fact his evidence is a tissue of lies of which he should be ashamed. He obviously lied about the preparation of exhibit "X". He stated that he was worth £16,000 at the time in question when he would not meet his Bill. If that is true then he is a keen unprincipled business man, who has no regard for commercial code of honour.

I have no doubt whatever in my mind that it was the defendant who committed a breach of the contract in question and the next question I have to deal with is the measure of damages.

Mr Bernstein, for the defendant, submitted that the measure of damages is to be assessed according to section 50 (3) of the Sale of Goods Act, 1893, whereas Mr Impey for the plaintiffs submitted that section 50 (2) and not 50 (3) of the Sale of Goods Act, applies.

Section 50 (2) reads:

"The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract."

Section 50 (3) reads:

"Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, then at the time of the refusal to accept."

It is for the Court to consider the circumstances of this case and to decide whether the measure of damages should be in accordance with section 50 (2) or section 50 (3) of the Sale of Goods Act, 1893.

Mr Bernstein very cleverly got Mr Cotton, General Manager of the plaintiffs to say there was available market at Ibadan between certain months in order to bring the case within the provisions of section 50 (3) but it seems to me that Mr Cotton had in mind the fact that textiles sold better at some time of the year than at others; for instance it is a matter of common knowledge that people buy more goods shortly before Christmas and the New Year, at Easter time and before the Mohammedan festivals. Mr Cotton's evidence only goes to show that there are certain periods of the year when textile goods sell well. This is not the meaning of "available market" referred to in section 50 (3) of the Sale of Goods Act.

I am inclined to accept the submission of Mr Impey that the kind of market envisaged by the section is a place where goods of the type in question are continuously being sold, like the Corn Exchange, or the Coal Exchange. In that sense we have no such markets in Lagos or Ibadan.

The defendant called evidence to show that materials like those ordered from the plaintiffs were being sold in 1954-55 in shops in Lagos and Ibadan at higher prices than they were sold for by the auctioneer.

The plaintiffs have no business house in Nigeria and for their business purpose their Agents were the Bank then known as the Bank of British West Africa Limited, which had no shops. It is therefore preposterous to suggest that the goods in question should have been sent to some shops for sale. It therefore follows that the goods could not have been sold in shops, if shops are taken to be equivalent to a market, which in my view, they are not. The proper and reasonable thing the plaintiffs could have done was what they did by sending the goods to a reputable auctioneer like Chief Oluwole to sell. This was what was done in *Re Vic Mills Ltd.*, [1913] Ch.D. 183, at page 186. I therefore hold that section 50 (3) of the Sale of Goods Act is not applicable and that section 50 (2) has to be applied.

The general principle applicable is as stressed by Lord Atkinson in *Sally Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301 at page 307 in the following words:—

> "And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, as far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed."

Subject therefore to the rule about remoteness of damage the plaintiffs are entitled to recover all losses flowing directly and naturally from the defendant's breach of contract.

I shall proceed to deal with the particulars of the plaintiffs' claim. The first item is the c.i.f. value of the goods according to Bill, exhibit "S1". There is a statement of account in exhibit "S" showing how the amount of £1,372 13*s* 1*d* was arrived at.

The defendant contended that more goods than ordered were shipped to him but the plaintiffs' General Manager said that in Textile Business it is impossible to make the exact yardage ordered for the customer and that it is the custom of the trade for the customer to take up the goods ordered with a margin of allowance known as "Tolerance" for the extra length put into the loom.

Invoices, exhibits "V4" and "V5" cover all the goods shipped including tolerance. The shipment by *s.s.* "*Koyan*" represents half of all goods ordered and the remaining half had been shipped by *s.s.* "*Fulani*" and *s.s.* "*Cambray*" as per Invoices; exhibits "V"-"V3". The defendant had accepted and paid for the goods per *s.s.* "*Fulani*" and *s.s.* "*Cambray*" and I am therefore unable to accept the defendant's evidence that he knew nothing about tolerance when he had already taken up and paid for the goods ordered which included extra yardage owing to the way the materials were set in the loom.

An examination of exhibit "A" and "A1" shows that the defendant ordered 960 yards of materials 56×30/33 yards per price and 1,200 yards of materials 56×30/33 yards per price which presupposes that the material might not be of the same dimensions and he must have anticipated extra yardage over and above the yards ordered. The fact that he paid for the first two lots without demur is evidence, in my view, of agreement between the parties that he would so take up the goods when they were shipped. I therefore find the first item proved.

The second item relates to interest for two years claimed by the plaintiffs. There was an agreement between the parties that the defendant would pay interest at 6 per cent per annum on the goods and that interest was payable on the Bill drawn in respect of the goods. The interest chargeable is part of the price of the goods: *see Farr* v. *Ward*, 3 M. & W. 25, 1041, and *Marshall and another* v. *Poole and another*, 13 East 98. If the defendant had honoured the Bill, exhibit "S1", he would have had to pay the interest claimed. This time the plaintiffs did not sell the goods in July 1953, when the defendant failed to accept the Bill, but the evidence shows that the defendant was still hoping against hope that he would be able to take up the goods even in December 1954. In my view the plaintiffs should not be penalised for keeping the contract open for the defendant. I, however, do not see the justification for not selling the goods between January 1955 and December 1955. It is the duty of the plaintiffs to minimise their loss. It seems to me unfair to the defendant to charge him with interest after January 1955.

I therefore allow interest for a year only, which amounts to £82 7*s* 7*d*.

In my view the plaintiffs are entitled to recover the amount paid for extending the insurance on the goods pending the time the defendant would take delivery of them. The extension was a necessity brought about by the defendant's default in not taking up the goods on their arrival. The defendant would have had to pay customs duties and charges to take out the goods. He failed to take out the goods and pay the necessary customs duties and charges which the plaintiffs had to pay. The duties and charges are a part of the loss brought on the plaintiffs by the defendant's breach of contract and are therefore recoverable as damages from the defendant.

In the same way I hold that the Bank rent and charges for keeping custody of the goods are recoverable by the plaintiffs as damages for expenses incurred as a result of defendant's breach of contract.

In my view, the Lloyds survey made by the plaintiffs was not only reasonable but necessary in the interest of both parties. The survey was made in August 1955, after the goods had been lying for about seventeen to eighteen months in the store of the Bank and it was desirable to know the condition of the goods. The survey cost the plaintiffs the sum of £4 4*s* 0*d*, which amount I consider a legitimate item for recovery from the defendant.

The last item of the plaintiffs' Particulars of Claim is a claim for £500 general damages.

The plaintiffs claim these damages on two grounds, *viz.*—

(1) Dislocation of business by time taken up by staff in correspondence relating to this transaction owing to the delay in payment, and

(2) the amount of money locked up in the shipment could not be used in financing other business and the amount involved has restricted their Bank facilities by that amount.

I am not impressed by the first ground but the second ground, in my view, has some substance. The question there is whether the special damages already claimed will be a sufficient compensation for the plaintiffs for the damage they have suffered through the breach of contract. It appears to me that the parties contemplated the possibility of the goods not being taken up in time and so arranged for payment of interest on the purchase price. In the circumstances, I do not consider that I should award the plaintiffs any further general damages.

I have been asked to say that the price obtained by the auctioneer was not a fair one; that the notice of sale was inadequate. It is not disputed that the Notice of Sale, exhibit "O", was for the 5th December, 1955, when according to the sales, exhibit "Q", no sales took place. The auctioneer explained what happened and I have no reason to think he had not told the truth. I accept his evidence that he refused to sell the goods when he did not receive offer which he considered reasonable and that he sold as he deposed to it in exhibit "Q".

The goods had to be sold all at once and not by retail which would take a long time to complete. The defendant's second witness who spoke of selling a piece of the same material for 30*s* added that the material had been two years in the shop. The evidence adduced by the defendant show that there was no ready market for the goods. I need hardly repeat that sale by auction was the proper thing in the circumstances. The price obtained, no doubt, appears low but I accept the evidence of the auctioneer that that was the highest possible then. The defendant cannot therefore grudge the price.

I therefore award the plaintiffs damages as follows:

	£	*s*	*d*
1. C.I.F. value of goods	1,372	13	1
2. One year's interest	82	17	7
3. Insurance	43	5	6
4. Customs charges	264	0	0
5. Bank rent, etc.	65	7	0
6. Lloyd's survey	4	4	0
	£1,832	7	2

As regards costs I take into consideration that the plaintiffs came out from England to prosecute this case at a cost of £500.

I therefore enter judgment for plaintiffs for £1,832 7*s* 2*d* with costs assessed at 700 guineas.

Judgment for plaintiffs.

IN THE MATTER OF THE LEGISLATIVE HOUSES (POWERS AND PRIVILEGES) LAW, 1956.
IN RE THE DIRECTOR OF PUBLIC PROSECUTIONS OF THE WESTERN REGION ... } *Applicant*

v.

1. ASSOCIATED NEWSPAPERS OF NIGERIA LIMITED ... ...
2. S. N. IWEANYA, ...
(Editor of the *Southern Nigeria Defender*) ... } *Respondents*

[HIGH COURT OF JUSTICE: Hedges, Ag.C.J., 14th August, 1959.]

Offence under s. 24 (1) of and paragraph 5 of Part A of Schedule to Legislative Houses (Powers and Privileges) Law, 1956, No. 27 of 1957—wilfully publishing false report of debate or proceedings of Western House of Assembly—preliminary objection to appearance of Attorney-General in criminal and quasi-criminal cases not supported by Nigeria (Constitution) Orders in Council, 1954 to 1958—report by Attorney-General under s. 27 of Law to Speaker of House—application to Court under s. 25 (1) by Director of Public Prosecutions substituted for reference to Attorney-General therein by paragraph 2 of Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958, L.N. 65 of 1958 made under s. 110 of Nigeria (Constitution) (Amendment) Order in Council, 1958—Hansard report of House of Assembly proceedings as matters of law prima facie true account—publication false in fact—interpretation of "wilfully publishing"—criminal liability of proprietors and editor of newspaper.

This was an application made by the Director of Public Prosecutions under s. 25 (1) of the Legislative Houses (Powers and Privileges) Law, 1956, No. 27 of 1957, for the respondents who were the proprietors and editor respectively of the daily newspaper known as the *Southern Nigeria Defender* to be called upon to show cause why they should not be punished for having committed an offence under s. 24 (1) of and paragraph 5 of Part A of the Schedule to that Law, namely, wilfully publishing in that newspaper a false report of a debate or proceedings of the Western House of Assembly. One of the preliminary objections raised was that the Nigerian Constitution precluded the Attorney-General from appearing in cases of this kind and indeed in all criminal and quasi-criminal cases.

Held: (1) that there was no provision in the Nigeria (Constitution) Orders in Council, 1954-1958, or anywhere else precluding the Attorney-General from appearing in cases like the present;

(2) that it was the Attorney-General who had, under s. 27 of W.R. Law No. 27 of 1957, to submit a report to the Speaker of the House of Assembly that in his opinion there was sufficient evidence to warrant proceeding further with a case under that Law;

(3) that although s. 25 (1) of that Law by its terms gave to the Attorney-General the power to make an application like the present to the High Court the application in this case had been properly made by the Director of Public Prosecutions by virtue of paragraph 2 of the Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958, L.N. 65 of 1958, made under s. 110 of the Nigeria (Constitution) (Amendment) Order, 1958, and which substituted the Director of Public Prosecutions for the Attorney-General in respect of the initiation, conduct and discontinuance of criminal proceedings;

(4) that as a matter of law the report of the debate or proceedings in question contained in *Hansard* must be regarded as being *prima facie* a true report;

(5) that a comparison of that report with the statements complained about and contained in the newspaper in question showed that the latter were false in fact;

(6) that it was clearly the intention of the respondents to publish the report which was prepared by their reporter and that they did so publish it without having made any attempt to check its veracity or otherwise and that they had therefore committed the offence of "wilfully publishing" a false report of a debate or proceedings of the House of Assembly, the expression "wilfully publishing" in the present context meaning "deliberately publishing".

Respondents found guilty.

Case cited:

Hall v. *Jordan*, [1947] 2 All E.R. 826.

Suit No. M/23/1959.

F. R. A. Williams, Q.C., Attorney-General (*Adedipe, Senior Crown Counsel*, with him) for Applicant.

Olowofoyeku, for the Respondent.

Hedges, Ag.C.J.: This is a proceeding arising out of an application made by the Director of Public Prosecutions under section 25 (1) of the Legislative Houses (Powers and Privileges) Law, 1956, No. 27 of 1957, and it is in fact the first proceeding of its kind to come before the High Court of the Western Region.

It will be convenient if I read the sub-section in full. It is as follows:

"Upon application made to the High Court in that behalf by the Attorney-General and supported by evidence on affidavit, the Court—

(*a*) may, if satisfied after perusal of the application and such evidence that any member or other person appears to have committed any offence under this Part, cause notice to be served on such member or person calling upon him to show cause why he should not be punished for that offence; and

(*b*) may, if no cause or no sufficient cause as aforesaid is shown to the satisfaction of the Court, after such inquiry as the Court may consider necessary convict him of the offence and sentence him to imprisonment for a term of two years or to a fine of two hundred pounds or to both imprisonment and fine."

The respondents are the Associated Newspapers of Nigeria Limited and the Editor of the *Southern Nigeria Defender* respectively.

When the matter first came before the Court an order was made calling upon the above-named respondents to show cause why they should not be punished for having committed an offence under section 24 (1) of the said Legislative Houses (Powers and Privileges) Law, in that they on Thursday, the 30th of April, 1959, wilfully published on the first page of the daily newspaper known as the *Southern Nigeria Defender* and under the headline "Uromi Court Issue NCNC Member Gagged from Speaking" a false report of a debate or proceedings of the House of Assembly of the Western Region of Nigeria.

The offence alleged to have been committed is that defined in paragraph 5 of Part A of the Schedule to the Law, namely,

"Wilfully publishing any false.....report of any debate or proceedings of the House....."

Particulars of offence are set out in an Annexure to the application and are as follows:

"The 1st and 2nd Respondents on Thursday the 30th day of April, 1959, wilfully published on the first page of the daily newspaper known as the *Southern Nigeria Defender* and under the headline "Uromi Court Issue NCNC Member Gagged from Speaking" a report of a debate or proceedings of the House of Assembly of the Western Region of Nigeria, which report is false in the following respects:—

"(*a*) The publication alleged falsely that the Honourable Mr Speaker of the Western House of Assembly said in the course of the proceedings: 'Order! Order! the Honourable Member must tell us from where he got his information.'

"(*b*) The publication alleged falsely that the Honourable Chief Anthony Enahoro said in the course of the proceedings that if Mr Abioro wanted to hear the facts, *i.e.*, about the alleged suspension of the Uromi Grade 'B' Customary Court, he should come to him (Chief Enahoro).

"(*c*) The publication alleged falsely that the Honourable Chief Rotimi Williams said in the course of the proceeding: 'Yes, Mr Speaker, irresponsible people are fond of giving information to irresponsible newspapers.'

"(*d*) The publication—

(*i*) by first giving prominence to the statement that the father of the Honourable Chief Anthony Enahoro was the Judge of the Uromi Grade 'B' Customary Court; and

(*ii*) then making the false allegations as aforesaid, in particular that contained in paragraph (*b*) of this Annexure; and also

(*iii*) by its general tenor when it is read as a whole,

constituted a false report to the effect that the Honourable members whose statements the publication has misrepresented as above, and in particular the Honourable Chief Anthony Enahoro, did not want the facts about the alleged suspension of the said Court to be stated openly on the floor of the House of Assembly."

The matter was argued on the basis of the affidavits filed by the applicant and the respondents, and I have had the advantage of hearing the addresses of Mr Olowofoyeku, counsel who appeared for the respondents to show cause why they should not be punished, and of the learned Attorney-General who appeared for the applicant.

Two preliminary objections were raised.

In the first place it was argued that the Attorney-General is precluded from appearing in Court in cases of this kind and indeed in all cases of a criminal or quasi-criminal nature throughout the Western Region by virtue of provisions in the Constitution. I can find no support for this naive proposition either in the Nigeria (Constitution) Orders in Council, 1954-58, or anywhere else, and I regard it as being entirely without substance.

Secondly, attention was drawn to certain conditions precedent to the making of an application to the Court.

Section 27 of the Legislative Houses (Powers and Privileges) Law, 1957, provides as follows:

"(1) An application under section 25 may be made to the High Court by the Attorney-General, in the case of any alleged offence under this Part committed in respect of or in relation to any House, only if—

(*a*) the Attorney-General has furnished a report to the President or Speaker of that House stating that, in the opinion of the Attorney-General, there is sufficient evidence to warrant the taking of further steps under this Law in that case; and

(*b*) that House, after consideration of such report, has by order requested the Attorney-General to make the application.

"(2) The making of an application under section 25 by the Attorney-General in any case shall constitute conclusive evidence that the application has been duly made in accordance with the preceding provisions of this section."

The application in the present case was made by the Director of Public Prosecutions and not by the Attorney-General. The reason for this is to be found in the Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958 (L.N. 65 of 1958) made by the Governor-General under section 110 of the Nigeria (Constitution) (Amendment) Order in Council, 1958. The effect of paragraph 2 of that Order in the Western Region is *inter alia* that in any Law, the expression Attorney-General shall in respect of the initiation, conduct and discontinuance of criminal proceedings be construed as meaning the Director of Public Prosecutions. It is the Attorney-General who furnishes the report to the President or Speaker under section 27 of the Legislative Houses (Powers and Privileges) Law, 1956, but it is the Director of Public Prosecutions who makes the application to the Court. Hence the preliminary objection on this point was overruled.

I must now deal with the merits of the present case. It is not disputed that the respondents were responsible for the publication of the matter complained of. The issues before the Court are whether or not the publication was false, and if so, whether or not the publication was wilful.

Historically, the Commons in the United Kingdom have repeatedly forbidden publication of debates or other proceedings in the House and these orders are said to be still in force; but so long as the debates are correctly and faithfully reported the orders which prohibit their publication are not enforced. Publishing a false account or a scandalous misrepresentation of what had passed in either House or of what had been said in debates are instances of misconduct which has been treated as a breach of privilege and duly punished.

In the case before me the affidavits supply two versions of what was actually said in the House of Assembly on the material date.

The official version is contained in *Hansard*. This name has been in general use since the 19th century and has its origin in the fact that T. C. Hansard was the first printer and later publisher of the unofficial series of Parliamentary Debates inaugurated by William Cobbett in 1803. It is a full report in the first person of all speakers alike. A full report is defined as "one which although not strictly verbatim, is substantially

the verbatim report, with repetitions and redundancies omitted and with obvious mistakes corrected, but which on the other hand leaves out nothing that adds to the meaning of the speech or illustrates the argument." Verbal corrections are allowed to be made and a Member has sometimes been permitted, as a matter of personal explanation, to point out at a subsequent sitting an error in the report of his speech.

In the present case the accuracy of the report in *Hansard* has not been challenged in any of the affidavits filed by the respondents. At the most it is alleged that on previous occasions mistakes have occurred in *Hansard*. I hold as a matter of law that a report contained in *Hansard* is *prima facie* a true report of what was said in the House.

The rival version is contained in a document which purports to be a longhand report of the proceedings in the House. This is marked exhibit "A" and attached to the affidavit filed by the editor of the *Southern Nigeria Defender*. One has only to look at this exhibit to see that the reporter was quite incompetent. With a judicious use of abbreviations it may be possible, though extremely difficult, to make a reasonably accurate longhand report of a speech. One would imagine that a reference to the Attorney-General would be represented by some such abbreviations as "A.G.", yet this reporter was so facile with his pen that he had time to write in full the words "Mr Chief Rotimi Williams Minister of Justice and Attorney-General....." The work of this incompetent reporter was the basis of the report which subsequently appeared in the *Southern Nigeria Defender*. It bears very little resemblance to the official report in *Hansard* which is virtually uncontradicted and which I accept as correct. I have compared the two versions with great care and I find as a fact that the statements complained of by the applicant were false statements. This is so patent on the face of the record that a detailed analysis becomes unnecessary.

The question remains whether the respondents *wilfully* published the false statements. Counsel referred to about a dozen cases in which the meaning of the word "wilfully" has been judicially considered. I have read them all and I have also consulted all the authorities cited in *Stroud's Judicial Dictionary* (3rd edition). Whilst helpful as a guide most of these cases seem to me to depend on particular circumstances. The meaning of "wilful" and "wilfully" has been considered where the word has been in juxtaposition with some other word or phrase in some enactment. For example, the Courts have considered the meaning of such phrases as "wilfully and falsely", "wilfully and maliciously", "wilful default", "wilful neglect", "wilful disobedience" and the like.

In the case before me, the respondents say in effect that if the words were false, that is explained as a mistake of hearing. But if one looks at the passage quoted in the first paragraph of the particulars of offence, it will be seen that not only were there no interruptions at the time when the item was being reported but also that the report completely changes the effect of a ruling given by the Speaker of the House and as such the report was scandalous. No attempt was made apparently to check the veracity of the report handed in by the reporter and it is clear that the intention of the respondents was to publish the report and they did so publish it.

In my view, "wilfully publishing" means deliberately publishing.

In *Hall* v. *Jordan*, [1947], 2 All E.R. 826, a solicitor was charged with "wilfully pretending to be qualified as a solicitor" contrary to section 46 of the Solicitors Act, 1932. Lord Goddard, C.J., said at page 827:

"Wilfully pretending to be a solicitor is treated by the law as a serious offence. Where a man has been on the roll of solicitors and has either been struck off the roll or has had his practising certificate suspended, and he deliberately—because that is what "wilfully" means—acts as a solicitor, he has committed a very serious offence."

In the present case, a false report of the proceedings of the House was made. No attempt was made by the respondents to ascertain whether the report was correct or false. Instead, they deliberately published the report. This constitutes the offence of wilfully publishing a false report, an offence of which both respondents are guilty and they are convicted accordingly.

Respondents found guilty.

THE QUEEN
v.
OLAPADE AKINYANJU

[HIGH COURT OF JUSTICE: Taylor, J., 24th August, 1959.]

Criminal procedure—murder contra *section 319 of Criminal Code, Cap. 42—preliminary inquiry by one Magistrate and committal for trial*—nolle prosequi *entered at trial by Attorney-General under section 73 of Criminal Procedure Ordinance—Cap. 43—re-arrest on same charge on warrant previously executed and expired under section 25 (2) of Cap. 43—irregularity cured by section 101 of Cap. 43—second preliminary inquiry by another Magistrate and committal for trial—whether second proceedings and committal order a nullity or whether Crown bound by it and precluded from electing to proceed under first proceedings and committal order—fresh information filed in respect of first preliminary inquiry and none filed in respect of second inquiry—part hearing of case by trial Court in respect of second inquiry a nullity—Court's power under section 364 (1) (a) of Criminal Procedure Ordinance to proceed as if no information filed.*

Shortly after the commencement of the trial of the accused on a charge of murder contrary to section 319 of the Criminal Code, Cap. 42, it was discovered that a preliminary inquiry in respect of the same offence had been previously conducted by a Magistrate who made a committal order for a trial which had however terminated by the Attorney-General entering a *nolle prosequi* under section 73 of the Criminal Procedure Ordinance, Cap. 43. The accused had then been discharged but had been immediately re-arrested under the same warrant as that previously executed in arresting him prior to the preliminary inquiry afore-mentioned. A second preliminary inquiry was later conducted by another Magistrate who committed the accused for trial. The information subsequently filed by the Crown was however in respect of the first depositions and none had been filed in respect of the second although the trial before the Court had been started in respect of the latter and it was only when the circumstances outlined above came to light that the trial had come to an abrupt end for a ruling to be made on the submission for the Crown that the decision in the case of *E. B. K. Sey* v. *The King*, 13 W.A.C.A. 128, applied to the present proceedings, it having been held in that case that after a *nolle prosequi* had been entered the Crown could without holding a fresh inquiry file a fresh information based on the original preliminary inquiry.

Held: (1) that the case of *Sey* v. *The King* was distinguishable in that in the present case there had in fact been a second preliminary inquiry and that as long as that inquiry was not a nullity the Crown was bound by it;

(2) that there was no power conferred by any provisions of the Criminal Procedure Ordinance on the Crown to ignore the effect of the second depositions justly taken according to law and the committal order made thereupon and that the Crown, having through its officers chosen not to rely upon the first depositions by putting the accused through a second one and a committal order, could not, because the former proceedings were more favourable to it, file an information on those proceedings and abandon the fresh one and committal order;

(3) that as no information had been filed in respect of the second depositions and committal order the trial so far as it had proceeded amounted to a nullity;

(4) that the Court would therefore exercise its power under section 364 (1) (*a*) of the Criminal Procedure Ordinance and the trial would be re-started as one in which no information had been filed against the accused;

(5) that the irregularity, in re-arresting the accused on the authority of a warrant which had been previously executed in effecting his arrest before the first preliminary inquiry and which had thus by virtue of section 25 (2) of the Criminal Procedure Ordinance outlasted its duration, was cured by section 101 of that Ordinance.

Proceedings held a nullity and trial ordered to re-commence.

Case cited:

E. B. K. Sey v. *The King*, 13 W.A.C.A. 128.

Akure Charge No. AK/4c/59.

Fasinro, Senior Crown Counsel, for the Crown.

Ogundare for the Accused.

Taylor, J.: The ruling being given in this case is as to whether the case at the stage it had reached after the evidence of the first witness for the prosecution can proceed further or whether the proceedings in Court at the hearing were a nullity, and if so what steps may now be taken. In order to get at the bottom of this it is necessary for me to set out in some detail and at some length the muddled history of the case.

The accused was arrested on the 17th of August, 1957, by virtue of a warrant of arrest dated the 1st of April, 1957, for the murder of a lady, to wit, one Oladunran Olapade contrary to section 319 of the Criminal Code. The said warrant was executed by Lance Corporal No. 10, M. Akinniyi.

The preliminary inquiry into the charge was commenced on the 9th of September, 1957, by Senior Magistrate J. O. Beckley and completed on the 10th September, 1957, on which day the accused was committed for trial to the High Court of the Benin Judicial Division, there being then no separate Akure Judicial Division.

By a notice dated the 26th February, 1958, the Honourable the Attorney-General, by virtue of the powers vested in him by section 73 of the Criminal Procedure Ordinance, Cap. 43, entered a *nolle prosequi* in the proceedings after the accused had pleaded not guilty on the 25th February, 1958. As a result the accused was accordingly discharged on the 27th of February, 1958. His liberty was however short-lived, for his re-arrest followed on the same day within a matter of hours. The authority for this re-arrest I shall touch upon a little later. Suffice it to say for the moment that he was again taken into custody on the same charge on the 27th February, 1958, and for some unexplained reason he was not brought up either for trial at the Assizes or for further preliminary inquiry, if the latter was desired until the 6th of February, 1959—a period of approximately one year and a disgraceful state of affairs. On that day he was brought before the Senior Magistrate, C. A. Piper, and a fresh preliminary inquiry was embarked upon which was completed on the 7th February, 1959, on which day the accused was committed to stand his trial at the Akure Assizes.

Now on the 13th February, 1959, a letter was addressed to the Divisional Registrar, High Court, Akure, written by the Acting Senior Crown Counsel and received on the 18th February, 1959, a copy of which I believe was despatched to the Police authorities, the important portions of which read as follows:

"I have asked the Divisional Registrar, High Court, Benin to send this file to you together with the copy of the deposition. I am basing this new information which I now file on the deposition taken by Mr J. O. Beckley, the Senior Magistrate and his order of committal dated the 10th day of September, 1957 which will be found at page 8 of the deposition.

"On the authority of *E. B. K. Sey* v. *The King*, 13 W.A.C.A. 128 it is not necessary again to have another preliminary investigation before a new information is filed."

It would seem by the contents of this letter that the learned Senior Crown Counsel was ignorant of the further preliminary inquiry before the Senior Magistrate C. A. Piper and the committal order of the said Magistrate roughly one week before the thought conceived in his letter was conceived. It would seem further that the Police have acted in a technical matter of this nature without consulting the Legal Department.

On the 2nd of March, 1959, the accused was brought up for trial and he pleaded not guilty to the charge. The hearing was then adjourned till the 6th March, 1959. After a few more adjournments during that session of the Akure Assizes before my brother, Morgan, J., the case was eventually listed for the special Assizes held by me on the 27th July, 1959. On that day the accused pleaded afresh to the charge and pleaded not guilty. The 17th of August was fixed by me as the hearing date for the case.

On that day, notice to call additional evidence having been served on the accused and being of the erroneous view that the information filed by the Crown related to the second preliminary inquiry I proceeded to hear the evidence of Dr R. O. Akinsete, Government Medical Officer, Ondo. Now when the learned Crown Counsel called his next witness it was then realised that we were both at cross purposes for while he was considering the deposition taken before His Worship Beckley, the Court and learned Counsel for the accused were considering the depositions taken before His Worship Piper. At this stage the proceedings came to an abrupt end and I adjourned the matter for further consideration in view of the submission of Mr Fasinro for the Crown that the case of *E. B. K. Sey* v. *The King*, still applied to these proceedings. Turning to that authority the relevant portion of the judgment at page 130 states that—

"We are satisfied that when a *nolle prosequi* has been entered by the Crown in a criminal case before the Supreme Court in respect of any charge contained in an information, a fresh information on a charge arising out of the facts inquired into in the original preliminary inquiry may be filed without the holding of a fresh preliminary inquiry. The trial of the present appellant was therefore held with jurisdiction and was not a nullity".

With this decision of the Court of Appeal I am bound, but the proceedings before me differ from those of *Sey* v. *The King*. in that here we have in fact a second preliminary investigation. The point now is whether the Crown having put the accused through a second preliminary investigation and committal order can be heard to say: "But this second preliminary investigation and committal order were unnecessary by virtue of *Sey* v. *The King*, I will therefore take no notice of them and elect to preceed on the original inquiry". The Crown can only be heard to say this, in my view, if the second proceedings and committal order were a nullity. As long as those proceedings are not a nullity and the committal order has the force ascribed to it by law, the Crown is bound by it.

I cannot for one moment persuade myself to the view that the result of *Sey* v. *The King*, is that where an accused person has been committed to an Assize Court for trial and he has been discharged on a *nolle prosequi* being entered by the Crown at the Assizes, and the Crown through its officers chooses by their action not to rely upon the former investigation by putting the accused through a second one and a committal order, the Crown can, because the former proceedings are more favourable to it, now file an information on the old proceedings abandoning the fresh one and committal order. Section 333 of the Criminal Procedure Ordinance gives certain powers to Law Officers or Crown Counsel after the receipt of depositions which powers include that of referring a case back to a Magistrate after depositions taken, but nowhere do I see a power given to such Law Officer or the Honourable, the Attorney-General to ignore the effect of depositions justly taken according to law and a committal order made thereupon. I therefore hold that the Crown is bound to proceed under the new depositions and committal order.

The Crown is met with further difficulty in that the information filed as stated in the letter of the 13th February, 1959, is filed not with respect to the new but the old inquiry. The witnesses at the back of such information being the following—Adeyola Gbadehan, Stephen Okoro, Matthew Akinniyi, Allen Campbell Frood, Raphael Adegboye. In the fresh preliminary inquiry the 4th deponent on the old depositions did not give evidence, for at page 7 it is stated that—

"Prosecutor says that for the purposes of the preliminary investigation he closes his case at this stage. He says the prosecution will call at the Assizes Mr Frood, Dr Akinsete who performed the post mortem, and the interpreter who interpreted to the accused in Mr Frood's presence, the statement exhibit "D".

The result is that there is no information filed in this matter on the fresh preliminary inquiry and I hold that the hearing which took place before me on the 17th instant was a nullity. I should have acted and I now propose to act under Part XXXVIII, section 364 (1) (*a*) of the Criminal Procedure Ordinance which states as follows:

"When an accused person has been committed by a Magistrate for trial by the High Court and if on or before the day appointed for trial of such accused an information against him has not been filed or if on such day no duly authorised person appears before the Court to prosecute the case on behalf of the Crown, the presiding judge—

(*a*) shall direct the registrar to charge the accused with the offence in respect of which he has been committed for trial; and

(*b*) may in his discretion direct the registrar to charge the accused with any other offence founded in the opinion of the presiding judge on the facts disclosed in the depositions; and

(*c*) shall explain the substance of the charge or charges to the accused and require him to plead thereto".

Sub-section (3) then provides for the trial where the accused pleads not guilty to such charge or charges.

Before directing the Registrar to charge the accused with the offence of murder contrary to section 319 of the Criminal Code I should also mention another irregularity in these proceedings in that the warrant of arrest of the accused contained in the depositions is the same warrant of arrest of the 1st of April, 1957, executed by Lance Corporal Akinniyi on the 17th August, 1957, and which by virtue of section 25(2) of the Criminal Procedure Ordinance had outlasted its duration. This however is cured by section 101 of the same Ordinance and the point becomes academic.

I now order the registrar to charge the accused as aforesaid and the trial will commence at the end of the call over today.

Proccedings held a nullity and trial ordered to re-commence.

THE QUEEN

v.

ABRAHAM ERUMESI

[HIGH COURT OF JUSTICE: Taylor, J., 28th August, 1959.]

Criminal law—murder contra *section 319 of Criminal Code, Cap. 42—whether accused should be convicted on his extra-judicial confessional statement duly made with regard to Judges' Rules—need for other circumstances to show that confession was fully consistent and probable or that a criminal act had been committed by someone.*

The accused was charged with the murder of a woman contrary to section 319 of the Criminal Code, Cap. 42. He had made a statement to the Police confessing to the commission of the crime, but beyond this there was very little else known by the prosecution of the facts and circumstances surrounding the death of the deceased outside the fact she had died as a result of gun-shot wounds.

Held: that the fullest weight and respect must be given to the accused's extra-judicial confessional statement duly made with regard to the Judges' Rules and that in accordance with established principles in this matter there were other circumstances which showed beyond any reasonable doubt that a criminal act had been committed by someone and that the accused's confession was fully consistent and probable.

Accused found guilty and sentenced to death.

Cases cited:

Kanu v. *The King*, 14 W.A.C.A. 30.

The Queen v. *Joseph Kesinro*, 1955-56 W.R.N.L.R. 56.

R. v. *Walter Sykes*, 8 Cr.A.R. 233.

Akure Charge No. AK/32c/59.

Fasinro, Senior Crown Counsel for the Crown.

Ogundare for the accused.

Taylor, J.. The accused is charged with the murder of one woman by name Odebola Awowole at Oke Oloba Camp, Ondo, on the 26th of January, 1959, contrary to section 319 of the Criminal Code.

In this case apart from the statement of confession of the accused made to the Police there is very little else known by the prosecution of the facts and circumstances surrounding the death of the deceased outside the fact that she died as a result of gunshot wounds. This is established by the evidence of Joseph Phillip Putumena, Medical Practitioner attached to the General Hospital, Ondo, beyond any doubt.

The rest of the evidence for the prosecution established the following facts: The evidence of the third prosecution witness, Julius Osigwe, Police Constable 4913, that on the 30th January, 1959, the accused was arrested and at the time of his arrest he was dressed in a dirty shirt, dirty knicker and a wrapper round his neck and when asked for his name he gave a false name. Further that on the previous day a dane gun, exhibit "A", was collected from the house of one Sunday which was next door to that of Josiah Awowole, the 6th and the 5th prosecution witnesses respectively; the evidence of the 5th prosecution witness establishes that he had often seen the accused in the district with a dane gun and that the latter was new to the district; the evidence of the 6th prosecution witness, Sunday Ogbeyi, establishes that the accused lived in the house

of that witness as from his arrival in the district which was shortly before the incident and finally that on the day in question when the 5th prosecution witness came to make a certain report to this witness at 4.30 a.m. he, this witness, left his house together with three other inmates and went to the house of the 5th procecutio ı witness. Before he left however he noticed that the accused was not in the room where he normally slept.

Those are the additional facts relied upon by the Crown as supporting the accused's own confession, exhibit "B", and in support of the charge of murder.

The accused in his defence says that he is a school boy and that he had come to Ondo with a view to finding work during the vacation. He was brought there by one Francis who is said to have later disappeared. He denies shooting anyone or ever making a confessional statement to the Police. He however admits living in the same house as the 6th prosecution witness but denies the suggestion that he was not in his room that morning for he says that he was in fact there and further that he heard the 6th prosecution witness open the door of the house and enter.

In exhibit "B" duly witnessed by the Assistant Divisional Officer, Ondo, the fourth prosecution witness, on the 2nd February, 1959, the accused gives a clear and detailed account of all that took place prior to and on the day the deceased met her death. He denies this statement and says that though he put his signature to a statement at the Police Station, all that statement contained was his denial of knowing anything about the incident.

The main and in fact the sole question to be determined by me is whether I can or should convict the accused on his confessional statement and with this is bound up the question whether there is other evidence in support of the confession. In the case of *Kanu* v. *The King*, 14 W.A.C.A. 30, at page 32, Coussey, J.A., says about confessions that—

> "A voluntary confession of guilt if it be fully consistent and probable is justly regarded as evidence of the highest and most satisfactory nature where-ever there is independent proof that a criminal act has been committed by someone."

Again in the case of *The Queen* v. *Joseph Kesinro*, 1955-56 W.R.N.L.R. 56 the learned Chief Justice of the Western Region said at page 57 that—

> "With regard to 'A', I admitted the statement exhibit 'E' as evidence because I was not satisfied the accused person was beaten as he alleged he was before the statement was obtained. As it is however an extra-judicial confession care must be taken that there is other evidence to support it as against the accused before the Court convicts."

I am not sure whether this latter authority does not take the law as regards the power of the Courts to convict on confessions further than the statement of the law made by Coussey, J.A., in the above case in a higher Court by whose judgment I am bound. In the case of *Kanu* v. *The King*, all that is required, to quote the words of the learned Judge of Appeal, is that "there should be independent proof that a criminal act has been committed by someone" whereas in the latter case it is said that the independent evidence must support the conviction against the accused. In the case of *R.* v. *Walter Sykes*, 8 Cr.A.R. 233, referred to by Coussey, J.A., Ridley, J., said at page 236 as follows:

> "I think the Commissioner put it correctly; he said: 'A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it. But seldom,

if ever, the necessity arises, because confessions can always be tested and examined, first by the Police, and then by you and us in Court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we can test them true? Was the prisoner a man who had the opportunity of committing the murder? Is his confession possible? Is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?,"

In the case of *The Queen* v. *Joseph Kesinro*, it should however be stated that the circumstances surrounding the making of the confession or its confirmation by the accused Mr Brett, an expatriate officer, are somewhat different from those before us. In this case Mr Adigun, the 4th prosecution witness himself read out the statement to the accused and further the statement was in a language that needed no interpretation being in pidgeon English as spoken and understood both by the accused and Mr Adigun. In the case of *Kesinro* however there was no evidence that the *Yoruba* version of the statement held by the interpreter and read over to the accused was ever translated to Mr Brett.

I am wholly satisfied that exhibit "B" is entitled to the fullest weight and respect to be given to any confessional statement duly made with regard to the Judges' Rules and I do accord it that respect and weight.

Now applying the test laid down in *Sykes'* case and *Kanu* v. *The Queen*, are there other circumstances which go to show that the confession is fully consistent and probable or that a criminal act has been committed by someone? In my view the following facts show this beyond any show of reasonable doubt:—

1. The evidence of Dr Putumena, the 1st prosecution witness, and Josiah Awowole, the 5th prosecution witness, of the deceased having died by gunshot wounds.

2. The evidence of the 6th prosecution witness, Sunday Ogbeyi, which I accept that the accused slept in his house but that at the material time when the 6th prosecution witness went out of the house in answer to the alarm raised by the 5th prosecution witness, the accused was not in the room at a time when all law abiding citizens would be asleep.

3. The accused's inability to explain satisfactorily his whereabouts, at the material time.

4. The evidence of the 5th prosecution witness which I also accept that he had seen the accused walking about the neighbourhood with a dane gun.

5. The evidence of the 6th prosecution witness in whose house the accused stayed that the dane gun belonged to the accused's master, Francis, which tallies with the accused's statement.

6. The finding by the police of the dane gun in the house of the 6th prosecution witness which also tallies with the accused's statement that he returned the gun to that house after the incident.

7. The suspicious circumstances of the accused's arrest and his giving a false name.

8. His unsatisfactory demeanour in the witness-box coupled with the obvious untruths told by him.

On the accused's own confession coupled with the above facts proven I find him guilty of the capital offence of murder.

Accused found guilty and sentenced to death.

THE QUEEN

v.

OLAPADE AKINYANJU

[HIGH COURT OF JUSTICE: Taylor, J., 1st September, 1959.]

Criminal law and procedure—murder contra s. 319 of Criminal Code, Cap. 42—statement by accused after committing Magistrate's caution at end of Crown's case in the preliminary inquiry that his defence was insanity and that he would raise it at the Assizes and call witnesses—statement ambiguous and capable of meanings favourable and unfavourable to accused—accused given benefit of the doubt—statement did not amount to a confession.

At the trial of the accused on a charge of murder contrary to s. 319 of the Criminal Code, Cap. 42, the prosecution tendered statement, made by the accused (after the committing Magistrate had cautioned him at the close of the prosecution's case) to the effect that his defence was one of insanity and that he would raise it at the Assizes and also call witnesses.

Held: (1) that the statement in question was capable of meaning that at the time it was made the accused was insane or that at the time of the alleged offence he was insane or that he was insane at the time of the offence and was still insane;

(2) that only if the second or the third meaning could be ascribed to the statement would it amount to a confession in law that he killed the deceased but that when he did so he was insane;

(3) that on the evidence before the Court and in the face of the accused's denial at the trial, the meanings unfavourable to him should not be ascribed to his statement in preference to the one favourable and that accordingly he must be given the benefit of the doubt and his statement held not to have amounted in law to a confession;

(4) that as the other evidence adduced by the prosecution raised no more than a grave suspicion against the accused, the Crown's case had not been proved to the hilt as was required by law.

Accused found not guilty and discharged.

Akure Charge No. AK/4c/59.

Fasinro, Senior Crown Counsel, for the Crown.

Adeyefa, for the Accused.

Taylor, J.: The accused is charged with the murder of his wife Oladuran Olapade on the 4th of March, 1957, contrary to section 319 of the Criminal Code.

The case for the prosecution is that the accused lived at 14 Okedibo Street, Ondo, in the same room as his wife, the deceased, his mother and others. Who these others were was not made known at the hearing. On the night in question as deposed to by the 2nd prosecution witness, Adeyola Badehun, the accused slept in that room with the aforesaid. Sometime during the night this witness heard a gunshot and shortly after the deceased ran into her room in a bloodstained condition. As a result of what the deceased told this witness she raised an alarm outside the house and people congregated. She noticed however that the accused was not among the crowd. In fact the accused was not seen again till his arrest some six months later.

The evidence of the 1st prosecution witness, Doctor R. O. Akinsete, establishes that on the 8th of March, he performed a post mortem examination on the body of the deceased and found thirty gunshop inlet wounds on the back of the left side of the chest and two inlet gunshot wounds on the head. In his opinion the deceased died of asphyxia following the gunshot wounds. Apart from the evidence of identification of the corpse, the only other admissible and material evidence was that of the 6th prosecution witness, a Police Constable Stephen Okoro, No. 4911, who found under a mat in the accused's room a matchet and two toy guns tendered in evidence and marked exhibits "A", "C", and "C1" respectively. He further tendered some pellets which he found in the same room and which were marked exhibit "D". One of the toy guns according to this Constable smelt of having been recently discharged whilst the other was still loaded.

That is the oral and circumstantial evidence adduced by the Crown in support of the charge of murder against the accused. An attempt was made to tender the accused's statements to the Police, but the original statement made to the Police had suffered such change by alterations, deletions and superimpositions which were not in any way thumb-impressed by the accused, nor was he asked to make a fresh thumb impression, that I was not satisfied that the final statement represented his act and deed and I rejected it. In its place however the prosecution tendered the statement made by him before the committing Magistrate which was marked exhibit "D". The effect of this statement has to be construed. I have to ask myself whether it amounts in law to an admission of the offence or a confession. The statement was made after the learned Magistrate had delivered the usual caution to the accused at the close of the case for the Crown at the preliminary inquiry. This is what the accused said—

"My defence is that of insanity and I will raise it at the Assizes where I will also call witnesses".

Further when he was asked whether he desired to call witnesses, this is what he said—

"I will give evidence and call witnesses at the Assizes. My witnesses are one Bowade who is my mother and one Adeduro my brother-in-law".

On statements made before committing Magistrates the learned author of *Archbold* (34th edition) says at page 427, section 1126 that—

"A written confession taken in accordance with rule 5 of the Magistrates Courts Rules, 1952 is evidence *per se*, and is the only admissible written evidence of the prisoner's having made a declaration of the things therein contained."

Rule 5 of the 1952 Magistrates Courts Rules referred to above deal with statements made under similar conditions to the present statement under consideration.

As I said before, does this statement amount to a confession? Mr Adeyefa contends the contrary. Now this statement was made after the charge against the accused had been read over to him though he was not asked to plead and after all the Crown witnesses then available had given evidence and the accused's statement rejected by me had been put in evidence. When asked what he had to say in answer to all this he said that his defence was that of insanity. Did he by this mean that he was then at that time insane or did he mean that at the time of the alleged offence he was insane or that he was insane at the time of the offence and is still in such a state of mind? In my view only if the second or the third meaning could be or rather should be ascribed to this statement of the accused am I entitled to hold that it amounted in law to a confession that he killed the deceased but that at the time he did so he did not know the nature

of his act. On the evidence before me and in the face of the accused's present denial where two such meanings are capable of being attached to his statement, one favourable to him and the other unfavourable, am I entitled to select the only unfavourable meaning and ascribe it to his statement? I think not. I think in such a case I must give him the benefit of the doubt, and hold that it does not amount in law to a confession in so far as he may have been referring to his state of mind at the time he was addressed by the learned Magistrate. If this statement does not amount to a confession then the evidence adduced by the Crown against the accused raises at the most a grave suspicion against him but no more. As I have had occasion to remark during these Assizes the Police must not where the evidence is available be content to rest their oars on the confession of an accused, but must always be prepared to go beyond it and produce evidence to corroborate that confession. Here the Police had the opportunity of calling one or more of the persons who slept in the room of the accused on that fatal night but not one was called, nor their absence explained.

On the evidence before me I hold that the case has not been proved against the accused up to the hilt as is required by law and I enter a verdict of not guilty against him and discharge him. Exhibits B, C, C1, D are all to be retained by the Police.

Accused found not guilty and discharged.

DEBO SOWANDE OLAIYA (by his next friend S. B. Olaiya) ... ... *Plaintiff*

v.

JOSIAH FOLORUNSO OSOSAMI ... ... *Defendant*

[HIGH COURT OF JUSTICE: Quashie-Idun, J., 4th September, 1959.]

Negligence—falling of crane used in building operations upon plaintiff whilst on foot path used by the public—failure of defendant to explain cause of accident—res ipsa loquitur —contributory negligence.

The plaintiff, a minor, claimed through his father as his next friend, special and general damages for negligence of the defendant's servants or agents as a result of which he had been injured when a crane which was being operated by a servant or agent of the defendant in the course of building operations fell on the plaintiff whilst he was returning from school along a foot path normally used by members of the public and school children. The evidence given by the defendant and his witnesses was that they were unable to explain why the crane had fallen, although it was proved that one of the two planks placed on the ground and on which the wheels of the crane rested was found broken at the time of the accident.

Held: (1) that there was a duty on the part of the servants of the defendant to see that the operation of the crane would cause no harm to people using the foot path on which the plaintiff had been injured;

(2) that on the evidence the falling of the crane must be regarded as having been caused by the breaking of one of the planks and that this amounted to an improper operation of the crane by the servant of the defendant whose duty it was to see that planks placed under the crane were of good quality;

(3) that in the circumstances of this case the maxim *res ipsa loquitur* applied to put the onus on the defendant to disprove negligence which they had failed to do;

(4) that as to the argument that the plaintiff must have known that it was dangerous to use the foot path whilst the crane was being operated, the fact was that the servants of the defendant knew that members of the public and school children used that path and that in the circumstances the plaintiff was not guilty of contributory negligence.

Judgment for plaintiff.

Cases cited:

West Rand Central Gold Mining Co. Ltd. v. *The King*, [1905] 2 K.B. 391.

Moore v. *Fox and Sons*, [1956] 1 All E.R. 182.

Tustin v. *Arnold and Sons*, [1915] 84 L.J.K.B. 2214.

Lathan v. *Johnson and Nephew Ltd.*, [1913] I.K.B. 398.

Davis v. *St. Mary's Demolition, etc., Co. Ltd.*, [1954] 1 All E.R. 578.

Ellerman Lines Ltd. v. *H. G. Grayson Ltd.*, [1919] 88 L.J.K.B. 616.

Phillip v. *South Western Railway*, [1879] 4 Q.B.D. 406.

Ibadan Civil Suit No. I/60/1957.

Lambo (with him *Balogun*) for plaintiff.

Ayoola (with him *Ogunleye*) for defendant.

Quashie-Idun, Ag.J.: The plaintiff, who has instituted this action through his father, claims £30,000 special and general damages for injuries sustained by him on the 2nd August, 1956, in consequence of the negligence of the defendant's servants or agents.

The case for the plaintiff is briefly as follows:

The plaintiff who was sixteen years of age at the material time lived in a house situated behind the Methodist Church, Ekotedo, Ibadan, which was being built by the defendant, a building contractor. There is a path leading from Ekotedo Road and lying on the left hand side of the Church (facing the Church) which, it is admitted, is used by members of the public going to houses situated behind the Church premises. There is also a School which is at the side of the Church although not quite opposite to the Church. It is not denied by the defendant that that path is also used by the school children attending that School.

On the 2nd August, 1956, the plaintiff who was returning from school, was walking on the foot path to get to his house. When he got to the side of the Church and as he was still on the foot path, a crane which was being operated by a servant of the defendant and which was lifting some planks from the ground to the roof of the Church, fell on the plaintiff. He became unconscious. Some people removed the planks which had fallen on the plaintiff. He was rushed to the hospital and was found to have sustained a fracture of the thigh bone. On the 9th August, 1956, an operation was performed on him and a kunscher nail was inserted into the medulla or the inner tissue of the thigh. He remained at the hospital until he was discharged on the 15th October, 1956. He continued to attend the hospital for treatment until he was finally discharged on the 15th February, 1957. These facts are not denied by the defendant. His case is that neither he nor his servants or agents was guilty of negligence and that the plaintiff is not entitled to damages.

Two issues are clearly before the Court. They are (1) whether or not the defendant's servant who was operating the crane was negligent and (2) if so to what amount is the plaintiff entitled as damages.

The plaintiff averred at paragraphs 7 and 8 of his Statement of Claim as follows:

> "At the said time the defendant by himself or his servants and/or agents were using a hand operated crane to lift heavy building materials for use on the roof of the said building. By reason of the negligence of the defendant by himself or his servants or agents the said crane being overloaded tumbled and fell on the plaintiff and broke his right thigh bone."

Apart from this averment the plaintiff gave the following particulars of negligence:—

> "The defendant, his servants and/or agents without exhibiting any warning whatsoever endangered the lives and limbs of pedestrians by reason of the manner in which he carried out his building operations."

As I have already stated earlier in this judgment, the defendant has denied negligence on the part of his servant who was operating the crane at the material time. The evidence given on this issue by the defendant and his witnesses is that they are unable to explain what caused the crane to fall.

The first witness called by the plaintiff, Daniel Obetim, a Police Constable, has told the Court that after a report of the accident had been made to him he went to the scene of the accident. He continued his evidence as follows:

"At the scene, I saw a crane on the ground. I asked for the driver. I saw him. The crane was lying down on its side. I interviewed the driver. He told me that as he was driving the crane, a plank supporting it underneath got broken and the crane fell.....The crane was about 15 feet high. It was bigger than the witness box in this Court. I saw the plank which the driver said was broken..... The plank was broken into two pieces....."

This evidence coming from a person whom I regard as an independent witness was not challenged by counsel for the defendant in his cross-examination. The driver of the crane, Felix Anthanson, however denied that he made the statement to the Police Constable. A witness, Fritz Lothan Wagner, an Engineer employed by the defendant, stated in his evidence that he had been using the crane since May this year, that it could easily carry two planks and that it could carry a load of six cwt. Under cross-examination, the witness explained how the crane was operated. This is what he said:

"The crane must be used when it is supported on the ground by two planks. The width of each plank is about two inches. The two wheels on each side rest on one plank..... It is not possible for the planks on the ground to break at all. Even if the planks break the crane could not fall. Before a crane falls the rope must be broken due to overloading. If the rope is not broken the crane could not fall. If a crane is properly operated it cannot fall."

In answer to a question put by the Court, the witness stated as follows:

"By properly operating the crane, I mean a proper levelling of the ground, the wheels of the crane must be evenly supported on the ground to distribute the load. These things done would not cause the crane to fall."

I refer again to the evidence of the driver. He stated that as the crane was carrying two planks and as it got near to the top of the building, the crane fell. He continued:

"I do not know what caused the crane to fall. I heard a crowd of people shouting. I had fallen down—people came and assisted me to get up..... I was unconscious."

The witness denied that the crane was overloaded.

On the issue as to whether the defendant's servant was negligent or not, Mr Ayoola has submitted that the plaintiff must aver with certainty the omission of duty complained of and has referred to a number of authorities in support of his contention—in particular, to the case of *West Rand Central Gold Mining Co. Ltd.* v. *The King*, [1905] 2 K.B. 391 at page 400. It is my considered opinion that the Statement of Claim and the particulars to which I have already referred in this judgment contain sufficient averment of negligence on the part of the defendant's servant. The plaintiff complains of the manner in which the defendant or his servants operated the crane. If I am satisfied from the evidence or from the circumstances that the crane was not properly operated, then I must come to the conclusion that the crane fell as a result of the negligence of the operator. As I have stated, the operator of the crane said he did not know what caused the crane to fall. This is not a sufficient answer to the averment of the plaintiff (*inter alia*) that the manner in which the crane was operated caused it to fall.

In the case of *Moore* v. *Fox and Sons*, [1956] 1 All E.R. 182, it was held that it was not enough for the defendant to say that he did not know how the accident happened and that the onus was on him to disprove negligence. It was also held in that case that the maxim *res ipsa loquitur* applied.

In *Halsbury's Laws of England*, 2nd Edition, page 674, paragraph 957, the following passage appears:—

> "The cases in which the maxim *res ipsa loquitur* applies are to be distinguished from those in which the cause of the accident is unknown. In the one case, further evidence is not required from the plaintiff because the inference is already clear; in the other case it is not required because it would be impossible to give it. The effect of the distinction is that in the one case, the defendant is liable if he does not produce sufficient evidence to counteract the inference; in the other case, the Court is left to decide on such facts as are available whether negligence on the part of the defendant is the more reasonable inference or not."

I accept the evidence of the Police Constable (1st witness for the plaintiff) that the operator of the crane told him that the crane fell because one of the planks on which the wheels rested got broken. That statement is admissable against the defendant—*see Tustin* v. *Arnold and Sons* [1915] 84 L.J. K.B. 2214. I have considered the evidence of Wagner, the first witness for the defendant, when he said that even if the plank got broken the crane would not fall and that it is only when the rope is broken due to overloading that the crane would fall. The fact is that the crane fell although the rope was not proved to have been broken. One of the essential things to do in order to operate the crane properly according to Wagner, is to see that the planks are placed on a level ground and that the wheels of the crane are evenly supported on the ground. If the rope did not break and yet the crane fell, then I have no alternative other than to come to the conclusion that the falling of the crane was caused by the breaking of one of the planks and that that amounts to an improper operation of the crane by the servant of the defendant whose duty it was to see that planks placed under the crane were of good quality. Having arrived at this finding, I am of the view that the maxim *res ipsa loquitur* applies to this case and I hold that the defendant's servant who operated the crane was negligent in its operation.

There is evidence before me that when the crane fell on the plaintiff the second witness for the plaintiff, Adeoye Tinker, and other persons removed some planks which had fallen on the plaintiff. The witness did not say how many the planks were but I find it difficult to believe the evidence of the operator that although he had lifted twenty planks with the crane, the crane only carried two planks at the time. I am also not satisfied on the evidence that the two planks, even if they were the only ones being carried at the time, were properly fastened on the crane.

Having come to the conclusion that the operator was guilty of negligence, it is not necessary, in my view, to deal extensively with the submission of Mr Ayoola that as the plaintiff was a trespasser or a licensee there was no duty on the part of the defendant to warn him against any danger. The case of *Lathan* v. *Johnson and Nephew Ltd.* [1913] 1 K.B. 398, cited by Mr Ayoola dealt with the necessity of warning against concealed or dangerous traps and would not apply to the facts of the present case. The path on which the plaintiff was knocked down by the crane was known to the defendant's servants to be used by pedestrians and by school children and although I do not hold that there was a duty on the part of the defendant to warn the users of that

path, there was clearly a duty on the part of the servants to see that the operation of the crane would cause no harm to people using that path. In this connection, I would refer to the case of *Davis* v. *St. Mary's Demolition and Excavation Co. Ltd.*, [1954] 1 All E.R. 578 to which my attention has been directed by Mr Lambo.

I now come to the issue as to what damage the plaintiff is entitled to be awarded. The plaintiff claims a total amount of £30,000 of which £4 17*s* 6*d* is special damages and the remainder general damages.

It was averred in the statement of defence that the injury, loss or damage was caused or contributed to by the negligence of the plaintiff. The only evidence on which, I assume, the defendant is relying in support of the allegation of contributory negligence arises from the inference that the plaintiff while using the path must have known that it was dangerous to use it while the crane was being operated. The fact that the path was used by the public was known to the servants of the defendant. Indeed, there is a school quite close to the Church which was being built. As it was stated by Lord Atkin in the case of *Ellerman Lines Ltd.* v. *H. and G. Grayson Ltd.* [1919] 88 L.J. K.B. 616—

> "The application of the doctrine (of contributory negligence) must have relation to the circumstances; and it appears to me that there may be circumstances as here, where a danger is introduced by the defendants without there being any obligation on the part of the plaintiff to seek to avoid it."

In the case referred to it was held by the House of Lords that though a plaintiff may have been guilty of negligence and although the negligence may in fact have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and negligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

In the circumstances of the present case, I do not hold that the plaintiff was guilty of contributory negligence.

The doctor who performed the operation on the plaintiff has not been able to assist the Court as to the actual loss or disability the plaintiff has suffered permanently. By consent of both counsel, however, a certificate issued by the Surgical Registrar of the Hospital has been admitted in evidence as exhibit "A2". It shows that the injury suffered by the plaintiff was a fracture of the right femur and that an operation was performed and a nail was inserted in the thigh bone. It is stated in the certificate that the plaintiff may or may not require another operation to remove the nail. It is also stated that the disability was only temporary and that he should recover completely within a few months and be able to walk and run. The disability which was stated to be temporary was estimated at 30 per cent. The plaintiff stated in his evidence that as a result of the injury he had to repeat a class at the school, that he is now unable to run although he had won a certificate for gaining a second place in a 100 yards' race and that he is now unable to play football. Although the certificate states that the disability suffered by the plaintiff was temporary, I accept the evidence of the plaintiff as to the present handicap suffered by him as a result of the accident. Apart from this, I must also take into consideration the pain suffered by the plaintiff as a result of the injury.

In Phillips v. *South Western Railway* (1879) 4 Q.B.D. 406, at page 407, Cockburn, C.J., stated as follows:

"We think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of the damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer according to its degree and its probable duration as likely to be temporary or permanent or as may incapacitate the party for the rest of his life."

I have taken into consideration the pains and suffering occasioned by the accident and the fact that the plaintiff may not be able to take part in athletics or in the game of football, although it has not been proved to me that he is a particularly shining star in these activities. I have also taken into account the fact that he has had to repeat a class at the school. I think that an amount of £704 17*s* 6*d* being special and general damages is adequate.

Judgment is entered for the plaintiff for £704 17*s* 6*d* with costs assessed at 130 guineas.

Judgment for plaintiff.

THE QUEEN

v.

ALICE ERIYAMREMU

[HIGH COURT OF JUSTICE: Morgan, J., 18th September, 1959.]

Criminal law—murder—defence of insanity under section 28 of Criminal Code, Cap. 42—mental infirmity arising from practice of "juju" and witchcraft—not "natural mental infirmity" but self-induced.

The accused on a charge that she had murdered her grand-daughter, put forward a defence of insanity arising from the facts that she worshipped *juju* and practised witchcraft and that she had killed the girl in accordance with the dictates of her confederates in witchcraft.

Held: that even if it was arguable that at the time that the accused killed the girl she was afflicted with mental infirmity which deprived her of the capacity to know that she ought not to have killed her, the fact remained that the infirmity arising from the prisoner's worship, of *juju* and/or witchcraft was not a "natural mental infirmity" within the meaning of section 28 of the Criminal Code, Cap. 42, but was self-induced and so could not found a defence of insanity.

Accused found guilty and sentenced to death.

Case cited:

R. v. *Omoni*, 12 W.A.C.A. 511.

Akure Charge No. AK/5c/58.

Ogundare for the Crown.

Ogedengbe for the accused.

Morgan, J.: The prisoner is charged with the murder of her grand-daughter, Oyinbo, at Irona Street, Ado Ekiti, in the Akure Judicial Division, on the 21st August, 1957.

On the 22nd August, 1957, as a result of information received by the police that a bad odour was coming from a room in Irona Street, Ado-Ekiti, the 4th prosecution witness, Police Constable Andrew Egbele, went to the house with other constables. A search warrant was obtained to search the room in question. The police found two keys at the foot of the door leading into room and opened the door. On entering the room they found a basket from which the bad odour which was escaping from the room came. In the basket they found the dead body of an albino girl overlaid by the dead body of a cat.

On the following day the 4th prosecution witness took the girl's dead body to the Iddo General Hospital where the 1st prosecution witness, Doctor Ralph Nkeaka, performed a post mortem examination on the body in the presence of the 4th prosecution witness.

According to the evidence of the doctor the body was that of a female albino child aged about three years. The child had two very deep lacerations on the right and one on the left popletial regions. There was severe contusion of the right forehead

and a fracture of the skull which was about four inches long. In the doctor's opinion the girl's death was due to inter cranial haemorrhage resulting from the fracture of the skull. The doctor was also of the opinion that a severe blow or a fall could have brought about the fracture of the skull.

The police looked for the tenant of the room where the body was found and arrested the prisoner at a place called Josiah's Camp which was about three miles from Ado Ekiti.

The prisoner was charged with the murder of the deceased girl and made a statement under caution through an interpreter. The statement was recorded in English but was confirmed by the prisoner to Mr Peter Afolabi, then Assistant Divisional Adviser at Ado Ekiti. The following are extracts from the statement:—

"Apart from making *gari* I use to serve *juju* also..... I am a grand-mother of Oyinbo, the parent at home in our town at Kokori. Between the night of Tuesday and Wednesday my mates in witchcraft came to my house and instructed me to kill my grand-daughter Oyinbo and I killed her that very night with a stick which is still in my room, and before this done I held her two legs swinged her round my head and knocked her on the floor three times. All these been done in the night. After the death I use a matchet to cut her two legs and I threw the matchet in a brook..... At Oke camp, I killed a cat. Oke came to town to make a report.....and police came to collect me to their station. I left the station for my house and packed the corpse of my daughter inside a basket and covered it with some rough dresses and also the cat."

The accused has admitted in evidence in chief that she made a statement to the police and in her evidence which she gave in a very clear, steady and coherent manner she has confirmed that it was she who killed the deceased girl. She said: "I killed the girl during the night..... she was sleeping when I killed her..... I killed the child by knocking her to the ground..... After killing the child I went to one Robinson Udeh and told him what I had done".

The prisoner's defence is insanity, and it may be stated here that the trial of the case has been delayed because of the difficulty of ascertaining whether the prisoner was fit to plead or otherwise. It seemed that she could and that there was a voluntary withdrawal on her part to take part in the proceedings of the court. She has now taken part and has followed the proceedings quite intelligently and gave her evidence in a clear and coherent manner. In my view, even after a lapse of about two years, she has a clear recollection of the circumstances in which she killed the girl and the manner of it. She said that the child was sleeping on a bed, that she removed her dress before killing her. She identified the dress the girl wore, the dress is stained with human blood.

It must be stated however that the prisoner even though she admitted in evidence-in-chief that she made a statement to the police says under cross-examination that she does not remember if she made a statement to the police. And even though she remembered the events subsequent to the killing she said: "I did not know when I killed her".

It may be argued that this is a statement from which the Court should conclude that the prisoner was insane when she killed the girl and that it is unnatural for a grand-mother to kill her own grand-child. It may be said that there was no motive for the crime apart from the prisoner's own statement in which she ascribed her conduct to the carrying out of the dictates of her confederates in witchcraft.

In fact it may even be said that the reference to witchcraft is itself evidence of mental aberration. Having regard to the prisoner's reference to her worship of *juju* and to witchcraft and to the clear manner in which she gave her evidence I am of the opinion that, even if it is arguable that at the time she killed the girl she was afflicted with mental infirmity which deprived her of capacity to know that she ought not to kill the girl, on the balance of probabilities the infirmity was not natural and that it was induced by the prisoner's worship of *juju* and/or witchcraft. In my view her defence of insanity must therefore fail because mental infirmity which is self-induced is not natural and is not a defence to insanity under the provision of section 28 of the Criminal Code for, as stated by Verity, C.J., in *Rex* v. *Omoni*, 12 W.A.C.A. 511, at page 512, the words " 'natural mental infirmity' means a defect in mental power neither produced by his own default nor the result of disease of the mind".

I therefore find the prisoner guilty of the murder of Oyinbo Daniel.

Accused found guilty and sentenced to death.

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D. O. NTIASHAGWO
(By his Attorney—A. K. Adele) ... ... *Plaintiff*

v.

1. EMMANUEL AMODU ...
2. MADAM FELICIA KALETU ... ... *Defendants*

[HIGH COURT OF JUSTICE : Charles, J., 26th March, 1959.]

Claim for possession—Order 7 rule 10 (2) High Court (Civil Procedure) Rules, 1958, joinder of parties at any stage of proceedings— what plaintiff must prove in action for possession—Recovery of Premises Ordinance (Cap. 193)—Sheriffs and Civil Processes Rules (Cap. 205)—Order 26 rule 8 of the High Court (Civil Procedure) Rules, 1958, setting aside of judgment obtained in absence of party—Order 13 rule 8 of the Rule of Supreme Courts—Illiterates Protection Ordinance (Cap. 88)—purchase receipt alleged signed by an illiterate, but writer did not sign, section 3 of the Ordinance, admissibility of such receipt, section 3 (b), Illiterates Protection Law, 1956, meaning of "illiterate person"—conditions for registration of instrument executed by illiterate, s.8 (1) Land Registration Ordinance (Cap. 108)—Evidence Ordinance (Cap. 63) section 124, presumption as to date of document.

The plaintiff sued the first defendant alone for the recovery of possession of a house known as No. 16 Labinjo Street, Mushin. The second defendant who lived in this same house with the first defendant as husband and wife sought and obtained an order of court to be joined in the suit. The property originally belonged to the first defendant who admitted that it was purchased by the plaintiff at a Sheriff's sale under an execution of a judgment against him in another case.

The second defendant subsequently bought the property from the plaintiff for £80 for which she was given two receipts signed by the plaintiff, but no conveyance was executed. One of the witnesses for the plaintiff admitted that the receipts were signed by the plaintiff. When the receipt was being tendered as exhibit, it was objected to on the ground that the plaintiff was an illiterate and it was not signed by the writer.

Held : (1) that the second defendant has a right to be joined as she has an interest in the property;

(2) that documents to which the Illiterates Protection Ordinance applies and which has not been signed in the prescribed manner is a nullity and it is inadmissible;

(3) that the onus is on the person who objects to the document to prove that the maker was an illiterate;

(4) that an "illiterate person", is a person who is unable to read with understanding, and to express his thoughts by writing in, the language used in the document made or prepared on his behalf;

(5) that the plaintiff has failed to prove that he is out of possession and he is entitled to immediate possession.

Claim dismissed.

(*Note.*—This judgment is at variance with the judgments of Taylor, J., in *T. D. Amao* v. *G. Ajibike and others* 1955-56 W.R.L.N.R. page 121 and Duffus, J., in *Akohwere of Okan* v. (*1*) *Emayabor* (*2*) *Enayoma* 1959, Part II W.R.N.L.R. page 83, on the question of the interpretation of section 3 of the Illiterates Protection Ordinance.)

Cases referred to :

Barclays Bank v. *Roberts* (1954) 3 A.E.R. 107.

Choyley v. *Bains* (1955) 1 W.L.R. 877.

Minet v. *Johnson* (1894) 63 L.T. 507.

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Hollington v. *Hewthorn Co. Limited* (1943) 59 T.L.R. 321.

Oyewole v. *Kelani* (1948) 12 W.A.C.A. 327.

Ikeja Suit No. AB/88/56.

O. Alakija for plantiff.

Bada for defendants.

Charles, J. : In this action the plaintiff claims the possession of land, and a house thereon, situated at and known as 16 Labinjo Street, Mushin.

The plaintiff has pleaded, and the defendants have admitted, that the plaintiff purchased the first defendant's right title and interest to and in the property claimed at a sheriff's sale under an execution of a judgment which had been given against the first defendant in another action. It is common ground that the defendants, who are man and wife, have continued in occupation of the property since the purchase by the plaintiff. The defence is that the second defendant has been in possession of the property since before the issue of the writ, the property having been bought by her from the plaintiff at the price which he had paid for it. The sale to the second defendant has been denied by the plaintiff.

Originally the action was against the first defendant only but, since the conclusion of the hearing, the second defendant has been added under Order 7 Rule 10 of the Western Region High Court (Civil Procedure) Rules, 1958. An earlier application by the now second defendant for the addition had been refused from an undue concern on my part not to force a new defendant upon the plaintiff without granting him an adjournment, which his counsel desired to be the term upon which the application would be granted. The addition was made subsequently after counsel for the plaintiff had stated that he did not desire to be heard as to it or as to terms for it.

The necessity for the addition of the second defendant will become apparent from a consideration of the nature of a claim for possession. Such a claim is for the plaintiff to be put into possession of immovable property of which he is out of possession—though not necessarily kept out of possession—at the time of the service of his writ of summons, and to which at that time he had the right to immediate possession. It is those two things, being out of possession of the property claimed and having the right to the immediate possession of that property at the time of the service of his writ of summons, which he must prove as constituting his cause of action. As the claim is not for a personal remedy against a defendant, as is a claim for damages or an injunction, but for recovery of possession of a thing, all persons who are in possession or apparently in possession of the property claimed are entitled to be, and should be, made defendants to the action in which the claim is made. If the claim is made in respect of vacant land—and, since it is really an assertion of the plaintiff's rights to possession, it may be in respect of vacant land—the proper person to be made defendant is the person who

was or was apparently last in possession of the land. It is no defence to a person who has been made a defendant that he is not in possession of the property claimed and so is unable to deliver possession to the plaintiff. If a defendant is not in possession of that property his proper course is not to defend and, if he is in occupation under another, as a licensee or employee, to hand the writ to that other so that the other may defend, if he thinks fit. A defendant who takes that course will not be liable for costs. On the other hand, a defendant who resists or joins in resisting the claim thereby acknowledged that he has been properly sued as having an interest in the possession of the property claimed, and will incur the usual liability for costs in the event of the plaintiff being successful.

To succeed in his claim, the plaintiff has to prove against all the defendants that he had the legal right to immediate possession of the property claimed at the time of the service of the writ. The opposition of any defendant establishes, of course, that the plaintiff is out of possession, the second element of his cause of action. If he fails to prove his right against any one defendant he fails against all. He also fails against all if any one defendant established a valid defence in equity which renders the legal right of the plaintiff unenforceable.

If the plaintiff succeeds in his claim, the judgment for possession follows the same pattern. It is not a judgment against the defendants personally but one which may be enforced generally against all persons on the property to which it relates, whether they were defendants to the claim or not. Thus, the writ of execution which is issued out of the High Court in England does not direct the sheriff to evict the defendant or defendants but that he causes the plaintiff to be put into possession. Similarly, the warrant of possession in the form prescribed by the Recovery of Premises Ordinance (Cap. 193), a form which is made generally applicable by the Sheriffs and Enforcement to Civil Processes Rules, directs that the sheriff shall forthwith give possession to the plaintiff. If a person who has not been a defendant to the action claims possession when the sheriff seeks to put the plaintiff into possession, the proper course for the plaintiff and the sheriff to adopt is to give the claimant a reasonable time in which to apply to the Court to have the judgment set aside and to refrain from executing under the judgment during that time. If the claimant does not get the judgment set aside, the judgment remains unenforceable against him, as against any one else on the property to which it relates. An application by a claimant to set aside the judgment will be granted, if the application is *bona fide*, subject to the term that the claimant becomes a defendant to the action. On the setting aside of the judgment and the making of the claimant a defendant, the claim for possession is reheard as a new action, and it is dismissed or the judgment for possession is re-made according to whether the plaintiff fails or succeeds in proving his right to possession against the new defendant. The setting aside of the original judgment may be done under Order 26 Rule 8 of the Western Region High Court (Civil Procedure) Rules, 1958, when applicable, or under the inherent jurisdiction of the Court to set aside a judgment or order which has been made without a person affected by it having the opportunity to be heard.

The authorities for the foregoing generally are the informative note to Order 13 Rule 8 in the *Barclays Bank* v. *Roberts* 1954, 3 All E.R. 107 C.A.; *Choyley* v. *Bains*, 1955, 1 W.L.R. 877 P.C. at page 884; to which may be added *Lecture V of Maitlands Lectures* on the Forms of Action. Authorities as to the setting aside of an Order for possession at the instance of a non-defendant claimant are *Minet* v. *Johnson* 1894 63 L.T. 507; the note to Order 12 Rule 25; *Windsor* v. *Chalerapt*, 1938 All. E.R. 751 C.A. and *Craig* v. *Kanseen*, 1943 1 All E.R. 108 C.A.

It follows from the foregoing that the second defendant has a right to be joined as a defendant once it appeared that she was in occupation of the property claimed. In any event, to have proceeded to judgment with the action constituted against the first defendant alone, even if that had been practicable, would only have been conducive of further litigation, contrary to the intention of the Rules of Procedure.

The material evidence in this case is short. The plaintiff, who sued by an attorney, did not give evidence. The attorney formally produced his power of attorney. The only other witness for the plaintiff was the auctioneer who sold the property claimed under the execution. The purpose for which he was called is not apparent, but he stated that the plaintiff had agreed to sell the property claimed to one Adeyemoija and, in cross-examination, that certain receipts in favour of the defendant were signed by the plaintiff, that Adeyemoija had completed the sale by paying the purchase price of £100, and that negotiations for the sale had commenced before the receipts were signed. In re-examination he stated that a conveyance to Adeyemoija had been executed.

Both defendants and one Shoyebo gave evidence to the effect that the plaintiff had negotiated the sale of the property claimed to the second defendant for £80 through Shoyebo; that that purchase price was paid by the second defendant in two instalments, one for £20 and the other for £60; and that the plaintiff issued in respect of the purchase price the receipts which the auctioneer had earlier identified as having been signed by the plaintiff. The receipts were objected to as being inadmissible on the ground that the plaintiff was an illiterate and that they had not been signed by the writer of them as required by the Illiterates Protection Ordinance (Cap. 88) which was in force in this part of the Western Region at the relevant times, but has since been replaced by the Illiterates Protection Law, 1956. The receipts were admitted tentatively as subject to the objection upon which I reserved my ruling.

The first question which arises under the Illiterates Protection Ordinance is whether a document made or prepared by a person on behalf of an illiterate person is inadmissible in evidence if it is not signed in the prescribed manner by the maker or preparer. The Ordinance is silent upon the point and, so far as I have been able to find, the point is not covered by authority.

It is a well established principle, I think, that if an enactment directs an act to be done, and makes the failure to do the act an offence, it is mandatory in its effect and nullifies anything done in disregard of its direction, when the apparent object of the direction is to protect or otherwise benefit the public or a considerable portion of the public. The Illiterates Protection Ordinance obviously was intended, as the name shows, to protect a section of the public which, unfortunately, was of considerable number in 1915, the date of its first enactment. The Ordinance directs that a person who writes or prepares a document for an illiterate shall sign the document with his name, his capacity as writer and his address; that is, it directs, in effect that a document made or prepared by a person for an illiterate shall be signed by the maker or preparer in the manner prescribed. It also provides a fine, with a term of imprisonment for non-payment of this, for which the maker or preparer is liable for failure to sign a document in the prescribed way. In my opinion the Ordinance thus comes within the principle referred to in respect of its direction as to signature by a writer or preparer and, consequently, a document to which the Ordinance applies, and which has not been signed in the prescribed manner, is a nullity and inadmissible in evidence.

The second question is: What is the meaning of "illiterate person" for the purpose of the Ordinance? This is also a point upon which the Ordinance is silent. Having regard to clause (*b*) in section 3, which indicates what the Ordinance is intended to safeguard against, it seems to me that an illiterate person, for the purpose of the Ordinance, is a person who is unable to read with understanding, and to express his thoughts by writing in, the language used in the document made or prepared on his behalf. That definition, no doubt, is very wide and would cover persons who are not generally regarded as illiterate, including Her Majesty's judges when they have letters written or prepared for them in a language which they cannot read, and in which they cannot write. I see no reason to reject the definition because of its wide scope, particularly as the Legislature of a multilingual country has given only the one key, that mentioned, as to its intention.

The third question which arises is: How is the inadmissibility of a document under the Ordinance to be determined? The common law is that once a document has been proved to have been signed or authorised by a person it is admissible in evidence, and the onus is upon any person alleging that the document is a nullity, because it is not what the signer or authoriser intended, to prove the lack of intention. In the case of a document which is a contract the onus upon the objector is increased by the refinements, based upon estoppel, of the doctrine of *non est factum*. Applying the salutary presumption that the Legislature did not intend to alter the existing law more than is necessary to achieve its apparent object (*Murngish* v. *Jaimudeen*, 1954, 2 W.L.R. 682 P.C. at page 687) the Ordinance has the effect, in my judgment, of altering the common law in its application to a document allegedly made or prepared for an illiterate to the extent that, once it is proved that a document was so made or prepared it is inadmissible unless signed by the maker or preparer in the prescribed manner, and proof that the illiterate did not know the nature of the contents of the document is unnecessary. That means, however, as indicated, that the onus is still upon a party objecting to a document as being inadmissible under the Illiterates Protection Ordinance to prove that the document was made or prepared on behalf of an illiterate.

In this case the plaintiff's attorney stated in cross-examination that the plaintiff could not read or write English but only signed his name in that language. He said that in answer to a single question, and he was not pressed as to the correctness of that statement. Shoyebo, the third witness for the defendant, stated, also in cross-examination, that the plaintiff could both read and write English, and he stated, when challenged as to an earlier statement, that he did not agree that the plaintiff could not write English. But for the statement of the plaintiff's attorney having been really left unchallenged, I would have had no hesitation in holding, on the evidence, that the plaintiff was not an illiterate when he signed the two receipts. Shoyebo impressed me as a truthful witness. The attorney, on the other hand, while I am not prepared to say that he was untruthful—the nature of his evidence did not admit of a conclusion as to that—appeared to be somewhat ill at ease in the witness box. Not having been tested on the one material matter upon which he gave evidence I am not prepared to prefer Shoyebo's evidence to his. Neither, of course, am I prepared to prefer the attorney's evidence to Shoyebo's. The position, put at its most favourable for the plaintiff, is that the evidence of the attorney and the evidence of Shoyebo equate each other as to the plaintiff's alleged illiteracy, with the result that the plaintiff's illiteracy has not been proved and I hold that the receipts are admissible. They will remain in evidence accordingly. I should add that while I hope that the basis of that ruling is clear, I do not wish it to be thought that I have acted on the argument of counsel for the defendant that the registration of

the plaintiff's power of attorney was evidence that the plaintiff is literate, having regard to section 8 (1) of the Land Registration Ordinance (Cap. 108). That argument appears to me to be completely untenable. The fact that some official in the Land Registry appears to have decided that the plaintiff was literate is no more relevant as to the admissibility of a document under the Illiterates Protection Ordinance than is the conviction of a motorist for negligent driving relevant on a claim against him for damages for the same negligence, as to which *see Hollington* v. *F. Kewthorn Co. Limited, 1943*, 59 T.L.R. 321, followed in *Oyewole* v. *Kelani* 1948, 12 W.A.C.A. 327.

The position which arises in this case is, therefore, that there is the uncontradicted evidence of three witnesses that the plaintiff agreed to re-sell the property claimed to the second defendant and that the latter has paid the purchase price in full. As already stated, one of those witnesses, Shoyebo appeared to me to be a truthful witness. The two defendants also appeared to me to be truthful. The story which all told was, in the circumstances, a probable one. It is, moreover, corroborated by the receipts which also show that the second defendant had completed her part of the purchase on the 22nd August, 1955 (Evidence Ordinance Section 124), which was before the date of the issue of the Writ, the 27th August, 1956. On that evidence I have no hesitation in finding as facts that before the date of the issue of the writ in this action the plaintiff had agreed to sell to the second defendant the property claimed for £80 and that the second defendant had paid the purchase price to the plaintiff.

On those findings, in accordance with the principles discussed earlier as governing claims for possession, the defendants are entitled to judgment. If the property claimed is subject to customary law it is probable that the legal right to possession of it is not in the plaintiff but in the second defendant. If, however, the property is subject to English law, so that the legal estate has remained in the plaintiff because a deed of assignment has not been executed—as is the case here—or for any other reason, the plaintiff is a bare trustee of the property for the second defendant and equity will not allow him to enforce against her his legal right to possession. Consequently, whichever law governs the tenure of the property claimed, the second defendant's right to it as against the plaintiff disentitles the plaintiff to a judgment for possession.

Having reached that conclusion it is unnecessary to decide whether or not the evidence that the plaintiff has also purported to convey his interest in the property claimed to a stranger to the action affords an additional answer to the claim.

There will be judgment for the defendants; the plaintiffs claim being dismissed with costs to be fixed.

Claim dismissed.

J. OLA. KALEJAIYE ... ... *Appellant*

v.

IKORODU DIVISIONAL COUNCIL ... ... *Respondent*

[HIGH COURT OF JUSTICE: Charles, J., 4th May, 1959.]

Customary Courts Law and Rules—charge for failure to pay 1957-58 rates contrary to section 138 and punishable under section 251 of the Local Government Law, 1957—defendant pleaded not guilty to the charge—prosecution addressed the Court, but led no evidence—defendant gave evidence on oath, denied the allegation, but he was convicted—appeal against conviction—appeal court ordered a re-trial—Orders IX and X of the Customary Courts Rules 1958 considered.

The appellant was tried and convicted by the Ikorodu Grade "C" Customary Court. The prosecution in his address only outlined the facts of the case for the prosecution but led no evidence. The appellant in his defence gave evidence on oath and denied the substance of the allegation. He was convicted. He appealed to the Ikeja Grade "B" customary court which allowed his appeal but ordered a retrial. Against the order of retrial, he appealed to the High Court.

On appeal:

Held: (*i*) that the retrial order was wrong, as it gave the prosecution a second chance of proving its case when it had failed to do so the first time;

(*ii*) that the prosecution must observe the provisions of Orders IX and X of the Customary Court Rules, 1958.

Appeal allowed.

Appeal from Ikorodu Customary Court Grade "C": Appeal No. HK/ICA/59.

Ogunsanya for appellant.

Odesanya for respondent.

Charles, J.: The appellant was convicted on the 19th September, 1958, before the Ikorodu Grade "C" Customary Court, of having "failed to pay 1957-58 Rates contrary to section 138 of the Local Government Law, 1957 and punishable under section 251 of the same Law". He was sentenced to a fine of fifteen pounds (£15) or imprisonment for two months in default of payment. The appellant appealed against that conviction and sentence to the Ikeja Grade "B" Customary Court and, on the 24th November, 1958, the appeal was allowed by setting aside the conviction and sentence and ordering a retrial. The present appeal is against the order for retrial having been made instead of an order for acquittal.

The record shows the following:—The Appellant pleaded not guilty before the Grade "C" Customary Court, stating that he had paid rates and taxes for 1957-58 in Lagos where he worked. The prosecutor then made an address in which he stated that the appellant was a native of Ikorodu and had resided in that town permanently for the past two years: that he had got himself assessed for rates in Lagos because the rates were lower there than in Ikorodu: and that, on being served with the summons in this case, he had run off to Lagos and paid his income rate there. After that address the prosecutor closed his case without calling evidence. The appellant then gave evidence in which he admitted that he was a native of Ikorodu but he denied that he had been residing there, and he stated that he lived at Lagos and had never paid Ikorodu rates. He also stated that he had gone to Lagos to pay his rates after he had received the

summons in this case because he had always paid his rates there and he did not wish to be summoned for the Lagos rates then due. The only result of his cross-examination was to obtain from him a re-iteration of certain parts of his evidence in chief. The Court, after purporting to sum up the evidence, reached the conclusion that the appellant had resided in Ikorodu in the year 1957-58 and that he was trying to evade payment of the Ikorodu rate for that year.

The reasons for the Grade "B" Customary Court setting aside the conviction ordering a retrial are thus recorded—

> "After hearing the appellant and representative of the respondent, and after reading through the proceedings of the Court below, the Court finds that there are indications of a prima facie case for the appellant to answer if and when the charge is properly laid before the Court. The proceedings of the Court below, however, lack the ingredients of the conventional form of recording. The prosecution has to prove yet the allegations contained in the charge by leading evidence properly and proving to the hilt the guilt of the appellant as alleged. No evidence has been called to do this and so, the proceedings *ab initio* were null and void."

The present Customary Courts of this Region are the creation of the Customary Courts Law, 1957 and it is by that Law that this jurisdiction is defined, and the substantive and procedural law which they are to apply and follow is prescribed. By Order IX of the Rules of Procedure made under that law the Customary Courts are required to observe at criminal trials a procedure which in substance, though not necessarily in details, accords with the procedure which governs criminal trials according to the course of the Common Law. By Order X of the same Rules the evidence of witnesses is to be given upon oath, and all witnesses are subject to cross-examination. The effect of those Orders is, by necessary implication, that a person charged before a Customary Court with having committed an offence should only be found guilty if the evidence, considered as a whole, proves the ingredients of the offence and fails to prove any matter of defence as to which the burden of proof has been placed upon him by some enacted law.

While neither the Customary Courts Law, 1957 nor the Rules of Procedure made under it specified what shall and shall not be evidence, it is obvious, I think, that in this case the trial court had nothing before it which could be regarded as evidence of the appellant's guilt. The Prosecutor's address, both because of the nature and because it was not upon oath, was not evidence that the appellant had failed to pay a rate after having received notice of assessment and of the time for payment, and the appellant's evidence did not contain any admissions of those matters, or of any other matter which may have been an essential element of the offence charged.

It was submitted, however, on behalf of the respondent that the statement which the appellant made when pleading not guilty was an admission of the offence charged in all respects other than that he was liable to be assessed for the rate to which the charge related, and as that was a matter of excuse which he had to prove, the trial court properly decided that his admission established a prima facie case against him. That submission was directed, it would seem, to showing that the trial court's error was really only in not properly considering whether the appellant's evidence established his defence, or in not recording its reasons for not accepting that evidence, and that the order for retrial should not, therefore be set aside.

It may be that the Rules of Procedure do not preclude a customary court from acting upon partial admission made by an accused when pleading guilty, and that there is no other legal objection to it so doing. It is unnecessary to decide that in this case. If such partial admissions can be acted upon as evidence, it is only when they have been made spontaneously—that is, not in answer to questions intended to extract them—and they are clear and unambiguous in their terms. In this case the appellant's statement accompanying the plea was not clear and unambiguous but appears merely to have been an emphasis upon the plea.

It follows that the conviction was invalid and was rightly set aside. The order for retrial, however, was in my judgment, wrongly made. The power given to an appellate court to order a retrial instead of an acquittal when setting aside a conviction is one which should be sparingly exercised. The object of the power is to meet the exceptional case in which, although there was strong or apparently weighty evidence to support the conviction, the conviction has had to be set aside for lack of jurisdiction or some defect in the course of the trial which annulled the trial or which could not reasonably be regarded as not having deprived the accused of a chance of acquittal, and in which the nature of the charge and the circumstances were such that a retrial is desireable in the public interest. A retrial for the purpose of giving the prosecution a second chance to prove its case when it has wrongly obtained a conviction without evidence to support it is outside the scope of that object.

The appellate court below appears to have been mainly influenced to order a retrial by regarding the failure of the prosecution to adduce evidence as rendering the original trial a nullity. That was a fallacy. The trial was valid in its inception and nothing that happened afterwards could affect that validity. The most that could have happened was for something to have occurred which legally precluded the court from reaching a conclusion and rendered the trial abortive. Such a thing did not occur. The failure of the prosecution to adduce evidence only meant that the court could not conclude the trial by a decision of guilty, but it did not prevent it from concluding the trial by a decision of not guilty, and it was bound to conclude it in that way.

The appeal will be allowed by setting aside the order for retrial and substituting for it an order for acquittal.

Appeal allowed.

1. GBAGBEKE OKOTIE ... ...
2. ISHOKA OGUOZI ... ... } *Accused/Appellants*
3. VICTOR ADJURHE ... ...
4. KUPA OBONUYE ... ...

In re:

1. GBAGBEKE OKOTIE ... ... } *Accused/Appellants*
2. VICTOR ADJURHE ... ...

v.

COMMISSIONER OF POLICE ... *Complainant/Respondent*

[FEDERAL SUPREME COURT: (Myles John Abbott, Ag.F.C.J., Lionel Brett and Louis Nwachukwu Mbanefo, F.JJ.) 29th May, 1959.]

Criminal Law and Procedure—conspiracy to bring false accusation, contrary to section 125 of the Criminal Code—stealing contrary to section 390 of the Code—arrest without warrant for an offence under section 125 of the Code, point on arrest without warrant raised first time on appeal, whether jurisdiction of Magistrate ousted—section 5 and sections 262 to 270 of the Code, irregularity in arrest, section 101 of the Criminal Procedure Ordinance—arrests without warrants generally, sections 10 to 20 of the Criminal Procedure Ordinance.

The appellant was charged before the Magistrate on two counts one of which was conspiracy to bring false accusations contrary to section 125 of the Criminal Code. He was arrested, tried, and convicted. There was no evidence on the record of proceedings to show that appellant was arrested with warrant. Appeal to the High Court was dismissed.

On appeal it was contended on behalf of the appellants that the provisions of the law that the accused cannot be arrested for that particular offence, without a warrant of arrest was not complied with and therefore the trial was a nullity.

On appeal.

Held: (*i*) that the point that the arrest was made without a warrant is one which could not be taken for the first time on appeal;

(*ii*) that failure to comply with the provisions of the Criminal Code that an offender with respect to a certain offence cannot be arrested without a warrant does not affect the jurisdiction of the magistrate to try the case.

(*iii*) that where the provisions for arrest with warrant is not observed it only makes the arrest unlawful.

(*iv*) that it is unnecessary to prove affirmatively that the arrest was made with a warrant—*omnia praesumuntur rite esse acta.*

Appeal dismissed.

Cases cited:

Inspector-General of Police v. *Onwunibe* (unreported), Aba High Court, 4th June, 1956

Price v. *Humphries* (1958) 3 W.L.R. 304.

Appeal from Magistrate Court, Warri, Appeal No. FSC 66/1959.

Adenekan Ademola, for appellant.

E. A. Ademola, with him *T. A. Aguda*, Senior Crown Counsel, for respondent.

Abbott, Ag.F.C.J. : This is an appeal by the first appellant from a judgment of the Western Region High Court dismissing his appeal from his conviction by the Warri Magistrate on two charges: the first of conspiracy to bring a false accusation, *contra* section 125 of the Criminal Code, and the second of stealing *contra* section 390 of the Criminal Code.

On the appeal coming before this Court leave was granted to argue an additional ground, reading as follows:

"That the trial and conviction of the appellants on Count 1 both in the Magistrate Court and the High Court is void in so far as the proceedings under section 125 of the Criminal Code was not instituted according to the law."

Section 125 of the Criminal Code provides that a person who offends against the provisions thereof cannot be arrested without a warrant and Counsel for the appellant urged that there being no evidence on the record that a warrant was obtained for the arrest of the first appellant or of the second appellant, the provisions of the law had not been complied with and therefore the whole of the proceedings in the two Courts below were a nullity, and on that ground the convictions should be quashed.

Mr Ademola, in support of his argument on this ground, cited to us a decision of Mbanefo, J. (as he then was) in the unreported case of *Inspector-General of Police* v. *Onwunibe* which came before him in the High Court of the Eastern Region at Aba on the 4th June, 1956, in which although the point there in issue was not the same as the one now before us, his reasoning seems to support the view that failure to comply with the provisions of the Criminal Code that an offender with respect to a certain offence cannot be arrested without a warrant affected the jurisdiction of the Magistrate to try the case. We do not agree that it is a matter of jurisdiction. The provision speaks of arrests and we are of the opinion that in applying it, its scope should be limited to arrests. Where it is not observed it only makes the arrest unlawful and we think that the point is covered at the present time by section 101 of the Criminal Procedure Ordinance which reads as follows:

"When any accused person is before a Magistrate whether voluntarily, or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the preliminary inquiry or trial may be held notwithstanding any irregularity, illegality, defect, or error in the summons or warrant, or the issuing, service, or execution of the same, and notwithstanding the want of any complaint upon oath, and notwithstanding any defect in the complaint, or any irregularity or illegality in the arrest or custody of the accused person".

This section is extremely wide in its terms, particularly in its last phrase, and it would be contrary to the whole spirit of the administration of the criminal law for the prosecution to rely on it too readily. We do not wish it to be thought that it can be invoked to exempt Police Officers either from carrying out their duties under the law in the proper way or, indeed, from any civil, criminal or disciplinary responsibility which they might incur by failure to observe the provisions of the criminal law of this country relating to procedure for procuring the attendance of an accused person before a Court.

Even if there were no special provision governing the matter we should not regard the point as one which could be taken for the first time on appeal. In *Price* v. *Humphries (1958) 3 W.L.R. 304*, the Divisional Court held that where the consent of the Attorney-General was necessary for the institution of a prosecution for a particular offence it need

not be proved affirmatively that that consent had been obtained, and that the maxim *omnia prasumuntur rite esse acta* was applicable. Although it is not an unusual practice in this country for warrants of arrest or search-warrants to be produced in evidence we regard it as unnecessary to produce them as a matter of course, and we should not, in any event, have been prepared to hold, on appeal, that the jurisdiction of the Magistrate was ousted because no warrant of arrest had been produced. It is, furthermore, far from clear that a provision in a section of the Criminal Code that a person offending against the section could not be arrested without a warrant was ever intended to preclude the Court from trying a person so arrested. Section 5 of the Code lays down that—

> "The expression 'the offender cannot be arrested without warrant' means that the provisions of this code relating to the arrest of offenders or suspected offenders without warrant are not applicable to the offence in question, except subject to such conditions, if any, as to time, place, or circumstances, or as to the person authorised to make the arrest, as are specified in the particular case".

But sections 262 to 270 of the Code, which formerly contained provisions relating to the arrest of offenders or suspected offenders without warrant, were repealed by Ordinance No. 43 of 1945, and comparable (though not identical) provision is now made by sections 10 to 20 of the Criminal Procedure Ordinance. Sections 262 to 270 of the Criminal Code were contained in Chapter XXV of the Code, which is entitled "Assault and Violence to the Person generally; Justification and Excuse", and we think the true effect of a prohibition of arrest without warrant has and always has had to do with the law of assault, not with the jurisdiction of the Court.

In view of the opinion which we hold of the effect of section 101 of the Criminal Procedure Ordinance, it follows that this appeal must be dismissed. There is no substance whatever in the original grounds filed by the appellant. His sentence will begin as from 21st May, 1959.

Appeal dismissed.

1. GBAGBEKE OKOTIE ... ...
2. ISHOKA OGUOZI ... ... } *Accused/Appellants*
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In re:

1. GBAGBEKE OKOTIE ... ... } *Accused/Appellants*
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v.

COMMISSIONER OF POLICE ... ... *Complainant/Respondent*

[FEDERAL SUPREME COURT: Myles John Abbott, Ag.F.C.J., Lionel Brett and Louis Nwachukwu Mbanefo, F.JJ., 29th May, 1959.]

Practice Note [*application by legal practitioners*]

The acting F.C.J. (Myles John Abbott) delivering the judgment of the Court in the above case said:—

"There is one other matter to which we feel we must refer.....

....."

"A direction has been given to the Chief Registrar that when Notices of Motions and other applications are filed by legal practitioners it must be clearly shown on whose behalf the notice is filed or the application made....."

"It is also our view that when a legal practitioner gives his own address as the address for service of his client, it is the duty of that practitioner to take all proper steps required by documents served upon him at that address including securing his client's attendance in Court where such attendance is necessary. If, after giving his own address as the address for service, a practitioner ceases to represent his client, he must so inform the Court and, at the same time, furnish either the client's own address where service can be effected, or, if known, the address of the practitioner to whom the client has transferred his instructions. Similarly, any practitioner who receives instructions from a client during the pendency of proceedings should inform the Court of the address where service on the client can be effected. It is proposed to deal with this matter comprehensively by Rules of Court in due course, but in the meantime that is the direction of this Court". "

THE QUEEN

v.

GOVERNOR IN COUNCIL

EX PARTE J. A. O. OSHUNLAJA

[HIGH COURT OF JUSTICE: Irwin, J., 22nd September, 1959.]

Certiorari—Appointment and Deposition of Chiefs Ordinance (Cap. 12)—due inquiry, section 2 sub-section (2) of the Ordinance—Western Region Appointment and Recognition of Chiefs Law, 1954 (No. 1 of 1955)—meaning of "Chief", sections 2 and 34 (2) of the Law—appointment, approval and recognition by Governor in Council, section 37 (3) (b) of the Western Region Appointment and Recognition of Chiefs (Amendment) (No. 2) Law, 1955 (No. 1 of 1955)—Chiefs Law, 1957,—Courts' Jurisdiction, section 24 of the Law.

Upon the death of one Adeboye on the 3rd of March, 1954 a vacancy occurred in the Chieftaincy of the Dagburewe of Idowa. A dispute arose as to the filling of the vacancy. On 14th September, 1954, the Awujale of Ijebu-Ode approved Mr E. A. Olaneye as the candidate for appointment in accordance with Native Law and Custom, and he was installed Dagburewe on 18th October, 1954. No inquiry was held as provided by section 2 (2) of the Appointment and Deposition of Chiefs Ordinance (Cap. 12), 1948.

On 11th April, 1956, the Governor in Council, under section 37 (3) (*b*) of the Western Region Appointment and Recognition of Chiefs Law, 1954 (No. 1 of 1955), which came into force on 13th January, 1955, approved and recognised Mr E. A. Olaneye as the Dagburewe of Idowa. This was published in the *Western Region of Nigeria Gazette* No. 31 of the 7th of June, 1956. On an application to show cause why an order of *certiorari* should not issue to quash the order of approval and recognition of the appointment of E. A. Olaneye as the Dagburewe of Idowa.

Held: (1) that no due inquiry was made as provided by section 2 (2) of the Appointment and Deposition of Chiefs Ordinance (Cap. 12) which was in force at the time of the appointment of E. A. Olaneye.

(*ii*) that the word "Appointment" in section 37 of the Western Region Appointment and Recognition of Chiefs Law, 1954 (No. 1 of 1955) is not to be construed as applying to the appointment of the Dagburewe of Idowa made before the application of Part II of the law to the Chieftaincy.

(*iii*) that the order or decision of the Governor in Council published on the 7th June, 1956 was made without jurisdiction.

Order nisi made absolute.

Application for *Writ of Certiorari*: Abeokuta Suit No. M/3/59.

Case cited:

The Resident, Ibadan Province and another v. *Memudu Lagunju*, 14 W.A.C.A. 549.

R. v. *The Governor, Western Region ex parte Alasan Babatunde Ajagunna II of Ikare*, 1959, W.R.N.L.R. 44.

Ayoola for applicant.

Adedipe, Senior Crown Counsel for respondent.

Irwin, J.: An application has been granted for an order *nisi* directed to the Governor in Council, Western Region, to show cause why a writ of *certiorari* should not issue to remove into this court for the purpose of being quashed the order of approval

and recognition of the appointment of E. A. Olaneye as the Dagburewe of Idowa, dated 11th April, 1956 and published as Western Regional Notice No. 417 in the *Western Region of Nigeria Gazette* No. 31 of the 7th June, 1956.

It is established by the affidavit and exhibits that after the death of Adebonojo, the Dagburewe of Idowa, on the 3rd March, 1954, a dispute arose as to the appointment of his successor, that in a written statement dated the 14th September, 1954, the late Awujale of Ijebuland expressed his approval of E. A. Olaneye as the rightful candidate for appointment in accordance with native law and custom, and that on the 18th October, 1954, Olaneye was installed as the Dagburewe of Idowa.

Olaneye has also stated on affidavit that his appointment was made on the 4th May, 1954.

It was then, in the year 1954, that it became the duty of the Resident, Ijebu Province, to whom the powers of the Governor has been delegated, to hold due inquiry under section 2 (2) of the Appointment and Deportation of Chiefs Ordinance, Cap. 12.

Copies of the judgments of the Federal Supreme Court and of the record of appeal (FSC 165/58) including the judgment of the High Court, Ibadan, dated the 16th May, 1956, in previous proceedings which relate to this dispute, were admitted in evidence.

The judgment of Ademola, J., as he then was, establishes the fact that no "due inquiry" was held.

Part II of the Western Region Appointment and Recognition of Chiefs Law, 1954, which came into operation on the 13th January, 1955, was not applied to this Chieftaincy until the 23rd February, 1955.

Section 37 was added to the principal Law by an amendment which came into operation on the 15th March, 1956.

The decision now complained of published on the 7th June, 1956, purports to have been made under section 37 (3) (*b*). In the judgment of the West African Court of Appeal, in *The Resident, Ibadan Province and another* v. *Memudu Lagunju, 14 W.A.C.A. 549,* Foster-Sutton, P., said:.....it is of the highest importance for the welfare and contentment of the people in the area concerned that the Resident should strictly adhere to the requirements attaching to his exclusive jurisdiction conferred by section 2 (2) of the Appointment and Deposition of Chiefs Ordinance. To do otherwise would amount to a denial of justice to interested parties such as the respondent who had right to be heard.

By sub-section 3 of section 37 no such right is given to a party to a dispute. In this case the Governor in Council acted upon a report of the Divisional Adviser for which privilege was at first obtained but claimed was subsequently waived at the hearing of this application. The new Law therefore affected rights and not merely matters of procedure.

It appears to me moreover that the applicant was not to be deprived of the right to be heard as a result of any failure on the part of the Resident in carrying out the duty to hold due inquiry within a reasonable time after he became aware of the existence of the dispute.

It is a cardinal rule of construction that where a statute altering the law is passed it is to be taken as intended to apply to a state of facts coming into existence after its passing unless by clear words or necessary implication a contrary intention appears.

The principal ground of this application is as follows:

"The order sought to be quashed was made without jurisdiction owing to the absence of essential conditions precedent to the exercise by the Governor in Council

of power under section 37 (3) of the Western Region Appointment and Recognition of Chiefs Law, 1954, there being (*a*) as a matter of law and fact no appointment to a chieftaincy to which Part II applies (*b*) as a matter of law and fact no "dispute as to an appointment to a chieftaincy to which Part II applies".

Mr Ayoola, for the applicant, submitted that the appointment having been made on the 4th May, 1954, it was not one to which Part II could apply.

Part II of the Law (No. 1 of 1955) seems to me to contemplate the occurrence of a vacancy in respect of a chieftaincy as therein defined followed by proceedings in accordance with its provisions to fill such a vacancy.

It was further submitted by Mr Ayoola that no vacancy had in fact occurred in respect of this chieftaincy since the law came into operation, and that the appointment of the 4th May, 1954, not having been made under its provisions, it was not within the competence of the Governor in Council to make an order under section 37 in respect of such an appointment.

Having regard to the language employed by the draftsman of the Law (No. 1 of 1955) and its amendments, I am of the opinion that the word "appointment" in section 37 is not to be construed as applying to the appointment of the Dagburewe made before the application of Part II to the chieftaincy.

Until the application of Part II the Dagburewe of Idowa was not a "Chief" as defined in section 2 since he was not the holder of a "chieftaincy" as also defined in that section.

Mr Adedipe, for the respondent, submitted that the jurisdiction of this Court was excluded by section 37 (3) (*b*) which provides that decision of the Governor in Council "shall be final and shall not be open to question in any court".

In reply, Mr Ayoola referred to the case of *R.* v. *The Governor, Western Region ex parte Alasan Babatunde Ajagunna II of Ikare, 1959, W.R.N.L.R. 44,* where it was held that section 24 of the Chiefs Law, 1957, had not excluded proceedings for *certiorari.*

I am in respectful agreement with the view expressed in the judgment of Jibowu, C.J., that this section relates to a matter of procedure and that it has therefore retrospective effect.

The right of the applicant to apply to the Court by way of proceedings for *certiorari* is not consequently, in my opinion, affected by the provisions of section 34 (2) or 37 (3) (*b*) of the Western Region Appointment and Recognition of Chiefs Law, 1954.

In the result, I hold that the order or decision of the Governor in Council published on the 7th June, 1956, was made without jurisdiction.

The order *nisi* herein will therefore be made absolute.

Order nisi made absolute.

MICHAEL OGUNTONADE ... ... *Plaintiff*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Taylor, J., 25th September, 1959.]

Criminal Law and Procedure—attempt to commit felony contrary to section 509 of the Criminal Code—finding not supported by the charge or facts proven—stealing contrary to section 390 of the Criminal Code—sections 95 and 96 of the Evidence Ordinance (Cap. 63), Primary and Secondary evidence of "Bankers Book" inadmissible evidence, effect of.

The appellant was charged with conspiracy, attempt to obtain money by false pretences and also with stealing. The false pretence as laid in the charge was to the African Continental Bank Limited, Lagos. The false pretence proved was to the National Bank, Ibadan and the false representation found by the learned Chief Magistrate was to the Production Board.

During the trial officials of the National Bank, Ibadan and the Bank of West Africa, Ibadan, were called to tender the Bank's statements of accounts of the Production Board with the Banks. There was no compliance with section 96 (2) (*e*) of the Evidence Ordinance (Cap. 63).

On appeal—

Held: (1) that the findings on the count of attempt to obtain by false pretences was not only different to the one laid in the charge, it was also different from the pretence proven by evidence;

(2) that the prosecution by calling the Banks officials to produce the Bank statements did not avail itself of the provisions of section 96 (2) (*e*) by inspecting such books and having extracts made;

(3) that the Bank statements tendered were primary evidence. They are a part and parcel of what constitutes "Bankers Book" which are used in the ordinary business of the bank. They are therefore admissible;

(4) that conviction will not be quashed upon the reception of inadmissible evidence, if there are other admissible evidence to support the conviction.

Appeal allowed on count 7. Appeal dismissed on counts 4 and 5.

Cases referred to:

R. v. *Albutt and Screen*, 6 C.A.R. 55.

Alhadi v. *Allie*, 13 W.A.C.A. 323 at page 325.

Appeal from Chief Magistrate in a Criminal Case: Appeal No. I/77CA/59.

Ayoola, for appellant.

Fasinro, Senior Crown Counsel, for respondent.

Taylor, J.: The accused was on the 16th day of June, 1959 convicted of the following offences:— On count 4 of stealing the sum of £423 18*s* 9*d* the property of the Western Region Production Development Board, Ibadan; on count 5 with stealing the sum of £398 18*s* 9*d* the property of the aforementioned and on count 7 with attempting to obtain from the African Continental Bank Limited, Lagos, the sum of £60 by falsely pretending that you had full power and authority to draw cheque No. 14LS4265 of 1st July, 1958 for £60 upon the African Continental Bank Limited, Lagos in settling your account with the Western Region Production Development Board, Ibadan contrary to section 509 of the Criminal Code.

I shall deal firstly with the charge and conviction under this latter count of attempting to obtain by false pretences and grounds 1 and 2 of the additional grounds of appeal which relate thereto. I must confess my inability to understand the conviction on this count when read in the light of the evidence before the learned Chief Magistrate. At the close of the case for the Crown and on a submission of no case to answer this is what the learned Chief Magistrate had to say on this count:—

"The sixth and seventh counts are based on the African Continental Bank cheque No. 4265 of 1st July, 1958. The second accused is charged with conspiring with person or persons unknown, with intent to defraud by falsely presenting the said cheque for payment to the Western Region Production Development Board. According to the Teller Exhibit "EE" the cheque was paid in by the second accused in favour of the Western Region Production Development Board as part payment of the amount found short in his account. The cheque was found to be worthless as the drawer had no account in the Bank. During the course of proceedings in this Court it was discovered that the cheque in question was issued by one Ninedeys (fourth prosecution witness) who gave evidence that although he prepared and signed the cheque, he did not give it to anyone and could not explain how it left his possession, and here again the way and manner in which the cheque got into second accused possession is shrouded in mystery which the second accused should explain."

The appellant did not offer any evidence after the ruling and the learned Chief Magistrate proceeded to give judgment, again on this count, as follows:

"The second accused has given no explanation as to how he got the cheque and on the face of the evidence of Ninedeys the only inference is that the second accused stole it, and by paying it into a Bank he falsely *represented to the Production Board* that the cheque had value. I hold that there is no evidence to support the sixth count of conspiracy; there is evidence to support the seventh count of attempting to obtain money by false pretences."

I must and do agree with the finding of the learned Chief Magistrate that and I quote him again; "by paying it into a Bank he falsely represented to the Production Board that the cheque had value", but unfortunately the learned trial Chief Magistrate did not proceed further to examine the charge before him in order to see whether it tallied with his findings. The finding is not only different from the charge but it is also different to the pretence proven by the evidence of prosecution witness 1. At page 4 where speaking of Exhibit "A" the cheque for £60 he says this:—

"I was informed that the cheque was paid into National Bank of Nigeria by the Western Region Production Development Board and the National Bank sent it for clearance with the African Continental Bank".

By paying this cheque to the National Bank surely not only was the representation made to the National Bank that the cheque paid to the account of the Western Region Production Development Board had value, but the attempt to obtain the money was from the National Bank. On the whole I am far from satisfied that the learned Chief Magistrate was right in convicting the appellant on this count in view of the variations in the pretence as laid and that proven. In my view this appeal must succeed on this count.

Before passing on to the conviction on the other counts I should perhaps mention that Mr Ayoola contended that the offence being committed in Lagos as laid in the charge the Chief Magistrate had no jurisdiction. This was ground 5 of his grounds of appeal. Suffice it to say that the representation was made in my view on the evidence before the Court to the National Bank, Ibadan as the Teller Exhibit "EE" clearly showed and not the African Continental Bank, Lagos. There was therefore jurisdiction in the Chief Magistrate.

Now on counts 4 and 5 for stealing the two sums set out above, Mr Ayoola has argued with great force ground 3 of his grounds of appeal which sets out seven matters as being inadmissible evidence received by the learned Chief Magistrate as a result of which he submits the conviction be set aside on those counts.

The first passage appears at page 6, lines 1 to 2 in the evidence of the first prosecution witness in which he is reporting the findings of the Auditors of the Western Region Production Development Board, Messrs Cooper Brothers. Such evidence is obviously hearsay and inadmissible and this also applies to the third passage at page 11, lines 14 to 16 where the sixth prosecution witness John Atkinson Russell was reporting a statement made to him by a certain Mr Clee, the accused not being proved to have been present. The other two passages forming grounds 3 (*iii*) and 3 (*iv*) will be lumped together and taken with 3 (*v*) to 3 (*vii*). On these grounds it is Mr Ayoola's contention that by virtue of the Evidence Ordinance, Cap. 63, sections 95 and 96 the evidence admitted on those grounds are inadmissible in law being secondary evidence which does not comply with the aforesaid provisions. The sections provide as follows:

"95. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

96. (1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

(*h*) When the document is an entry in a banker's book.

96. (2) The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of sub-section (1) is as follows:

(*e*) In paragraph (*h*) the copies cannot be received as evidence unless it be first proved that the book in which the entries copied were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit."

Mr Ayoola contends that sub-section (2) (*e*) has not been complied with and in the course of his address referred me to the definition of what is a "*banker's book*" as contained in the same Ordinance in the interpretation section. The books the subject matter of grounds 3 (*v*) to 3 (*vii*) are Exhibits "R", "S" and "FF". Exhibit "R" was the statement of account of the Western Region Production Development Board for the months of April 1957 to May 1958 with the National Bank, Ibadan. This statement of account was tendered by an officer of the said Bank—an Accounts Clerk, prosecution witness 7. Exhibit "S" was a statement of account of the same Board but with Bank of West Africa, Ibadan tendered in evidence by the eighth prosecution witness the Assistant Chief Clerk, Bank of West Africa also an officer of the Bank. Finally Exhibit "FF" represented the Bank statements of the account of the same Board covering January 1957 to October 1957 with the National Bank, Ibadan tendered by the seventh prosecution witness on his recall. The first question that arises is whether these exhibits are primary or secondary evidence within the meaning of the Ordinance. To do this I think it necessary to digress a little and enquire into the object of the Ordinance which is obviously taken from the Bankers Books Evidence Act of 1879 of England. This object is stated in Halsbury's Laws of England, Volume 1, the 1st Edition at page 645, section 1301 as follows:

"The main object of these provisions is to enable evidence to be procured and given; to relieve bankers from the necessity for attending and producing their books. They enable a party who formerly had the right to issue a *subpoena duces tecum* to compel bankers to produce their books and to attend and be examined on them, to obtain an order for leave to inspect and take copies of the books."

The same provision will be found in Halsbury's Laws of England, Volume 2, the 3rd edition at page 243, section 454. The object of the provision is therefore to allow third parties to make copies of entries in Banker's books and when such copies have been made to allow them to be tendered in evidence but subject to the very strict provisions contained in section 96 (2) (*e*) of the Evidence Ordinance. The case of *Rex* v. *Albutt and Screen*, 6 C.A.R. 55 is an authority supporting this, though the case goes further to interprete who is "some person who has examined the copy with the original entry" which words will also be found in our own Ordinance. There can be no room for doubt that on these authorities these exhibits are not copies or secondary evidence within the meaning of the Ordinance. They are in fact primary evidence. They are a part and parcel of what constitutes bankers books, books which are used in the ordinary business of the Bank produced on *subpoena duces tecum* issued on the Bank, the prosecution not having availed itself of the benefit of this section by inspecting such books and having extracts made. Grounds 3 (*v*) to 3 (*vii*) must therefore fail.

I now proceed to ground 3 (*ii*) which attacks the tendering of Exhibit "G". This Exhibit was tendered at page 6 of the record and consisted of a statement of account prepared by prosecution witness 3 from a check of the receipt books and entries in cash received books. This witness went on to say on the same page at lines 19 to 20 that—

"The statements of account are supported by cash books and receipt books already tendered".

With the other books from which this statement of account was compiled in evidence there can be no substance in this ground of appeal. Different considerations might apply had these books not been in evidence but merely this compiled Statement of Accounts.

Finally ground 3 (*iv*) attacks the admission of the evidence of the sixth prosecution witness at page 15, lines 28 to 29 that:—

"the amounts shown in the receipt books were all entered in the cash received book in the office; but I discovered that what was paid into the banks was less than what was shown in the books."

Once the appeal fails on grounds 3 (*v*) to 3 (*vii*) this ground must also fail for this is a deduction from a perusal of the Bank statement after comparison with the receipt books and bank tellers all of which are in evidence.

I have held earlier that there is substance in grounds 3 (*i*) and 3 (*iii*). I must now go on and enquire into whether such receipt of inadmissible evidence is sufficient grounds for quashing the conviction on those two counts. The principle to be observed here is whether there is other evidence to support the conviction, if there is, then the misreception does not affect the judgment—*Alhadi* v. *Allie*, *13 W.A.C.A.* 323 at page 325.

In my view there was ample evidence on record without these passages complained of on which a conviction was rightly based.

The last ground, *i.e.*, 4 was abandoned at the hearing of the appeal and there is therefore no need to consider it.

This appeal must therefore fail on counts 4 and 5 and I dismiss it, upholding the conviction and sentence of the Chief Magistrate on those counts. The appeal however succeeds on count 7 and I quash the conviction and sentence on that count and in its place I enter a verdict of Not Guilty and discharge the accused on it.

I would however in passing again note that the two sums of £423 18*s* 9*d* and £398 18*s* 9*d* the subject matter of these two counts—4 and 5— add up to £822 17*s* 6*d* and not £822 15*s* 6*d* as appears in the evidence at page 7 and the judgment of the Chief Magistrate at pages 32 to 33. The correct figure however will be found in the evidence of prosecution witness 6, at page 16 lines 1 to 5, *i.e.*, £398 16*s* 9*d* and £423 18*s* 9*d*. I am convinced that the figure 18*s* wherever it appears on the record in the sum of £389 18*s* 9*d* is a typographical error for £398 16*s* 9*d* for apart from the fact that Exhibit "G" makes this quite clear the total sum with which the accused was charged with stealing both at pages 48 and 38 of the record has always been the same. I therefore correct such error in count 5 accordingly.

Appeal allowed on count 7. Appeal dismissed on counts 4 and 5.

THE QUEEN
v.
THE MINISTER OF LOCAL GOVERNMENT
EX PARTE THE AKALAKO OF AFO

[HIGH COURT OF JUSTICE: Duffus, J., 30th September, 1959.]

Writ of Certiorari—lies only for judicial acts and not for administrative or executive acts—section 7 of the Local Government Law, 1957.

The Minister of Local Government, under section 7 of the Local Government Law, 1957 amended the Instrument establishing the Ijebu Western District Council by altering the composition of the Council.

An application was made to the Court to quash the order made by the Minister.

Held: (1) that an order of *Certiorari* does not lie against the Minister for the exercise of his powers under section 7 of the law, as he was carrying out an administrative or an executive function and was not carrying out a judicial or quasi-judicial duty.

Order nisi refused.

Application for a Writ of *Certiorari:* Ibadan Suit No. M/47/1959.

Cases cited:

Amaka v. *Lieutenant Governor* 1 F.S.C., page 57.

Nakkuda Ali v. *Jayaratne* (1951) A.C. 66.

R. v. *Electricity Commissioners* (1924) 1 K.B. 171.

Rex v. *Legislative Committee of Church Assembly* (1928) 1 K.B. 411.

R. v. *Manchester Legal Aid Committee, ex parte* R. A. Brand and Company Limited, (1952) 2 Q.B. 413.

Franklin and others v. *Minister of Town and Country Planning* (1947) 2 All. E.R. 289.

O. Ayoola for the appellant.

Duffus, J: This is an *ex parte* application asking for an order for rule *nisi* for a Writ of *Certiorari* to issue, directed to the Minister of Local Government, to remove into this Court for the purpose of being quashed an Instrument amending the Instrument establishing the Ijebu Western District Council.

The application is supported by an affidavit with various exhibits attached. I am at this stage concerned as to whether the applicant has established a case for the issue of the order *nisi*.

The Writ of *Certiorari* only lies for the removal of judicial acts, and there are of course numerous decided cases as to what are judicial acts.

I would refer first to the case of *Amaka* v. *Lieutenant Governor*—1 F.S.C. 57 and to the following passage from the judgment of Foster Sutton, F.C.J.

"In determining whether the learned trial Judge was right in discharging the Order *Nisi* it is necessary to consider the nature of the proceedings that the appellant was attempting to impugn, since the writ of *certiorari* does not lie to remove mere ministerial, administrative or executive acts.

Certiorari, as has often been pointed out, is a remedy of a very special character, and it only lies to remove judicial acts."

In this case the act which it is sought to quash is the amendment by the Minister of Local Government of an Instrument establishing a Local Government Council.

A Local Government Council is established under section 3 of the Local Government Law, 1957 (Western Region Law 12 of 1957) and the power to amend is contained in section 7 of the Law. The relevant portion of section 7 reads—

"7 (1) Subject to the provisions of this section, the Governor in Council may by further Instrument amend the Instrument establishing any council....."

"(2) The Governor in Council shall not amend an Instrument in any of the following ways, unless he has complied with the provisions of sub-section (3) of this section....."

"(3) Before making an amendment in any of the respects specified in sub-section (2) of this section the Governor in Council shall—

(*a*) cause to be published in the area concerned not less than thirty clear days' notice of his intention to exercise his powers under this section;

(*b*) give an opportunity to the council concerned to make representations to him in writing; and

(*c*) cause such inquiries to be made as he may deem desirable for the purpose of ascertaining the wishes of the inhabitants of the area concerned."

The powers of the Governor in Council have been delegated to the Minister of Local Government.

The amending Instrument the subject of this application altered the composition of the council and the Minister is therefore required by Law to comply with the provisions of sub-section 3 before he makes the amendment.

The question which I have to decide is whether the Minister had any judicial or quasi-judicial function to perform under section 7.

Learned counsel for the applicant submitted that the three requirements of sub-section 3, that is the publication of his intention in the area, the opportunity to make representations afforded to the council, and the inquiries to be made to ascertain the wishes of the inhabitants of the area concerned showed that the Minister had judicial or quasi-judicial functions to perform and accordingly the Writ of *Certiorari* would lie.

I would refer here to the judgment of the Privy Council in *Nakkuda Ali* v. *Jayaratne*—(1951—A.C. 66. at page 78) and to the following passage:—

"The principle is most precisely stated in the words of Atkin, L. J. (as he then was) —*Rex* v. *Electricity Commissioners* (1924 1 K.B. 171, 205)..... "the operation of the writs has extended to control the proceedings of bodies who do not claim to be, and would not be recognised as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the right of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." As was said by Lord Howart, C.J. in *Rex* v. *Legislative Committee of the Church Assembly* (1928—1 K.B. 411-415)—"In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the right of subjects; there must be super-added to that characteristic the further characteristic that the body has to act judicially."

The test is, has the Minister the duty to act judicially.

I would also refer to the following short passage from the Judgment of Parker, J. in the case of *R.* v. *Manchester Legal Aid Committee ex-parte R. A. Brand and Company Limited* (1952—2 Q.B. 413 at 431).

"If, on the other hand, an administrative body in arriving at its decision at no stage has before it any form of *lis* and throughout has to consider the question, from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially; compare *Franklin* v. *Minister of Town and Country Planning*."

This latter case arose under the New Town Act, 1946, in which the Minister had certain statutory duties to perform in connection with a proposed order under the Act. I would refer to the Judgment of Lord Thankerton and to the following passage on the question as to whether the Minister had a judicial or quasi-judicial duty (*see* 1947, 2 A.E.R. 289 at page 295).

"In my opinion, no judicial, or quasi-judicial, duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case. The respondent's duties under section 1 of the Act and schedule 1 thereto, are, in my opinion, purely administrative, but the Act prescribes certain methods of, or steps in, the discharge of that duty....."

It is my view that the principles here set out clearly apply to this case and the Minister of Local Government has no judicial or quasi-judicial function to perform under section 7 of the Local Government Law, 1957.

Under section 7 the Minister decides that the Instrument establishing the council needs amendment, and sub-section (3) requires him to carry out certain statutory duties before effecting the amendment. None of these duties are in any manner judicial. There is no dispute between parties, and no issue to be decided. It is a question of policy to be decided by the Minister. Sub-section (3) requires a publication and allows the council to make representations on the proposed amendment, and requires the Minister to make some inquiries as to the wishes of the inhabitants of the area, but these are only matters intended to make the Minister aware of public opinion in the area and to know the views of the council. He has no decision to make on the facts as presented, and is not bound to follow the wishes of the inhabitants.

The whole matter remains one of policy and is, in my opinion, clearly a case in which the Ministers' decision cannot be questioned by the process of a Writ of *Certiorari*.

It appears therefore that this application is misconceived and that the Minister in acting under section 7 of the Local Government Law, 1957, carried out administrative or executive functions, and that he had no judicial or quasi-judicial duties to perform.

The application for a Rule *Nisi* to issue is refused.

Order nisi refused.

LATIFU GBADAMOSI ... ... *Appellant*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: (Sir Adetokunbo Ademola, F.C.J., Lionel Brett and Louis Nwachukwu Mbanefo, F.J.J.), 2nd October, 1959.]

Criminal Law and Procedure—making of false statement to police officer contrary to section 125 (A) (1) of the Criminal Code—defective particulars of offence in the charge.

The appellant was charged with making false statement to a police officer in that he, after stealing cocoa and money belonging to his employers made false statement to a police officer stating that his store had been broken into by thieves.

On appeal against his conviction—

Held: that the particulars of the charge was defective in that it did not set out (*a*) what the false information was (*b*) what use the appellant intended to cause the constable to make of his lawful powers and (*c*) what person was likely to suffer injury or annoyance.

Appeal allowed.

Case referred to:

R. v. *Manley*, 24 Cr. App. R. 25.

Appeal from High Court, Western Region in a Criminal Case; Appeal No. FSC 153/1959.

A. G. O. Agbaje for appellant.

B. A. Adedipe, Senior Crown Counsel for respondent.

Brett, F.J.: This appeal was heard on the 25th September, 1959. At the conclusion of the hearing we allowed the appeal and we now state our reasons for doing so.

The appellant was charged before the Western Region High Court on an information containing four counts. He had been employed as registered produce storekeeper under the Co-operative Produce Marketing Union Limited, Abeokuta, and the case against him was, in outline, that after stealing cocoa and money belonging to his employers he caused evidence to be manufactured indicating that the store for which he was responsible had been broken into, and then made a false report of a breaking to the Police. He was acquitted on all counts except the first, which reads as follows:

Statement of Offence—First Count:

"Making false statement to public officers with intent contrary to section 125 (A) (1) of the Criminal Code.

Particulars of Offence:

Latifu Gbadamosi (*m*), on the 11th day of February, 1958, at Ibara, Abeokuta, in the Abeokuta Judicial Division gave an information which he knew or believed to be false to a Police Constable No. 7602, O. Agha, a person employed in the Public Service, with intent of causing the said constable to use his lawful powers to the injury or annoyance of any other person."

It will be observed that the so-called particulars of offence stated in the count are gravely defective on the face of them: no attempt is made to set out what the false information was, what use the appellant intended to cause the constable to make of his lawful powers, or what person was likely to suffer injury or annoyance. If objection

had been taken at the trial, the learned Judge would no doubt have ordered the count to be quashed or amended, but for some reason counsel for the appellant did not take the point either at the trial or before this Court. The inconvenience of allowing the trial to proceed on a count worded in this way was, however, well illustrated during the argument before this Court, when Mr Agbaje, seeking to argue that the information had not been proved to be false, was reduced to mere speculation as to what parts of the statements made by the appellant to the police were said to have been false.

The only point of substance raised in the appeal concerned the intent with which the appellant was alleged to have given the false information to the police constable. Sub-section (1) of section 125 (A) of the Criminal Code, which creates the offence, reads as follows:

> "Any individual who gives any information which he knows or believes to be false, to any person employed in the public service with the intention of causing such person—
>
> (*a*) to do or omit or do anything which such person ought not to do or ought to omit to do if the true facts concerning the information given were known to such person; or
>
> (*b*) to exercise or use his lawful powers as a person employed in the public service to the injury or annoyance of any other person, is guilty of an offence and liable to imprisonment for one year."

Mr Agbaje argued that the intent to be imputed to the appellant if the facts were proved was that set out in paragraph (*a*) of the sub-section and not, as charged, that set out in paragraph (*b*). We are in agreement with this submission. Irwin J., in the court of trial held that the words "injury or annoyance to any other person" meant injury or annoyance to the community, on the ground that the section was intended to define an aspect of public mischief, such as was held indictable in England in *R.* v. *Manley*, *24 Cr. App.R.25*. The section was, no doubt, enacted in order to bring the Code into line with the decision in *Manley*, but we do not regard that as sufficient grounds for construing "any other person" as meaning the community at large, even if it were a correct application of what the Court or Criminal Appeal held in *Manley*. In our view it is clear that the intention of the appellant was to cause the police to waste time in investigating a supposed offence which had never been committed and such an intention falls plainly within the wording of paragraph (*a*) of the sub-section, not paragraph (*b*). The consequence was that we felt it necessary to allow the appeal.

The appeal was otherwise quite without merits, and the appellant goes free because the person who drafted the information failed to consider what the natural inference was from the facts he was in a position to prove. It does great disservice to the administration of justice, and to public respect for the law, when a guilty man escapes punishment for a reason such as this, and we hope that those responsible for these matters will realise the need for the greatest possible accuracy in the framing of charges and information.

Appeal allowed.

DAVID JAIYEOLA ... ... *Plaintiff*

v.

PATRICK AKIMBO ... }
RAMONU ALLI ... ... }... ... ... *Defendants*
OLUSOGA ADEGBOYEGA }

[HIGH COURT OF JUSTICE: Charles, J., 20th October, 1959.]

Claim for trespass, injunction and mandamus—Land Registration Ordinance (Cap. 108)—section 2 of the Ordinance, meaning of instrument—sections 6 and 7 of the Ordinance, compulsory registration of "Instrument" not exempted from registration by regulation 5 made under section 28 of the Ordinance—section 15 of the Ordinance, admissibility in evidence of registrable instrument not registered—section 19 of the Ordinance, effect of registration of an "Instrument"—Stamp Duties Ordinance (Cap. 209), section 89 (3), document not duly stamped, admissibility thereof in evidence—memorandum of agreement.

The plaintiff's claim against the defendant was for damages for trespass, *mandamus*, and injunction restraining the defendants from further acts of trespass. The claim for *mandamus* was withdrawn. It was proved that the plaintiff who had been in possession of the land was ejected by the defendants who deposited building materials on the land. During the hearing of the case, two documents Exhibits "F" and "AA" were tendered. The first, Exhibit "F" an instrument in the form of a lease which was not registered and the second Exhibit "AA" a purchase receipt which was not duly stamped.

Held: (*i*) that a person who is out of possession would not be granted an order for injunction where a claim for possession is available for him but not claimed.

(*ii*) that although the instrument Exhibit "F" is void, it still remains an instrument which should have been registered and, not having been registered, it cannot be used as evidence;

(*iii*) that where registration of an instrument is compulsory under the Ordinance non-registration of the instrument makes it in admissible in evidence.

(*iv*) that a lease which is void at law does not become an agreement for a lease in equity.

(*v*) that a lease which is void for want of a deed becomes a memorandum of an agreement for a lease.

Claim for trespass succeeds, claim for injunction dismissed.

Claim for trespass and injunction Ibadan Suit No. 1/115/1958.

Cases cited:

Clore v. *Theatrical Properties Limited* (1936) 3 All E.R. 483 C.A.

Facchini v. *Bryson* (1952), I.T.L.R. 1387 C.A.

Hawdon v. *Khan* (1920), 37 W.N. (N.S.W.) 131.

Pedlar v. *Washband* (1949), Q.S.R. 116.

Dosunmu (with him *Onalaja*) for plaintiff.

Oluwa (with him *Okuribido*) for defendants.

Charles, J.: In this action the plaintiff claims £500 damages for trespass to land situated at and known as No. 4 Apata Street, Somolu, and an injunction against further

trespass. The plaintiff also claimed in his writ a *mandamus* for the removal of a shed or other building allegedly erected by the defendants on the land. At the end of the hearing, however, his counsel abandoned that claim.

Two documents have been admitted in evidence tentatively, subject to objections upon which I reserved ruling. The first, Exhibit "F", relates to the creation of a tenancy. It commences "This agreement made the 1st day of August, 1916", and after recitals, continues: "This Agreement witnesseth that the said Lessors have agreed in terms herein stated to lease and the said Lessees have agreed to take all that piece or parcel of land commonly known as Shomolu Village aforesaid for a continued period computed from the 1st day of August, 1916 rendering therefore the *clearly* annual rent thereof at the rate of 10*s* (ten shillings) payable in advance at the end of every year. First payment to be made at the execution of these presents." Then follows certain conditions subject to which "the said Lessees shall quietly and peaceably hold and enjoy the said land for themselves and their heirs for a definite period". Next follows a provision in the nature of a covenant for quiet enjoyment, and another in the nature of a covenant by the Lessors not to alienate any part of the land without giving three months' notice to the Lessees.

The document was tendered by the plaintiff and was objected to as being inadmissible under the Land Registration Ordinance (Cap. 108), section 15 because it was an instrument, as defined by that Ordinance, and had not been registered. The submission by the plaintiff was that the document was an agreement for a tenancy so that it was exempt from the application of the Ordinance by rule 5 of the Land Registration Rules.

"Instrument" is defined in section 2 of the Land Registration Ordinance as meaning "a document affecting land in Nigeria whereby one party (hereinafter called the grantor) confers, transfers, limits, charges or extinguishes in favour of another party (hereinafter called the grantee) any right or title to or interest in land in Nigeria....." The Ordinance requires any instrument not excepted from its application to be registered whether the instrument was made before or after the coming into operation of the Ordinance (sections 6, 7). The question is, having regard to rule 5 referred to, whether the document on its correct construction purported to confer, transfer, limit, charge, or extinguish any right or title or interest in land, or it merely amounted to an agreement to do any of those things. In other words: Did the parties to the document intend that a tenancy would come into existence immediately upon its execution or that something more was to be done in order to create the tenancy? It is trite law that the nature and effect of a document is not to be determined by the label which the parties have put upon it but by the rights and obligations which, as appear from the proper construction of its terms, they intended to apply. The label is evidence of the intended rights and obligations but it is not conclusive and cannot prevail if the rights and obligations found to have been created in the document are inconsistent with it (*Clore* v. *Theatrical Properties Limited, 1936, 3 All E.R., 483, C.A.; Facchini* v. *Bryson, 1952, 1 T.L.R. 1387 C.A.*

In my judgment, the manifest intention of the parties to the document under consideration was to create the relationship of landlord and tenant with immediate effect upon the execution of the document, notwithstanding that it is called an agreement and the word "agreed" appears at the beginning of the operative part, and that, therefore, it is an instrument which should have been registered. "Agreement" and "agreed" are equivocal words for determining whether a document creates a tenancy or an agreement for a tenancy. The significant features which appear to me to determine the nature of the document are: recitals that a tenancy was already existing between the parties

and that the lessors had requested the lessees to enter into a written agreement confirming the tenancy: the provision that the tenancy was to commence from the 1st August, 1916, that is, the date of the execution of the agreement: and the provision that the first payment of rent was to be made on the execution of the document.

It was submitted on behalf of the plaintiff that, although the purport of the document may be such as to bring it within the definition of "instrument", it was to be treated as being in equity an agreement for a lease because it was void in law for not being under seal and because it purported to create a tenancy of a kind unknown to English law.

One answer to that submission is, I think, that whether a document requires registration or not depends upon its purport, and not its validity, having regard to section 19 of the Ordinance. That section provides that registration shall neither confer validity upon an instrument nor deprive it of any validity which it already has.

Another answer is that a lease which is void at law does not become an agreement for a lease in equity. What happens, in the case of a lease which is void for want of a deed, is that the void lease becomes evidence of the agreement upon which it was based, and equity will give effect to that agreement provided it is specifically enforceable. As the void lease is only evidence of the original agreement it cannot be used as such contrary to a statutory prohibition. It follows that if the instrument under consideration is void, as submitted, it still remains an instrument which should have been registered, and not having been registered, it cannot be used as evidence.

The result is, in my opinion, that the Exhibit "F" is inadmissible and must be disregarded accordingly.

The other document which was objected to is Exhibit "AA". It is a receipt which was tendered on behalf of the defendant. It was objected to on the ground that it should have been stamped as an agreement because it contains a description of the property for which the money received had been paid and an acknowledgment by the vendor that possession had been taken by the purchaser and that a conveyance would be executed if required.

In my judgment, the correct approach to determine the sufficiency of the stamping of a document under the Stamp Duties Ordinance is as follows:

(*i*) Does the document relate to any matter or matters which gives or give it a character requiring it to be stamped?

(*ii*) If the answer to (*i*) is in the affirmative, to how many of such matters does it relate?

(*iii*) If the document relates to only one dutiable matter it is to be stamped accordingly.

(*iv*) If the document relates to more than one dutiable matter, are the matters related to each other as part of a single transaction or dealing or are they unrelated to each other so as to be, in effect, separate transactions or dealings as in a deed of conveyance which covers two separate pieces of land?

(*v*) In so far as the document relates to related matters or a group of related matters, the stamp duty as to them is to be determined according to the predominant one as denoting the primary purpose of the matters or group, or, if a predominant one is not apparent, according to the matter which will attract the higher or highest duty.

(*vi*) In so far as the document relates to unrelated matters or unrelated groups of related matters, it is to be stamped as to each unrelated matter or unrelated group as if each such matter or group were covered by a separate document.

Applying the foregoing to the document under consideration, I am of the opinion that that document should have been stamped as a memorandum of agreement and not merely as a receipt. It relates to three matters: payment of the purchase price under the contract of sale of land, acceptance of possession under the contract by the purchaser and an outstanding obligation on the part of the vendor to execute a deed of conveyance. The document is thus an acknowlegment by the vendor of all three matters. The first matter rendered the document dutiable as a receipt at least. The second matter did not attract duty to the document as it, by itself, was not an acknowledgment of an executory contract but the acknowledgment merely of the performance, and thereby of the extinction, of an agreement. Had the document stopped there it would only have been dutiable as a receipt. The third matter, however, was an acknowledgment of a contract of sale having been performed by the vendor in one respect but uncompleted in another, and as such it rendered the document, in my opinion, a memorandum of an uncompleted agreement and attracted duty to the document as such. The two dutiable matters are related as they arise out of, relate to, and are inseparable from the contract of sale. Neither matter predominates over the other and therefore the document should have been stamped as a memorandum.

It follows that Exhibit "AA" was also inadmissible in my opinion and must be disregarded. Its defect is curable upon payment of penalties, but, as will appear, I do not think its admissibility affects the defendants' case and it is unnecessary therefore to give the defendants an opportunity to cure the defect.

The plaintiff's case is that he purchased the land in dispute in 1951 from the Apata family; that he thereupon entered into possession of it by having it cleared and levelled; that since then he has kept it cleared; that in 1957 he had the land surveyed; and that on the 13th May, 1958 the defendants brought building materials onto the land without his consent.

The defendants have admitted the alleged entry by them upon the land. Their case is that the first defendant had purchased the land in dispute in 1942 as part of a larger area of seven acres from the Somolu Family and that immediately after the purchase he had entered into possession of the whole seven acres by having it cleared and fenced, putting up notices upon it, by installing three caretakers upon it and by planting crops; that he erected a hut upon the portion of the seven acres which is the land in dispute; and that in 1951, when he terminated the employment of the caretakers he again erected notices of ownership and that in 1953, when he discovered the seven acres being built upon, he erected more notices.

On the evidence I am satisfied that the plaintiff did enter upon the land in dispute in 1951 and did the acts mentioned. The plaintiff's evidence in those respects was uncontradicted and on the whole he was an impressive witness, despite his adoption of a traditional George Washingtonian attitude that he could not tell a lie and had stated in other proceedings, apparently, that he had purchased the land in dispute in 1947. His evidence was confirmed by a member of the Apata family, Salome Apata, who was unshaken under cross-examination.

I am not satisfied on the evidence that the first defendant had entered into possession of the land in dispute in 1942 and, therefore, I am also not satisfied that the plaintiff's entry was at least an interference with his possession, if not an ouster. The first defendant as a witness was contradictory, shuffling and hesitant, and his story, when compared with its details, was an improbable one. The second defendant, a member of Somolu family, was also unconvincing. Another witness for the defence, a very old

lady of the Somolu family appeared to be straight forward as to a sale by her of land to to the first defendant but little reliance can be placed upon her evidence as to the land sold as she appeared to have been affected by senility and that low cunning which so often accompanies illiterate senility. The only other witness, who gave material evidence for the defence, was not so patently unsatisfactory, and I am prepared to accept his evidence that he was employed by the first defendant on some land which had been purchased from the Somolu family. His evidence suggests, however, that the land upon which he was employed did not include the land in dispute and that the caretaker's hut was not erected on the latter.

While it may well be that the first defendant did complete with the Somolu family a purchase of seven acres of land at or in the vicinity of Somolu Village and enter into possession of the land so purchased, the unsatisfactory evidence does not establish as a probability, in my judgment, that the land in dispute formed part of any seven arces of land which the first defendant may have acquired by purchase or otherwise. It is to be noted that no plan of the seven acres was produced to assist in identifying the land in dispute as part of the seven acres.

The position which, in my judgment, has emerged from the plethora of evidence which was adduced in this case is thus shortly that the plaintiff entered into possession of the land in dispute in 1951 and had continued in that possession until the defendants entered upon the land in 1958; that the defendants' entry was a trespass unless the first defendant had title to the land in dispute by reason of possession prior to the plaintiff's or otherwise; and that the defendants have failed to prove title by such prior possession or otherwise. The defendants are therefore liable to the plaintiff in damages. No evidence has been adduced as to the amount of actual damage which the plaintiff has suffered. It would seem that the defendants' trespass has deprived him of the use of the land. It is also apparent that the trespass was a forcible one which, in my opinion, calls for exemplary damages. A proper award appears to me to be £50.

As to the claim for an injunction, it must fail. On the plaintiff's pleadings the defendants are occupying the land in dispute and therefore their proper remedy is an order for possession, which has not been claimed. The remedy of an injunction is one which has been evolved by equity to meet cases when the remedy provided by the common law is inadequate. The order for possession is an adequate remedy when a trespasser is not coming and going upon land but is actually occupying it and I have not heard of any case where an injunction has been granted when the order for possession is available. This view accords with the decisions of the Supreme Court of *New South Wales and Queensland in Hawdon* v. *Khan 1920, 37 W.N.(N.S.W) 131, and Pedler* v. *Washband, 1949, Q.S.R. 116 respectively.*

There will be judgment for the plaintiff against the defendants in the sum of £50 as damages and 100 guineas as costs, inclusive of out of pocket expenses. The claims for injunction are dismissed.

Claim for trespass succeeds, claims for injunction dismissed.

JACOB OYAKOJO ... ... *Plaintiff*

v.

IBADAN DISTRICT COUNCIL ... ... *Defendant*

[HIGH COURT OF JUSTICE: Doherty, J., 11th November, 1959.]

Claim for declaration of title, trespass and injunction—ownership of Market under Ibadan Native Law and Custom—markets communal properties.

The plaintiff's claim against the defendant was for a declaration of title to Ibuko Market in Ibadan, damages for trespass and injunction to restrain the defendants from committing further acts of trespass.

The plaintiff's family originally owned the land upon which the market is situated.

Held: that once a market was established according to Ibadan Native Law and Custom, it became a communal property, vested in the Native Authority—Olubadan in Council and the original owners of the land upon which such market was established have no more rights over the land and market.

Claim dismissed.

Claim for declaration of title, trespass and injunction: Ibadan Suit No. I/63/57.

Akinjide for plaintiff.

Ogunkeye for defendants.

Doherty, J.: By his writ of summons the plaintiff, as representative of his family, is claiming against the defendants a declaration of title to a piece of land situate at Ibuko in Ibadan. He also claims an injunction and £200 damages for trespass. The land in dispute is the area marked red on the survey plan exhibit A, and evidence discloses that it is the present site of Ibuko market in Ibadan. Giving evidence about this market the plaintiff said it first started at Idiarere from where it was removed to a site in front of Bamgbose's land and finally to its present site which is his family land. According to the plaintiff some itinerant traders from Okeiho and other places begged permission from one Adebiyi who was then the Mogaji of their family to use a portion of the family land as a market. The permission was given and the land now in dispute started to be used as a market. The family also granted land to many people in the area most of whom have erected buildings on their plots. The family also planted Ayunren trees on a portion of the land but these had been uprooted by the defendants and the area converted into a motor park. To the knowledge of the plaintiff Ibuko market had been on the land in dispute for about forty years. His family collects gifts from people using the market as well as allocate stalls therein. When a Mogaji of their family dies or a new one is being installed users of the market collect contribution which is paid to the family. This was in recognition of the fact that the land belonged to the plaintiff and that it was the family of the plaintiff who created and owned the market. Evidence was also led to show that a private road which runs through the market was recently constructed by one Raji Igbodu with the permission of plaintiff's family.

Against this contention of the plaintiff, however, there is overwhelming evidence which supports the claim of the defendants that Ibuko market as well as other markets in Ibadan town and districts is owned and controlled by the native authority, which in the present day is the Olubadan and Council. The plaintiff's first witness, Mr Laniyonu, was the first person to strike this note. He is a native of Ibadan and he said

he knew that markets are communal properties and that they are vested in the Olubadan and Council. Furthermore, he said in his former employment under the defendants he was the surveyor in charge of the Lands Registry. In that capacity he prepared a schedule showing the properties owned by the defendants. Ibuko market which is in dispute in this case is one of such properties.

Chief Emmanuel Akinwale, first witness for the defendants, is a retired customary court judge and a senior chief of Ibadan. He has been a member of Olubadan's Council since 1940. He is sixty years of age and had known Ibuko market from his youth. It belongs to the Olubadan. According to this witness, to create a market the Bale or head chief of Ibadan will look for a vacant piece of land which would be cleared and put in good order. The Bale will then inform the owner of the land that he had made use of the land for the purpose of a market. As the land is acquired for public use no compensation is paid to anyone. Apart from Ibuko other markets so acquired in Ibadan are Eleta, which is on the road leading to the other side of Wesley College; Oje market which is on the way to Agodi and Ojaba, which is the largest of them all. They all belong to the Olubadan and once a market has been established the original owners of the land have no more rights over the land. Giving evidence about two markets in the district namely, Akanran and Araromi, this witness explained that although the Obisesan Aperin family of Ibadan own the land on which the markets are sited it was the Bale of Ibadan who established both of them, they therefore belong to the state and not to the family. The family have Bales in the two places but the Bales have nothing to do with the markets. The wages of the Akodas engaged to look after the welfare of the markets are paid by the Ibadan District Council, and not by Obisesan family.

Abudu Morounkola Apampa, third witness for the defendants, is a son of a Bale of Ibadan, the late Bashorun Apampa, and is about sixty-five years of age. He said he grew up to know Ibuko market when it was sited at Bode. It was Bale Shittu who ordered its removal to the present site. To create a market in a village or farm the procedure, according to this witness, is as follows: People will meet and decide on a special site. The owner of the land will agree. A message will then be sent to Ibadan to the overlord of the particular area in which it is proposed to establish the market. The overlord will then seek the approval of the Bale and council. Once this is given the market becomes the property of the Bale and the owner of the land cannot reclaim it. Ibuko market is owned by the Olubadan.

The fifth witness for the defendants, Daniel Akinbiyi, is a chief and a retired customary court judge. He was also a councillor for twelve years. In his evidence he said Ibuko is one of the ancient markets of Ibadan. During the time of Bale Shittu the Ibadan to Ijebu road was completed but traffic on it was heavy. To safeguard the lives of people using this market Bale Shittu ordered its removal to the present site, because it was more commodious. All markets, according to this witness, belong to the Olubadan, hence on the death of an Olubadan all markets must close. After the founding of a bush market the founders will seek recognition of the Olubadan and Council. Once this is given the market belongs to the Olubadan and will be controlled by rules made by the native authority.

Ashiru Oba Ishara, second witness for the defendants, is an old man of between seventy-five and eighty years of age. He deposed that the present Ibuko market is behind his house and he is the only survivor of the four people who established it. He agreed that the land originally belonged to the family of the plaintiff and it was from them that they obtained the plot. They gave no present however to the Bale of the

family, and the market was not established by any Mogaji or chief. The Bale of Ibadan (Shittu at the time) was duly informed of the establishment of the market and Akodas were sent to maintain peace therein.

Sule Braimoh, sixth witness for the defendants, was in charge of the estate office of the defendants. He said Ibuko market belongs to the defendants and it is a recognised market under the Market Bye-laws made by the defendants. Market inspectors employed by the defendants supervise the market and allocate stalls therein. When a road was constructed through the market in 1948 by communal effort to quarters which were behind the market, the defendants did not object because it did not interfere with general design of the market.

On this review of the proceedings I consider that the weight of evidence is against the plaintiff's contention. The first, third and fifth witnesses for the defendants are prominent and responsible people in Ibadan and their opinions expressed on matters relating purely to native law and custom must of necessity carry considerable weight. I accept their testimony in its entirety. It is not surprising that the plaintiff's own witness, Mr Laniyonu, agreed with these witnesses on the main issue, namely, that Ibuko market, like other markets in Ibadan, is communally owned by the Olubadan and Council, *i.e.*, the defendants.

The plaintiff's claim is dismissed.

Claim dismissed.

GANIYU AND THREE OTHERS ... ... *Appellants*

v.

SUPERINTENDENT-GENERAL OF POLICE ... *Respondent*

[HIGH COURT OF JUSTICE: Hedges, C.J., 12th November, 1959.]

Criminal Law and Procedure—Sections 355 and 451 of the Criminal Code—Customary Courts Law 1957—Composition of Customary Court—duties of assessors where a Customary Court sits with one or more—considerations of sections 4 (1) and 7 (3) of the Customary Courts Law, 1957.

The appellants were tried by Customary Court Grade A, Oyo on two counts under sections 355 and 451 of the Criminal Code. The Court sat with assessors and on one occasion the panel of the assessors changed.

On Appeal—

Held: That it is irregular to sit with assessors when they are not required, it is doubly irregular to ignore them when they are present. The panel of assessors having changed during the trial, the trial was a nullity.

Appeal allowed, a retrial ordered.

Cases referred to:

(1) *Ilegbede and others* v. *Superintendent-General of Police:* AB/18CA/59.

(2) *R.* v. *Camborne Justices* (1954), 2 All E.R. 850.

(3) *R.* v. *Sussex Justices, ex parte McCarthy* (1924) 1K.B. 254.

Appeal from Customary Court Grade A, Oyo. Appeal No. I/85CA/59.

E. O. Fakayode for appellants.

C. O. Madarikan, Director of Public Prosecutions, for respondent.

Hedges, C.J. : This is an appeal from a decision of the president of the Customary Court Grade A, Oyo, dated 24th June, 1959, in a case of two counts under sections 355 and 451 respectively of the Criminal Code.

The only grounds of appeal were the usual *omnibus* one together with an appeal against the supposed severity of the sentence. The court, of its own motion, took the ground that as there appeared to be a variation in the constitution of the Court during the hearing the trial might be a nullity. On this matter the Court had the advantage of hearing arguments by the Director of Public Prosecutions as well as by Mr Fakayode who represented the appellants.

It is common ground that the Court sat with assessors and that on one occasion at least, during the trial the panel of assessors was differently constituted. My attention was drawn to a decision of my learned brother, Irwin, J., given on 4th September, 1959, in *Ilegbede and others* v. *Superintendent-General of Police* (AB/18CA/59). That was a case where there were variations in the panel of assessors and the Court held that the irregularity disclosed amounted to such a disregard of the form of justice that the convictions could not stand. It is necessary to consider whether the principle applied in that case is applicable in the present case. To some extent the case was decided on the particular circumstances since reference was made to the Warrant establishing the Court. I feel free to decide the present case in the light of its own particular facts. It has been represented to me that I am not bound by the decision of my learned brother and that is true; but his decision has persuasive authority and in any event I think it was correct.

Leave was granted to admit in evidence an affidavit sworn by the president of the Customary Court Grade A, Oyo. In it he stated that although assessors sat with the Court at all material times when the case was tried the assessors did not at any time take part in the hearing of the case nor were any of them consulted in arriving at the decision of the Court. Section 4 (1) of the Customary Courts Law, 1957 provides that a Customary Court shall consist of members sitting with or without assessors. Section 7 (3) provides that where a Customary Court sits with assessors the assessors shall act in an advisory capacity and shall have no vote in the decision of the Court.

The Director of Public Prosecutions argued that assessors need only be appointed to advise the Court where there is some question involving criminal offences against customary law or in civil matters. By a recent amendment to the Customary Courts Law no offences may be tried against customary law and therefore the only cases in which assessors are necessary will be those concerning civil matters. In short, his argument was that it was unnecessary in this case for the Court to sit with assessors at all. With that submission I agree. The fact remains that the Court did sit with assessors and that being so they are bound to act in an advisory capacity and the president of the Court has stated in his affidavit that they were not consulted at all.

The Director of Public Prosecutions quoted the following passage from the judgment of Slade, J., in *R.* v. *Camborne Justices*, 1954, 2 All E.R., 850 at page 855:—

> "The frequency with which allegations of bias have come before the courts in recent times seems to indicate that the reminder of Lord Hewart, C.J., in *R.* v. *Sussex, JJ. ex parte McCarthy* (1924) 1 B.K. 259, that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, on the flimsiest pretexts of bias. While indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, C.J., this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."

This is a timely warning. Nevertheless in the present case I feel that the forms of justice have not been complied with. It is irregular to sit with assessors when they are not required; it is doubly irregular to ignore them when they are there. I therefore order that the trial was a nullity.

It is further ordered that the case be sent back to the Customary Court Grade A, Oyo, to be tried, with liberty to the Director of Public Prosecutions, as provided by law, to apply for transfer to the Magistrate's Court.

Appeal allowed, a retrial ordered.

ESEKODI NNANDO ... ... *Plaintiff/Appellant*

v.

OKONKWO DIOKPA ... ... *Defendant/Respondent*

[HIGH COURT OF JUSTICE: Thomas J., 13th November, 1959.]

Customary Courts Law and Procedure—evidence taken by Customary Court of Appeal not recorded—Order X, Rules 1, 3 and 4 of the Customary Courts Rules, 1958.

The plaintiff/appellant obtained judgment against the defendant/respondent in the Ibusa Customary Court. On appeal, the Aniocha Customary Court of Appeal, after taking evidence, set aside the judgment of the Ibusa Customary Court. The Court of appeal did not record the evidence taken by it.

On appeal to the High Court:

Held: (1) that as there was nothing on the record of the Aniocha Court of Appeal to show that it complied with the provisions of Order X, Rules 1, 3 and 4 of the Customary Courts Rules, 1958, the trial before it was therefore a nullity;

(2) that the trial before the Customary Court of Appeal having been declared a nullity, the record before the Court was the record of the proceedings before the Ibusa Customary Court;

(3) that the record of the trial before the Ibusa Customary Court discloses enough facts upon which the Court came to its decision.

The decision of the Ibusa Customary Court restored, judgment of the Aniocha Customary Court of Appeal set aside. Appeal allowed.

Case cited:

Boakye v. *Baabu*, 2 W.A.L.R. 183.

Appeal from Ibusa Customary Court: Benin Suit No. B/6A/59.

Idigbe for plaintiff/appellant.

Analogu for defendant/respondent.

Thomas, J.: This is an appeal from the decision of the Aniocha Customary Court of Appeal of the 26th May, 1959, reversing the decision of Ibusa Customary Court's decision in Case No. 167/58.

The claim before the court was as hereunder:—

(*i*) Declaration of title and ownership of Umuomale-Umuezeague land situated in neighbourhood of Umuezeagulu and Odanta Villages, Ibusa, being inherited property of petitioner from his forefathers.

(*ii*) An injunction to restrain respondent and his agents from trespassing into the said Ani Umuezeagua land. Dispute arose yesterday.

Judgment having been entered in favour of the plaintiff/appellant, in this court, the defendant/respondent in this court appealed to the Aniocha Customary Court of Appeal on several grounds, the most important being—

(*a*) "That the judgment was against the weight of evidence, *i.e.*, the Court accepted an evidence of Nwoakafor Adigwu which on reviewing it at same angle fell in all fours of the Plaintiff's evidence which denotes that the evidence of Nwoakafor Adigwu the second witness is a sort of Catechism, and he gave it as he was taught. And as such his evidence is hearsay and cannot be supported in a court of law.

(*b*) That the court did not take judicial notice that this portion of land in dispute is part and parcel of the land Aniocha in Case 206/53 in which the same court gave judgment in favour of the defendant/appellant which is now the subject matter in this case."

The judgment of the Customary Court of Appeal was as follows:

"The judgment of the lower court is set aside. The appeal is allowed. The land in dispute belongs to the defendant/appellant."

The plaintiff/appellant has now appealed on the following grounds:—

"(1) Judgment is against the weight of evidence.

(2) The Aniocha Customary Court of Appeal gave judgment on the unsworn evidence of witnesses.

(3) The said Court of Appeal misdirected itself as to the evidence of the witness Obi Okonma.

(4) The said Court of Appeal failed to record the evidence of the witnesses called by the said court as required by law.

(5) The said Court of Appeal failed to give the plaintiff/appellant opportunity to cross-examine the witnesses before the court as required by law."

It has not been disputed that the Court of Appeal did not record the evidence that was taken.

The only evidence before this court is therefore that of the Ibusa Customary Court which sifted the evidence very carefully and in some detail. They also inspected the land.

They dealt with the question of Boundary, Traditional History, user of land by either factions, etc., and found for the plaintiff/appellant. The conclusion of the Ibusa Customary Court was based on findings of fact which they were quite competent to make on the evidence before them. Their conclusion was not unreasonable and was supported by ample evidence from the record.

The court considered the issue as to whether the land in dispute between the parties was identical with that in dispute in suit 206/53 and found that they were not identical, *i.e.*, they found in favour of the plaintiff/appellant, after hearing the witnesses and inspecting the land.

The defendant/respondent raised the issue and failed in the court of first instance. In the Aniocha Customary Court of Appeal, the onus was still on him. There is no recorded evidence, so far as the proceedings in that court are concerned, to show on what evidence the court decided that the land in dispute, in both cases, were identical. They might be contiguous, but there was no proof that they were identical.

The Court of Appeal appears to have based its decision merely on what its members saw and heard on the visit to the land. Verity, Ag. J.A., in *Boakye* v. *Baabu*, 2 W.A.L.R. page 184 stated *inter alia:*

"Such visits are in many cases useful: at times they may be essential, but they lie open to the danger that the members of the court may find themselves in the position of substituting their own observations for the sworn testimony in matters which cannot be determined thereby. This is more especially the case in regard to an appeal court which has not seen or heard the witnesses under examination by the more orthodox methods of a trial court."

There was a conflict of evidence as to the identity of the land in dispute, in both suits, which the Ibusa Customary Court had to resolve, and which it did resolve on the credibility of the witnesses who testified before it and on inspection of the area.

The Customary Court of Appeal should not have reversed the decision of that court in the circumstances in which it did.

Finally, then the Customary Court of Appeal recorded as follows:

"We believe the defendant/appellant and his witnesses and find for him".

There is nothing on the record to indicate that the members of the court complied with Order X, Rules 1, 3 and 4 of the Customary Court Rules in respect of the taking and recording of the evidence of witnesses appearing before it. Their belief does not appear to be well-founded in law and is therefore not justified.

The whole procedure, before the Customary Court of Appeal, was contrary to law, and after considering very carefully the arguments and cases cited by Counsel on either side, I am of the opinion that the Judgment of the Customary Court of Appeal should be annulled and set aside. I hereby do so, and restore the judgment of the Ibusa Customary Court.

Appeal allowed.

MAMORO UGBOMA ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Thomas, J. 16th November, 1959.]

Criminal Law and Procedure—Robbery contrary to section 402 of the Criminal Code—evidence of identification—statement of co-accused—misdirection.

The appellant was charged with robbery. The only eye witnesses of the robbery were the first and second prosecution witnesses. They made an immediate report to the police but they were unable to describe or mention the name of the appellant to the police.

Subsequently, the appellant was in custody of the police along with others for another offence, when first prosecution witness pointed him out to the police.

A co-accused made statement to the police that he knew the appellant.

On Appeal against his conviction.

Held: (1) that the identification was improper;

(2) that the Magistrate misdirected himself. The fact that one accused made a statement to the police to the effect that he knew the appellant cannot be evidence that they committed the offence together.

Appeal allowed, conviction quashed and sentence set aside.

Appeal from Magistrate in a Criminal Case: Appeal No. B/65CA/59.

Okandeji for the appellant.

K. Momoh for the respondent.

Thomas, J.: The Appellant was charged with robbery contrary to section 402 of the Criminal Code Cap. 42. He was convicted and sentenced to four years Imprisonment with Hard Labour. He appealed on the following grounds:—

1. That the decision is altogether unwarranted, unreasonable, and cannot be supported, having regard to the weight of evidence.

2. That the decision is erroneous in point of Law—

(*a*) Because the Learned Chief Magistrate relied on the statement made to the Police by the first accused in coming to his decision.

(*b*) Because the Learned Chief Magistrate disregarded the evidence on alibi;

(*c*) Because the learned Chief Magistrate failed to take consideration of the fact that the first prosecution witness was in court when the prosecution opened the case for the prosecution.

Counsel for the appellant based his arguments with reference to ground (1) on the question of identification. The only eye witnesses of the robbery were the first and second prosecution witnesses who immediately made a report to the police. They were not able to describe the appellant in such a manner to enable the police to trace him directly and did not mention his name either. He was traced through other parties and was never arrested. Sometime however, he was in the custody of the Police in Warri for some other offence when the first prosecution witness pointed him out as he was in a room with other accused persons and witnesses. No identification parade was ever held at which either of the eye witnesses identified the appellant.

This is to my mind fatal to the Respondent's case. As the appellant had not been named by the complainants and had not been traced directly through them, it was important for an Identification Parade to have been held as soon as possible to put the question of identity beyond doubt prior to the trial. It does not appear on the Record as to whether the first prosecution witness identified him from his own knowledge of the facts. There is no indication as to how he came to identify him, or his means of identity of the appellant. The second prosecution witness also should have been called independently to identify the appellant especially as it was sometime after the incident.

The first accused made a statement to the Police Exhibit "B". It did not in any case assist the case for the prosecution. It did not follow that because the first accused knew the appellant before they were charged that they must have committed the offence or that the appellant had committed the offence and was therefore guilty.

It appears that the statement Exhibit "B" did affect the mind of the learned Chief Magistrate.

I am of the opinion that the case was never strictly proved against the appellant and it would be dangerous to uphold the conviction.

It is not impossible on a view of the evidence as a whole that the first prosecution witness had mistakenly pointed out the appellant as one of persons who had robbed him and his wife.

I will therefore set aside the Judgment and conviction and sentence against the appellant and substitute a verdict of acquittal and discharge. The appeal is allowed. The court below to carry out the order.

Appeal allowed, conviction quashed and sentence set aside.

CHRISTIANA BOSEDE TINUBU ... ... *Petitioner*

v.

SAMUEL ADEGBITE TINUBU ... ... *Respondent*
MISS ADEPEJU ADU ... ... *Woman-named*

[HIGH COURT OF JUSTICE: Taylor, J., 30th November, 1959.]

Divorce—constructive desertion—adultery—conduct conducing to adultery—exercise of Court's discretion where no discretion statement was filed—adultery not admitted in the amended petition—section 28 (2) Matrimonial Causes Rules.

The petitioner got married to the respondent in 1952 without the knowledge of her father. They lived together for about three months. The petitioner with the consent of the respondent went to live with her father. In July 1952 the respondent asked for the permission of the father to marry his daughter and this was refused. After this refusal the petitioner did not return to the respondent.

In 1955, the respondent started to live with the woman-named as husband and wife and she had three children for him.

In July 1958, the wife petitioned for the dissolution of the marriage. In January 1959, she was granted leave to amend the petition by praying for the exercise of the Court's discretion by which time she was five months pregnant. She did not admit adultery in the amended petition. In May 1959 she delivered a child. She did not file the discretionary statement in the Registry but instead tendered it at the hearing of the petition on 9th November 1959.

Held: (*i*) That the petitioner is guilty of constructive desertion since she failed to write or return to her husband after her father had in July 1952 refused the permission for the respondent to marry her.

(*ii*) That the conduct of the petitioner was conducive to the adultery of the respondent because of her desertion by refusing to return to him since July 1952.

(*iii*) That having regard to the circumstances as to how the marriage was brought about and the seven years separation between the parties, the Court's discretion would still be exercised in her favour notwithstanding the infringement of section 28 (2) of the Matrimonial Causes Rules.

Order nisi granted.

Cases referred to:

Simpson v. *Simpson* (1951) 1 All E.R. 955.
Spence v. *Spence* (1939) 1 All E.R. 52.
Sifton v. *Sifton* (1939) 1 A.E.R. 110.
Blunt v. *Blunt* (1942) 2 A.E.R. 613 (1943), 2 A.E.R. 76.

Ibadan Suit No. I/166/58.

Omotosho for petitioner.

No appearance for respondents.

Taylor, J.: This is a petition presented by the wife Christian Bosede Tinubu on the 15th day of July, 1958 for the dissolution of her marriage with the respondent. She seeks such a dissolution on the grounds of the adultery of the respondent with the woman-named to wit, Miss Adepeju Adu. The union sought to be dissolved was contracted on the 3rd day of March, 1952 and the parties cohabited for the short period of three months up to the 23rd May, 1952 and from then till today there has been no cohabitation between the parties nor have they lived under the same roof.

The respondent filed an answer on the 18th October, 1958 and while he denies the allegations made against him, he charges the petitioner with desertion. In paragraph 6 of the answer he admits knowing the woman-named and in the following two peculiarly worded paragraphs 7 and 8 he would seem to have been in some doubt as to whether after knowing her adultery took place. I quote one of these paragraphs—

7. "If, which is not admitted, the respondent committed the alleged or any adultery, the petitioner has conduced to such adultery."

Paragraph 8 is in much the same words with additional averments. I described these paragraphs as peculiarly worded because in Divorce proceedings unlike civil actions the parties are expected to come to Court in an attitude of complete frankness where adultery is charged and one or both party or parties pray for the exercise of the Court's discretion in her or his favour. In spite however of paragraphs 7 and 8 we find the respondent seeking the exercise of the Courts discretion in his favour. Further we find him in his affidavit in support of his answer swearing that the contents of paragraphs 7 and 8 are true to the best of his knowledge, information and belief. Be it noted that no discretion statement was filed by him, nor any admission of adultery made by him in spite of this prayer for the Court's exercise of its discretion in his favour.

The answer of the woman-named is as lacking in that frankness and honesty that is expected of parties in Divorce proceedings as that of the respondent. Her paragraphs 1 and 2 are identical word for word with paragraphs 7 and 8 of the respondent's reply save that the words "of Nigeria" contained in paragraph 8 of the respondent's reply after the words "Northern Nigeria" are omitted from her answer. According to paragraph 6 of the respondent's answer he did not know the woman-named until 1956 and yet we have her pleading facts or events alleged to have taken place in 1952 between the married parties.

Now on the 15th April, 1959 the petitioner was granted leave to amend her petition by praying for the exercise of the Court's discretion in her favour. As a result of this one would have expected her to lodge a discretion statement in the Registry at the time of the application or soon thereafter. The discretion statement dated the 3rd June, 1959 was never lodged in the Registry but for reasons best known to Learned Counsel for the petitioner it was tendered at the hearing of the petition on the 9th November, 1959 contrary to section 28 (2) of the Matrimonial Causes Rules which states *inter alia* as follows:

"where the application for the Registrar's certificate under Rule 30 is made by the party praying for the discretion of the Court, the discretion statement shall be lodged in a sealed envelope with the application for the certificate....."

The application for the Registrar's certificate was made by Learned Counsel for the petitioner on the 12th January, 1959 and at that time the petitioner was roughly five months in a state of pregnancy for she delivered a male issue on the 28th May, 1959, but no discretion statement was lodged in Court at any time before the hearing date.

Enough said about the preliminaries to this petition. Now to the evidence and events on the day of hearing. When the petition was called, Mr Agbaje-Williams who appeared for the respondent and the woman-named sought the leave of the Court to withdraw his appearance in view of the seeming absence of interest of his clients who were not in Court that morning. Leave being granted Mr J. O. B. Omotosho Learned Counsel for the petitioner proceeded with the proof of his case. I will say at the outset that I accept the evidence of the petitioner with only one reservation which will become

apparent later on. She was completely frank and open and impressed me as a witness of truth, but what I have to ask myself is whether, accepting such evidence she is entitled to the prayers sought in her petition particularly bearing in mind the infringement of section 28 (2) of the Matrimonial Causes Rules?

She deposed that at the time she met the respondent she was training as a midwife in Abeokuta and the respondent was a teacher under the Baptist Mission. During that period sexual intercourse took place between the parties with the result that the petitioner found herself in a state of pregnancy. The respondent was afraid that if this came to light he might lose his employment with the Baptist Mission. So they both chose to get married which they did on the 3rd March, 1952. After the marriage and straight from the Registry the respondent went to Abeokuta and the petitioner to Ogbomosho where they both stayed apart for the next four days. At the end of that period they came together and lived in Abeokuta till May 1952. The petitioner then left the respondent with his consent and went to work for the Sudan Interior Mission having completed her training. From that day till the day of hearing the parties have never lived together nor has sexual intercourse taken place between them. She said that in July 1952 the respondent came to her father's house to seek the father's permission to marry the petitioner, and the father who evidently had been kept in the dark about the whole affair refused such permission. Nothing more took place between the parties either by correspondence or meetings until around 1955 when the petitioner says she discovered, by what means I do not know, that her husband was living with the woman-named as man and wife. The respondent and woman-named put this period of knowing each other in their answers at 1956, but in the absence of any evidence to contradict that of the petitioner I accept her figure of 1955. There is some doubt however as to the month. She further deposed that the woman-named has children for the respondent and gave the name of the eldest as Dayo Tinubu whom she says is over three years of age. She says that it is a notorious fact that the respondent is living with the woman-named as Mr and Mrs Tinubu. In support she tendered a copy of the Nigerian Tribune, of the 12th October, 1959 in which the parties, *i.e.*, the respondent and the woman-named are described as Chief S. A. Tinubu and wife. She finally deposed to her own misconduct with one J. O. B. Omotosho of the Northern Region in September 1958, as a result of which she delivered a male child in May 1959.

On that evidence Mr Omotosho, Learned Counsel for the petitioner contends that the respondent deserted the petitioner in 1955 and as a result he conduced to the adultery of the petitioner. Further he says that the respondent's own adultery coupled with the alleged desertion are sufficient grounds on which I should exercise my discretion in the petitioner's favour in respect of her admitted adultery.

The first and most important issue for me to decide is which of the parties—the petitioner or the respondent—is guilty of desertion in law? It is clear from the evidence before me that this was not a normal marriage; the parties never wanted it except as a means to an end, *viz*, saving the respondent from losing his employment; and they shed it at the earliest opportunity. It is however important to bear in mind the respondent's favour that in July 1952 roughly two months after the petitioner had left him, he went to the petitioner's father to seek his consent though to a *fait accompli*. After the refusal no further steps were taken by either party. Mr Omotosho referred me to the case of *Simpson* v. *Simpson* 1951 1 A.E.R. 955 at 959 but with the greatest respect to Learned Counsel I cannot see the bearing it has on this case. The facts are wholly different and the legal principle involved the application of the principle in a petition based on cruelty that a man must be taken to intend the natural consequences of his acts.

It is stated in Rayden on Divorce the 7th edition at page 147 that:—

"But in its essence desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party. Desertion is not a withdrawal from a place, but from a state of things."

On the evidence of the petitioner the respondent consented to her departure from the matrimonial home in May 1952. In July 1952 however, the respondent came to seek the father's permission to the marriage and what did the petitioner do in this matter on this occasion? The evidence is silent on that point though she admits that as from May 1952 she has made no attempt to consumate the marriage. She further says that the respondent also has made no endeavours in this line. But in this she is obviously mistaken, for on her own evidence of the action of the respondent in July 1952 the only reasonable inference that can be drawn from the action of the respondent was that with the consent of the petitioner's father obtained, the marriage could resume its proper course.

It is said by Langton, J., in the case of *Spence* v. *Spence* 1939 1 A.E.R., page 52 at page 58 that—

"whilst it is true that the actual feelings of the deserting party may not be material in any given case, there must be, in order to constitute a matrimonial offence, an intention on the part of the accused party to desert the other.....

In other words the parting must be unfairly or unreasonably imposed by the offending spouse in order to constitute desertion."

In the case before me the act of the petitioner in leaving the matrimonial home in May 1952 did not constitute desertion for the reasons already stated, but when after July 1952 the husband had made an approach and the petitioner herself did nothing either then or later and made not the slightest endeavour to persuade her father or to see the respondent or even write to him the separation originally consensual subsequently in my view changed its quality, and the period of desertion began to run as from July 1952.

In the case of *Sifton* v. *Sifton* 1939 1 A.E.R. 110 at page 113 Henn Collins in a case where the parties as in the one before me separated by consent states that—

"When a spouse is deserted, he or she is in the position that the presumption is in his or her favour, and against the deserting spouse, and it is not until some offer to return is made by the other side that the question arises whether or not that is an offer which ought, in all circumstances to be accepted."

In other words, once the petitioner is shown to be the deserting spouse a presumption is drawn in favour of the respondent that he was at all times during the statutory period ready and willing to receive the deserting spouse back again. The offer to return during that period must come from the deserting spouse. It never came in the case before me. In the result that on the evidence before me I hold that the above presumption is not rebutted. Having accepted the evidence of the wife that she found out that the respondent and the woman-named were living as man and wife in early 1955 and in the absence of any positive evidence as to the month I would put it at a period after the statutory period of three years had elapsed, *i.e.*, around July 1955.

The wife having deserted the husband, can she now in spite of the husband's proved adultery though after the statutory period of desertion, seek the exercise of the Court's discretion for her misconduct by virtue of a discretion statement never lodged at the Registry? She says, erroneously that her misconduct was brought about by her husband's desertion and adultery, but I think the truth is on the evidence before me that the husband's adultery was brought about by her desertion and refusal to live with the husband after May 1952. She deposed that during the relevant period she was under a bond to the Sudan Interior Mission and that as a result she could not join her husband. The nature or terms of such bond were never put before me and I find it hard to believe that such a bond would be so worded as to prevent a married woman, for she was legally married, from setting up a home for her husband. If in fact it was so worded, no Court of law would hold her bound to it for such an agreement would be against public policy.

Unfortnately the husband has not appeared and his answer and cross-prayer are such that even though he has asked for the Court's discretion to be exercised in his favour, he has filed no discretion statement as I have said before, nor has he made any admission of any matrimonial offence for which such prayer is sought.

Finally I must now consider the authority on these matters of the Court's discretion in divorce proceedings. I refer to the case of *Blunt* v. *Blunt*. The Court of Appeal decision is reported in 1942 2 A.E.R. 613 and the House of Lords decision in 1943 2 A.E.R. 76. There would have been no need for me to refer to the decision of the Court of Appeal but for the point which also arose there as to the effect of the lateness of a discretion statement and full disclosure of the misconduct of the party seeking the exercise of the Court's discretion in his or her favour. On this point the relevant facts before Hodgson, J. in the Court of first instance is shortly this: On 2nd February, 1942 the husband petitioned for divorce on the ground of the wife's adultery with one Farrow. The petitioner did not ask for the Court to exercise its discretion in his favour, nor was the petition accompanied by a discretion statement. By her answer the wife, as did the husband in the case before me, denied that she had committed adultery with Farrow, and in the alternative said that, if she had done so, the husband by his conduct had conduced to such adultery. Now the wife petitioned on 3rd February, 1942 for divorce on the grounds of the husband's cruelty and this petition also did not ask for the Court's discretion nor was it accompanied by a discretion statement. Hodgson, J. heard these two petitions on 9th to 11th June, 1942. On 8th June the day before the hearing the husband filed a statement admitting adultery with a woman—Margaret Dean. On the 10th day of June, 1942, the second day of hearing the husband was given leave to amend his petition by adding a prayer for the exercise of the Court's discretion in his favour. On 5th June, four days before the hearing began the wife filed a discretion statement admitting adultery with Farrow and also seeking the Court's discretion in her favour. Hodgson, J., exercised his discretion in favour of the husband and dismissed the wife's petition. It was on the question of the exercise of his discretion that the Court of Appeal were unable to uphold his judgment. He seemed to have placed reliance more on the fact that the husband did in the end make a full admission though belated and about this Mackinnen, L.J., says at page 615 of the report—

"This seems to suggest that absolution can and ought to be given upon full confession—even a death-bed confession, and even one which is not voluntary but is dragged from the impenitent because it is impossible for him to persist in concealment. In my opinion there was nothing in the conduct of the petitioner which should have disposed the court to exercise its discretion in his favour, and there was almost everything which should have disposed it to the contrary".

The Court of Appeal therefore set aside Hodgson, J., order made in favour of the husband and in confirming his order in respect of the wife's petition Mackinnon, L.J., went on to say that—

"All that I have said as to the necessity, and the absence of frank and early avowal of misconduct applied equally in her case..... The result is that this pair must remain in the bonds of wedlock. That may well be thought by many an undesirable result from considerations of social or moral expediency; but the jurisdiction of the court to dissolve marriages is not one that it may exercise upon such considerations".

The House of Lords however reversed the decision of the Court of Appeal on the husband's petition and restored the judgment of Hodgson, J. On this point under review as to the lateness of the admission of misconduct on the part of the spouse seeking the exercise of the Court's discretion Viscount Simon, L.C., at page 78 of the report quotes two cases as follows:

"It is to be observed that, in the case last quoted (*Wilkinson* v. *Wilkinson*), divorce was decreed notwithstanding that the petitioner's misconduct was only disclosed after the King's Proctor had intervened, and this was also the facts in *Wilson* v. *Wilson* (9) and in other cases".

In spite therefore of the lateness of the wife's discretion statement I do not propose to hold such lateness against her but will consider such discretion statement with all the relevant matters to be taken into account in the exercise of my discretion as stated in *Blunt* v. *Blunt by Viscount Simon, L.C. at Page 78 as follows:*

1. The position and interest of any children of the marriage.

2. The interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage.

3. The question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife.

4. The interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably.

On the first of these points there are fortunately no children of the marriage to be considered. On the second the evidence of the petitioner is singularly lacking. All I have before me is the fact that the party is called J. O. B. Omotosho and that he is in the Northern Region, but beyond that I am left completely in the dark. Whether he is married or not or whether he is prepared to or desires to marry the petitioner I am not told. On the third point I can only infer from the circumstances that the parties who married for convenience and lived together for about three months in seven years are not likely to reconcile. Finally on the last point the petitioner is a young lady of about twenty-seven years of age and attractive and I have no doubt would experience little difficulty in marrying again, and with this sad experience behind her, I hope wisely.

Those four points were originally stated by Sir Henry Duke, P., in the case of *Wilson* v. *Wilson* and to them Viscount Simon, L.C., adds a fifth—

"To these four considerations I would add a fifth of more general character, which must indeed be regarded as of primary importance, *viz*, the interest of the community at large, to be judged by maintaining a true balance between respect for

the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years the last considerations has operated to induce the Court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused".

It is the fourth and the fifth considerations which move me to exercise my discretion favourably in this case for the petitioner. She has made a mistake in entering into a marriage with the altruistic motive of saving the respondent from losing his employment. In Court she was perfectly frank and truthful as I have said. With all these in her favour to insist on her being tied down by the shackles of a bond which broke down seven years ago without the slightest hope of being repaired would have the result of perpetuating an intolerable not to mention an immoral state of affairs for both spouses. In the exercise of my discretion I therefore make an Order *Nisi* in her favour.

Order Nisi granted.

LAWANI LATEJU ... ... *Plaintiff/Appellant*

v.

LAWANI IYANDA ... ...
EMMANUEL ILORI ... ... } *Defendants/Respondents*

[FEDERAL SUPREME COURT: (Sir Adetokunbo Ademola, F.C.J., Lionel Brett, F.J., and Samuel Okai Quashie-Idun, Ag. F.J.) 4th December, 1959.]

Claim for declaration of title to Land:—estoppel per rem judicatam—s. 40 (1) of the Native Courts Ordinance (Cap. 142)—Order for a re-trial by the High Court under s. 40 (1) (a)—effect of such order—order for filing of statement of claim and defence—failure to file statement of defence—striking out of appeal—section 50 of the Native Courts (Colony) Ordinance, 1944, of the Gold Coast (now Ghana) section 34 of the said Ordinance of 1944.

In suit No. 71/51 the present appellant sued the second respondent and one Laoye in the Ibadan Native Court for ownership and possession, and the first respondent gave evidence for the defence, and stated that the land belonged to his family (but he did not appear as a representative of the family). Judgment was given for the present appellant, and although the Native Court of Appeal reversed it, it was restored by the District Officer and affirmed in successive further appeals to the Resident and the Lieutenant-Governor. In suit 77/54, the first respondent sued the appellant and the second respondent in the Ibadan Native Court for title and injunction. The present appellant relied on the judgment in suit No. 71/51 as binding on the first respondent but the Court rejected that submission and gave judgment for the plaintiff, the present first respondent. This was affirmed by the Native Court of Appeal, and an appeal was then brought to the High Court of the Region. The Chief Justice directed that the case should be tried *de novo* in the High Court, and ordered pleadings. A statement of claim was filed, but no defence, and on a motion for judgment by default the High Court made an order simply striking out the appeal.

The appellant then brought a fresh action in the High Court claiming against the respondents, declaration of title and possession in respect of the same land. The appellant and the first respondent each relied on the judgment in his favour and judgment was given for the respondent on the ground of *res judicata*.

On appeal it was submitted on behalf of the appellant that the learned judge was wrong in holding that the judgment in favour of the appellant in suit No. 71/51 was not binding against the first respondent, and that the native court which tried suit 77/54 was also wrong in holding the same thing. It was further argued that the order for re-trial by the High Court set aside the original judgment in suit No. 77/54 and that the subsequent order striking out the appeal for failure to file statement of defence did not restore the orginal judgment which had been set aside by the order for re-trial and therefore the first respondent had no judgment standing in his favour.

Held: (1) that the Chief Justice in ordering a re-trial *de novo* by the High Court was exercising his power under section 40 (1) (*a*) of the Native Courts Ordinance (Cap. 142) and it did not amount to the setting aside of the judgment appealed against:

(2) that since the judgment in suit No. 77/54 was not set aside by the order for re-trial, the High Court was acting within its powers in striking out the appeal as that was what he could do in exercise of one of its powers under section 40 (1) (*a*) of the Native Courts Ordinance (Cap. 142).

(3) that the judgment in suit No. 77/54 thereby operated as an estoppel against the appellant in that it declared the title to be with the first respondent and also decided that the judgment in the earlier suit No. 71/51 did not bind the first respondent.

Appeal dismissed.

Cases cited:

(1) Nana Ofori Atta *v.* Nana Abu Bonsra (1958) A.C. 95.

(2) Horsfall *v.* Amachree (1938) 4 W.A.C.A. 18.

(3) Ekeleme *v.* Ugwuiro (1942) 8 W.A.C.A. 224.

(4) Ekeleme *v.* Ugwuiro (1949) 12 W.A.C.A. 516.

(5) Apena *v.* Shonusi (1943) 9 W.A.C.A. 95.

(6) Abortsi *v.* Avulete (1949) 12 W.A.C.A. 422.

(7) Yeboah *v.* Taibil (1952) 14 W.A.C.A. 41.

(8) Amoku *v.* Duro (1953) 14 W.A.C.A. 257.

(9) Tsojo Gubba *v.* Gwandu N.A. (1947) 12 W.A.C.A. 141.

Appeal from High Court, Ibadan, Appeal No. F.S.C. 156/1959.

Adenekan Ademola for plaintiff/appellant.

A. Okubadejo for defendants/respondents.

Brett, F.J.: This is an appeal by the plaintiff from a judgment of the High Court of the Western Region dismissing his claim against the two defendants for a declaration of title to land and possession of the land. It was not the first case between the parties involving the same piece of land. In suit 71/52 the present appellant sued the second respondent and one Laoye in the Ibadan Native Court for ownership and possession, and the first respondent gave evidence for the defence, and stated that the land belonged to his family. Judgment was given for the present appellant, and although the Native Court of Appeal reversed it, it was restored by the District Officer and affirmed in successive further appeals to the Resident and the Lieutenant-Governor. In suit 77/54, the first respondent sued the appellant and the second respondent in the Ibadan Native Court for title and injunction. The present appellant relied on the judgment in suit 71/51 as binding on the first respondent, but the Court rejected that submission and gave judgment for the plaintiff, the present first respondent. This was affirmed by the Native Court of Appeal, and an appeal was then brought to the High Court of the Region. The Chief Justice directed that the case should be tried *de novo* in the High Court, and ordered pleadings. A Statement of Claim was filed, but no defence, and on a motion for judgment by default the High Court made an order simply striking out the appeal.

In the present case the second respondent made no claim to the land, and pleaded that he was on it merely as caretaker for the first respondent. It is unnecessary to refer to him further. The appellant and the first respondent each relied on the decision in his own favour, and judgment was given for the respondent on the ground of *res-judicata*, no evidence being heard. It is against this decision that the appeal is brought, and Mr Ademola, for the appellant, has submitted that the learned Judge was wrong in holding that the judgment in favour of the appellant in suit 71/51 was not binding against the first respondent, and that the Native Court which tried suit 77/54 was also wrong in holding the same thing. In support of this argument Mr Ademola has cited the judgment of the Judicial Committee in *Nana Ofori Atta* v. *Nana Abu Bonsra* (1958), A.C. 95, which was delivered after the judgment appealed against in this case and was therefore

not cited to the Judge. In that case the Judicial Committee recognise that in litigation concerning land in West Africa the doctrine of estoppel *per rem judicatam* has been developed further than in England and that a person who knowingly stands by during litigation concerning the title to land in which he claims an interest, in circumstances in which he might reasonably be expected to apply to be joined as a party, may find himself bound by a judgment even though he was not a party to the suit in which the judgment was given. In the present case I am prepared to hold, if it is open to me to do so, that the first respondent is bound by the decision in a suit which was brought against someone who he now says was merely his caretaker on the land and of which he must be held to have known, since he gave evidence, in it. The question is, however, whether it is open to this Court so to hold in view of the fact that in suit 77/54 the Ibadan Native Court held that its own previous judgment was not binding on the first respondent, and the answer to that question depends on the effect of what took place when the appeal in that case came before the High Court.

The powers of the High Court on an appeal from a Native Court are set out in section 40 (1) of the Native Courts Ordinance (Cap. 142), which reads as follows:

> "40. (1) A native court of appeal, a magistrate's court, the Supreme Court, a District Officer, a Resident or the Governor in the exercise of his appellate jurisdiction under this Ordinance may—
>
> (*a*) after rehearing the whole case or not, make any such order or pass any such sentence as the Court of first instance could have made or passed in such cause or matter;
>
> (*b*) order any such cause or matter to be reheard before the court of first instance or before any other native court or before any magistrate's court".

There have been a number of decisions on the construction of this section, and of the similarly worded section 50 of the Native Court (Colony) Ordinance, 1944, of the Gold Coast. To take the Nigerian decisions first, in *Horsfall* v. *Amachree* (1938) 4 W.A.C.A. 18, it was held that a magistrate rehearing a case after an order made by a Resident under section 40 (1) (*b*) is exercising appellate, not original jurisdiction. This decision was followed in *Ekeleme* v. *Ugwuiro* (1942) 8 W.A.C.A. 224. In *Apena* v. *Shonusi* (1943) 9 W.A.C.A. 95, it was held that where a magistrate made an order for a rehearing under section 40 (1) (*b*), with the intention of rehearing the case himself, and the case was afterwards transferred to the High Court and reheard there, the result of the order made by the magistrate was that the judgment of the Native Court was set aside. *Horsfall* v. *Amachree* was not referred to, and the West African Court of Appeal mentioned the question whether the High Court had been acting in its original or its appellate jurisdiction, without expressly deciding it. No question was raised as to the competency of the appeal to the West African Court of Appeal. In *Ekeleme* v. *Ugwuiro* (1949) 12 W.A.C.A. 516, *Horsfall* v. *Amachree* was treated as having been rightly decided, and it was held that section 34 of the Native Courts Ordinance gave no right of appeal to the West African Court of Appeal from a decision of the Supreme Court on appeal from a magistrate rehearing a case after an order under section 40 (1) (*b*) of the Ordinance.

Section 50 of the Gold Coast Ordinance empowers an appellate court either to rehear the cause in whole or in part itself and reverse, vary or confirm the decision appealed against, or to refer it back to the court from which the appeal was brought for rehearing *de novo*. In *Abortsi* v. *Avulete* (1949) 12 W.A.C.A. 422, it was held that where the appellate court refers the cause back "it is expressly provided that the rehearing shall be *de novo*, and this necessitates the original judgment being set aside." It was

further held that if the appeal court rehears the cause itself it should not set aside the judgment of the court below, because it would not be possible for it to vary or confirm a decision of the court below which had already been set aside, for that decision would have ceased to exist. This part of the decision was followed in *Yeboah* v. *Taibil* (1952) 14 W.A.C.A. 41 and *Amoku* v. *Duro* (1953) 14 W.A.C.A. 257, and in the latter case it was held that the appeal court became *functus officio* by setting aside the judgment appealed from.

The cases thus establish the following four propositions:—(*a*) a court rehearing a case after an order under section 40 (1) (*b*) of the Nigerian Ordinance is exercising appellate jurisdiction; *Horsfall* v. *Amachree*; (*b*) an order for rehearing under section 40 (1) (*b*) impliedly sets aside the judgment appealled against; *Apena* v. *Shonusi*; (*c*) a rehearing *de novo* necessitates the original judgment being set aside; *Abortsi* v. *Avulete*; (*d*) once a decision has been set aside, the appellate court is *functus officio* under the Gold Coast Ordinance; *Amoku* v. *Duro*. These propositions are not altogether easy to reconcile, and although the Native Courts Ordinance has now been repealed in the Northern, Eastern and Western Regions the Regional Laws which have replaced it contain sections with wording identical to that of section 40 (1) of the former Ordinance, so that the decisions on the meaning of that section will continue to be important, if only for the purpose of determining in any case whether an appeal lies as of right to this court, or only by leave.

What we are called on to decide in the present case is what effect the order of the High Court striking out of the appeal against the judgment in suit 77/54 had, in view of the previous order for a retrial. In my view, a distinction has to be drawn between a rehearing under section 40 (1) (*a*) of the Native Courts Ordinance, and an order for rehearing under section 40 (1) (*b*). Under paragraph (*a*) the appellate court rehears the case itself; under paragraph (*b*) it orders the case to be reheard by some other court, and the order made by the magistrate in *Apena* v. *Shonusi* must be regarded as exceptional in this respect. Where there is to be a rehearing under paragraph (*a*) I do not consider that the judgment of the court of first instance is set aside until the rehearing is complete and some other order is made. The power of the appellate court under paragraph (*a*) is entirely an appellate power, that is to say, the court's power is to make any such order or pass any such sentence as the court of first instance could have made or passed. The limits of this power are discussed in *Tsofo Gubba* v. *Gwandu N.A.* (1947) 12 W.A.C.A. 141, and have, in consequence of that decision been extended in criminal appeals, but they remain unaltered in civil appeals, and it may be necessary on some future occasion to consider the effect of the decision in civil appeals. In the present case, I do not consider that the judgment of the Native Court in suit 77/54 was at any time set aside, and I think it remained open to the Chief Justice to do as he did in striking out the appeal.

If this view is correct, the judgment in 77/54 operates as an estoppel against the appellant in two ways; it declares the title to be with the first respondent, and it decides that the judgment in the earlier suit, 71/51, is not binding on the first respondent. I therefore feel bound to uphold the decision of the Western Region High Court in the present case, though my reasons are not entirely the same as those on which Taylor, J., based his decision.

I would dismiss the appeal.

Appeal dismissed.

SULE LENGBE ... ... } *Plaintiff/Appellant*
(Representing Lengbe Family) ... ... }

v.

1. RUFAI IMALE ... ... } ... *Defendants/Respondents*
2. SALAWU EKEMODE ... ... }

[FEDERAL SUPREME COURT: (Sir Adetokunbo Ademola, F.C.J., Lionel Brett, F.J., Samuel Okai Quashie-Idun Ag.F.J.) 4th December, 1959.]

Claim for declaration of title and damages for trespass—allotment of Family land for farming purposes—allottee claiming declaration of title under Native Law and Custom—power of Appeal Court to disturb finding of facts by the lower Court.

This is a claim for ownership of farm land. The facts are fully set out in the judgment. The Court considered whether the division of the farm land was a partition or an ordinary allotment of a portion of it for farming purposes. The Court also considered whether it could disturb a finding of fact made by the lower Court.

Held: (1) that an allotment by the head of the family to various members of the family of portions of land for farming purposes does not in any way vest such ownership in the allottees as would entitle them under Native Law and Custom to a declaration of title.

(2) that the appeal Court will only disturb findings of fact by the lower Court, where in the opinion of the Court such findings are not supported by the evidence or the judgment is unreasonable having regard to the evidence.

Appeal in respect of claim for declaration of title dismissed. Appeal allowed in claim for damages for trespass.

Case referred to:

Kai Tongi v. *Sulaiman Kalli* 14 W.A.C.A. 331.

Civil Appeal from High Court, Western Region, Appeal No. F.S.C. 86/1959.

M. A. Adesanya, for appellant.

O. Somolu (*Otuyelu with him*) for respondent.

Quashie-Idun, Ag.F.J.: The plaintiff, as the representative of the Lengbe Family, instituted an action in the Supreme Court, Lagos, against the defendants claiming a declaration to a farm land and damages for trespass.

On the 5th October, 1954, the suit was transferred to the High Court, Western Region, in whose jurisdiction the land is situated.

The material averments in the plaintiff's statement of claim were the following:—

(1) that the land in dispute was a portion of the large piece of land acquired by Lukoku about three centuries ago.

(2) that Lukoku begat Oshogbiye also known as Abirunje, Gbiyelu, all males. Oshogbiye begat Aina, Ewugbase, Odukojo, all females, Sonubi and Talabi, both males. Ewugbase begat Ajayi Lengbe who begat the plaintiff.

(3) that after the death of Lukoku the land was divided among his children Oshogbiye and Gbiyelu.

(4) that about thirty years ago the members of the large family agreed to divide the land available amongst themselves, namely, Lengbe, Odukojo, Talabi, Kabo and others.

(5) that the land in dispute was the portion which went to Lengbe and on which he planted kola trees, farmed and from which he harvested the kola trees, and in respect of which he collected rents until he died sixteen months prior to the institution of the suit.

(6) that on the death of Lengbe the land descended to his children who have been in possession of it since.

(7) that the defendants are descendants of Odukojo and Talabi respectively.

(8) that on the 29th January, 1953, the defendants unlawfully entered upon the land, cleared the area edged yellow on the plan and cut down the plaintiff's kola trees.

(9) that the defendants were falsely claiming the land in dispute as their own.

In their statement of defence the defendants admitted that the farm land in dispute originally belonged to the Olukolu family but that the defendants form an important branch of that family. It is necessary to mention here that the parties agreed that Olukolu was the same person as Lukoku. The first defendant averred that he and his family have been in possession of the land in dispute and have cultivated it for over one hundred years as their portion of the Olukolu family land. The second defendant claimed no interest in the land. It appears from the Record of Proceedings that with the consent of Counsel, the Court decided that two issues were to be tried, namely, (*a*) whether the property of Lukoku was ever partitioned, and (*b*) whether Lengbe was a descendant.

On these two issues depended also the issues as to whether or not the plaintiff was entitled to a declaration in respect of the land in dispute and for a claim for damages for the trespass alledged to have been committed by the defendants.

The plaintiff gave traditional evidence and was supported by another member of the family who belonged to the Oshogbiye branch. Both gave evidence of the partitioning of the land after the death of Lukoku. The plaintiff also called a witness Salamatu Odumosu who testified that she hired a Kola nut farm from the plaintiff's father before he died. Another witness, Suberu Igbira, also gave evidence that he hired a Kola nut farm from the plaintiff. None of the defendants gave evidence although the first defendant was called only to tender documents in evidence. He was not sworn and did not give any evidence. The defendants, however, called one Ajayi Elejieporo who said he was the oldest member of the Lukoku family. This witness denied that Ajayi Lengbe, plaintiff's father, was a member of the Lukoku family. He also denied that plaintiff's father was granted a portion of the family land. He said that plaintiff's father leased a piece of land from the Olukolu family and that it was the one in dispute. He continued his evidence and said that the mother of the first defendant was granted a piece of land for the purpose of planting kola nuts. The first defendant's mother died and the first defendant inherited that piece of land. He continued and stated as follows:

"The farm land given to first defendant's mother is not the same as that given to Lengbe. They are about one mile apart. The land in dispute is the one given to the mother of the first defendant which plaintiff now claims".

The learned trial Judge, after reviewing the evidence, dismissed the plaintiff's claim.

Six grounds of appeal have been argued on behalf of the appellant, but in this judgment I think it is necessary to deal with only three. They are:

(1) that the learned trial Judge was wrong in holding that there was never a partition of Olukoku's land;

(2) that the learned trial Judge misdirected himself in law and in fact when he held that Ajayi Lengbe was a descendant of Ewugbase instead of saying that Ajayi Lengbe was a descendant of Oshogbiye, when it was quite clear that the maternity of Lengbe was not in issue;

(3) that the decision is unreasonable and cannot be supported having regard to the weight of evidence.

I think it is convenient now to dispose of the second ground of appeal. Counsel for the appellant has not been able to satisfy the Court that any miscarriage of justice has occurred even if the Court did misdirect itself as alleged. But the plaintiff's evidence before the Court was that Ewugbase begat Ajayi Lengbe. That evidence supported paragraph 2 of the statement of claim which averred that Ewugbase begat Ajayi Lengbe. That being so, I fail to see why the learned trial Judge's finding can be wrong. On the evidence before the Court perhaps it would have been more correct for the judge to have said that Ajayi Lengbe was begotten by Ewugbase and therefore a descendant of Olukolu than to say that he was a descendant of Ewugbase. It is my view, however, that as the learned trial Judge did not base his decision on that finding, no miscarriage of justice has occurred and the ground fails.

I now deal with the first and third grounds argued. The learned trial Judge stated as follows in his judgment:

"On the evidence adduced, I am not satisfied that there has been a partition of the land belonging to Olukoku. I believe that what has happened is what amounts on the evidence of D.W. 2, which I accept on this point, to an allotment by the head of the family to various members of the family of portions of land for farming purposes. Such an allotment does not in any way vest such ownership in the allottees as would entitle them under Native Law and Custom to a declaration of title..... On the issue of possession of the area in dispute the evidence of D.W. 2, though confusing in its early stages is later clarified..... I accept this evidence in preference to that of the plaintiff and his witnesses".

Although the plaintiff averred in his statement of Claim (paragraph 6) that the family land was "divided", he is recorded as having stated in his evidence that the land was "partitioned". Whether what he meant was that the land was partitioned amongst the members of the family so that each branch could occupy the portion allotted to it, is not very clear. But I agree with the view held by the learned trial Judge that what took place was an allotment to various heads of the family. This view is amply supported by the evidence which was not contradicted.

Having come to the conclusion that the family land was allotted to various heads of the family, the learned trial Judge held that the plaintiff was not entitled to claim a declaration of title under Native Law and Custom in respect of the portion allotted to his family, and also dismissed his claim for damages for trespass. I agree with the learned trial Judge's decision in respect of the claim for a declaration of title as I support his view that what took place among the members of the family was an allotment of the family land among the various heads of the family and not a partition of the family land thereby vesting ownership in the heads of the family. But I disagree with the

view of the learned trial Judge that the plaintiff was unable to prove possession of the land in dispute. The plaintiff's evidence that the kola farms on the land had been rented to people who paid rent to the plaintiff's father and later to the plaintiff's was not contradicted by the defendants. Apart from the fact that none of the defendants gave evidence, the only witness called by the defendants gave a very unsatisfactory evidence. Although the statement of defence alleged that the land leased out to plaintiff's father was separate and distinct from the one in dispute, the witness stated that the land leased out to the plaintiff's father was the one in dispute. He stated later that the land in dispute was the one which the family had granted to first defendant's mother and which had been inherited by the first defendant. There was, therefore, ample evidence that the plaintiff's family is in possession of the land in dispute. That being so, the plaintiff was entitled in law to institute an action for damages for trespass. *See Kai Tongi* v. *Sulaiman Kalli*, 14 W.A.C.A. page 331. There was also evidence that the defendants cut down two Kola nut trees on the land.

It is not the function of this Court to disturb the findings of fact of the lower Court, but, where in the opinion of the Court, such findings are not supported by the evidence, or where the judgment is unreasonable having regard to the evidence, the Court will set aside the judgment.

It is my view that the learned trial Judge was wrong in dismissing the claim of the plaintiff for damages for trespass and the judgment should be set aside. The judgment dismissing plaintiff's claim for a declaration is upheld. Judgment is entered for plaintiff on his claim for damages for trespass.

Appeal in respect of claim for declaration of title dismissed. Appeal allowed in claim for damages for trespass.

JOSEPH OSIOBOR ONUBAKA ... ... *Appellant*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Sir Adetokunbo Ademola, F.C.J., Lionel Brett and Louis Nwachukwu Mbanefo, F.JJ., 14th December, 1959.]

Criminal Law and Procedure—information charging indictable offence together with non-indictable offence—non-indictable offence alone not triable on information—decision given "per incuriam", set aside—sections 158 and 340 of the Criminal Procedure Ordinance—Section 34 of the Medical Practitioners and Dentists Ordinance (Cap. 130)—section 18 Road Traffic Ordinance.

The appellant was charged before the High Court of the Western Region sitting at Ibadan on two counts—First, Manslaughter—an indictable offence and on a second count of giving unlawful injection contrary to section 34 of the Medical Practitioners and Dentists Ordinance which is a non-indictable offence. He was discharged on the first count but was convicted on the second count.

Upon this conviction he appealed and contended on the strength of the decision in *Adelani* v. *The Queen* FSC 50/1959 that the trial was a nullity in that the trial on the second count, not being an indictable offence, should not have been tried on an information or together at the same trial with a count on an indictable offence.

Held: (*i*) that the decision in *Adelani* v. *The Queen* was given "*per incuriam*" and cannot bind the Court;

(*ii*) that having regard to the provisions of section 158 of the Criminal Procedure Ordinance (Cap. 43), a count charging a non-indictable offence could be included in an information charging an indictable offence.

Appeal dismissed.

Cases cited:

The Queen v. *Adelani* FSC 50/1959 (unreported).

The Queen v. *Anthony George Boulos* 14 W.A.C.A. 543.

Regina v. *Mallam Maina Waziri* (1958) N.R.N.L.R. 91.

Appeal from High Court Ibadan in a Criminal Case: Appeal No. FSC 208/1959.

Appellant absent and not represented.

C. O. Madarikan, Director of Public Prosecutions for respondent.

Ademola, F.C.J.: The appellant in this case was tried by Quashie Idun, J. at the Assizes at Ibadan in the Western Region on an information containing two counts, namely, first count, manslaughter *contra* section 325 of the Criminal Code, and second count, giving unlawful injection *contra* section 34 of the Medical Practitioners and Dentists Ordinance, Cap. 130, the latter charge being a non-indictable offence.

During the hearing the charge of manslaughter on the first count was withdrawn. The trial proceeded on the second count only, which was a non-indictable offence. The appellant was later found guilty on this count and sentenced to a term of twelve months imprisonment with hard labour. He has appealed against his conviction.

The appellant was not present at the hearing of his appeal before us, but the learned Director of Public Prosecutions (Western Region) appearing for the respondent has called our attention to the case FSC 50/1959 the *Queen* v. *Adelani*, which is an appeal heard in this Court on the 28th July, 1959, the Court being differently constituted.

The appellant in that case who was tried in the High Court at Ikeja on the information charging him with (1) manslaughter and (2) negligent driving under section 18 of the Road Traffic Ordinance, appealed against his convictions on the two counts. His appeal was dismissed on the count charging him with manslaughter, but the Court was of the view that the charge of negligent driving must be struck out on the grounds (*a*) that the greater charge (manslaughter) includes the less and, (*b*) that the charge on the second count, not being an indictable offence, should not have been tried on an information or together at the same trial with a count on an indictable offence.

No authority was given for this statement of the law, and the record shows that the point was not argued and that judgment was delivered immediately upon the close of the hearing and not reserved. We are unable to agree with the decision and we are of the clear opinion that it was given "*per incuriam*". It is possible the Court had in mind the case of the *Queen* v. *Anthony George Boulos* where the accused was tried in the High Court by Abbott, J. on an information charging him with three counts of indictable offences and a fourth count on a non-indictable offence. The point was argued before the learned Judge whether a count for a misdemeanour or simple offence can be lawfully joined with the counts on indictable offences on a trial upon an information at one trial.

The learned Judge ruled that the accused could be so tried; he dealt with the case, finally convicted the accused on the count charging him with misdemeanour and discharged him on the counts of indictable offences. On an appeal to the West African Court of Appeal, the appellant was discharged on the count of misdemeanour for which he was convicted in the High Court, but the point was never argued whether felonies, misdemeanours or simple offences, might be joined in the same information and the accused tried therefor at one trial. The appellant was discharged on another point taken at the hearing of the appeal.

In the case *Regina* v. *Mallam Maina Waziri* (*1958*) *N.R.N.L.R. 91* the accused was committed for trial before the High Court, Northern Region, for manslaughter, slaughter, which is an indictable offence. The information did not charge him with manslaughter but with a simple count of dangerous driving, which is not an indictable offence. Reed, J., held that while in certain circumstances a count alleging a non-indictable offence may be joined in an information with a count or counts alleging indictable offences, a non-indictable offence alone is not triable upon information.

This case is distinguishable from the present case in that the information in the present case contains one count of an indictable offence and one of a non-indictable offence. Section 158 of the Criminal Procedure Ordinance states:—

> "If in one series of acts or omissions so connected together as to form the same transaction or which form or are part of a series of offences of the same or a similar character more offences than one are committed by the same person charges for such offences, whether felonies, misdemeanours or simple offences, may be joined and the person accused tried therefor at one trial."

This section, in our view, enables, in certain circumstances, a count alleging a non-indictable offence to be joined in an information charging an indictable offence in accordance with the provisions of section 340 of the Criminal Procedure Ordinance.

As stated above, the case *The Queen* v. *Adelani* to which our attention has been called was decided "*per incuriam*" and we are not prepared to hold that a count for a non-indictable offence joined in an information charging an indictable offence is bad.

This appeal will therefore be dismissed.

Appeal dismissed.

SALAWU OLORI-ODE ... ... *Appellant*

v.

IKORODU DIVISIONAL COUNCIL ... ... *Respondent*

[HIGH COURT OF JUSTICE: Duffus, J., 14th December, 1959.]

Criminal Law and Procedure—Criminal trial in Customary Court—Charge under Local Government Law, 1957 (W.R. No. 12 of 1957)—prosecution did not make a prima facie case—defendant gave incriminating evidence—Customary Courts Rules, 1958, Order IX, rule 5 whether analogous to section 286 of the Criminal Procedure Ordinance.

The appellant was charged before the Igbogbo/Baiyeku Customary Court, Grade "C" with unlawfully collecting rates from one Abudu Oduola. The only witness for the prosecution was Abudu Oduola himself. He gave evidence which did not in any way incriminate the appellant. At the end of the case for the prosecution the trial Court decided that a *prima facie* case had been made against the appellant to answer.

The appellant gave evidence in his defence and made admissions sufficient to justify his conviction. He was convicted. He appealed against this conviction to the Ikeja Customary Court Grade "B". The appeal was dismissed. He then appealed to the High Court.

Held: (1) in a criminal trial in a Customary Court, if at the end of the case for the prosecution, no case is made out against the accused, the Court shall acquit and discharge the accused;

(2) if the Court erroneously called upon the accused to enter a defence when in fact no case has been made out against him and the accused in his defence gave evidence incriminating himself and was convicted upon the incriminating evidence, the Appeal Court, notwithstanding the incriminating evidence must acquit and discharge the accused.

Appeal allowed.

Case cited:

Eregie v. *Inspector-General of Police*, 14 W.A.C.A. 453.

Criminal Appeal from Igbogbo/Baiyeku Customary Court, Grade "C": Appeal No. HK/11CA/59.

Ogunsanya for appellant.

Odesanya for respondent.

Duffus, J.: This is an appeal in a criminal cause from the decision of the Ikeja Grade "B" Customary Court of Appeal, sitting in its appelate jurisdiction from a decision of the Grade "C" Customary Court of Igbogbo/Baiyeku.

In the trial Court the appellant was charged for unlawfully collecting rates from one Abudu Oduola contrary to certain sections of the Local Government Law, 1957—(Western Region Law 12 of 1957).

At the end of the prosecution's case, the trial Court decided that a case had been made out for the defence to answer, and the defendant/appellant gave evidence and he was duly convicted and fined £55. On appeal the Customary Court of Appeal affirmed the conviction but reduced the fine to £10.

On appeal the only ground argued was that there was no evidence to support the conviction.

Learned Counsel for the respondent did not seriously argue that the prosecution had made out a *prima facie* case, but rather he relied on the fact that the defendant/appellant in giving evidence had made admissions sufficient to justify his conviction, and he relied on the Judgment of the West African Court of Appeal delivered by Verity, Chief Justice in *Eregie* v. *Inspector-General of Police* (14 W.A.C.A. 453).

I will not deal fully with the facts, but it would suffice to say that the only witness as to the collection of the rates, the complainant Abudu Oduola, did not in any way incriminate the Appellant, and there was in fact at the end of the prosecution's case, no evidence upon which the appellant could have been convicted.

The Customary Courts in the Western Region are created by Statute under the Customary Courts Law, 1957, and the jurisdiction, practice and procedure in these Courts are governed by that Law, and by the Customary Courts Rules, 1958, made under the powers conferred by section 68 of the Customary Courts Law, 1957.

Before considering the relevant rules I would refer to the case of *Eregie* v. *Inspector-General of Police* (14 W.A.C.A. 453). In that case the Court of Appeal was considering the effects of section 286 of the Criminal Procedure Ordinance (Cap. 43) which reads as follows:

"286 –If at the close of the evidence in support of the charge it appears to the Court that a case is not made out against the defendant sufficiently to require him to make a defence the Court shall, as to that particular charge, discharge him".

In dealing with this section, Verity, C.J. said, *inter alia*, in delivering the Judgment of the Court (at page 453) said—

"The argument as I understand it is that if, in fact, there is no such sufficient evidence, then it cannot have appeared to the Court that there was and the mandatory provision of the section should have been complied with. If it is not complied with and in the course of the defence such sufficient evidence appears and a conviction is recorded it will be quashed on appeal as having been improperly obtained.

If these submissions be well founded then indeed the enactment of the section has brought a revolution in the law for, as Counsel readily conceded, they do not represent the law in England or in Nigeria prior to 1945.

We do not consider, however, that they are well founded. It is clear that by the old established rule it was envisaged that a defendant might wrongly be called upon for a defence but it is, we think, equally clear that at no time was it contemplated that the trial Judge would so call upon the defendant unless it appeared to him, albeit perhaps erroneously, that a *prima facie* case against him had been made out. It is in our view, this rule, neither more or less, that has been embodied in the provision of section 286 of the Ordinance. Had it been intended to go further we think that the terms of the section would have been made absolute and would have provided that in any case in which at the close of the evidence in support of the charge a case is not made out the defendant shall be discharged".

Proceedings at trials in Customary Courts are now regulated by Order IX of the Customary Court Rules, 1958. In this case, the appellant at his trial before the Igbogbo /Baiyeku Grade "C" Customary Court pleaded not guilty.

The charge is, of course, a criminal one. Rule 5 of Order IX applies. The relevant portions are—

"5. (1) where the defendant does not admit the claim or the charge, as the case may be, the plaintiff or the complainant shall adduce evidence in support of his case.

(2) In any criminal cause or matter—

(*a*) at the close of the case for the complainant, the Court shall consider whether any case has been made out for the defendant to answer;

(*b*) if no case has been made out, the charge shall be dismissed and the defendant acquitted and discharged;

(*c*) where there is a case for the defendant to answer, the Court shall call him to make his defence; and he shall adduce evidence in support of his case."

There is no ambiguity about the meaning of this section, the directions are clear and simple. The Court shall at the close of the complainant's case consider whether a case has been made out against the defendant. If no case has been made out, then the rule is mandatory and the charge shall be dismissed and the defendant acquitted and discharged.

The provision here is quite different from that in section 286 of the Criminal Procedure Ordinance considered by the Court of Appeal in *Eregie* v. *Police*. Customary Courts, by virtue of Rule 5 can only call on the defence if there is a case to answer, and in my opinion, if the Courts act erroneously and call for the defence when no case has been made out, then on appeal the defendant is entitled to succeed, even if he did in fact incriminate himself in his defence at his trial. In Customary Courts, in this Region as the Law now stands, the prosecution must make out a *prima facie* case against the defendant, and cannot rely on admissions in evidence given in defence, when the Court wrongly calls on the defendant.

As I have already stated there was at the end of the complainant's case no evidence to support the charges against the appellant, and the charge should have been dismissed and the appellant acquitted and discharged.

This appeal will be allowed, and the conviction and sentence quashed and I direct that the charge be dismissed and the defendant/appellant acquitted and discharged.

Appeal allowed.

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v.

FRANCIS KUFI ... ...

[HIGH COURT OF JUSTICE: Duffus, J., 16th October, 1959.]

Criminal Law and Procedure—unlawful carnal knowledge, contra *section 357 of the Criminal Code, Cap. 42—unsworn evidence of a child, under section 182, Evidence Ordinance, Cap. 63—corroboration of such evidence—consent material.*

The accused was charged with unlawful carnal knowledge of a girl aged ten years without her consent. The girl gave unsworn evidence that she did not give her consent. The girl's father gave evidence that the accused confessed the offence to him and gave him a promissory note to pay £20.

Held: (1) In a charge of rape consent is most material, and the prosecution have to prove that the accused had carnal knowledge of the complainant, despite her age, without her consent.

(2) That the evidence of the girl's father was ample corroboration of her evidence.

Convicted of rape.

Case cited:—

R. v. *Harling*, (1938) 2 All E.R. 307, 26 Cr.App.R. 127.

Ikeja Criminal Case No. HK/7c/59.

Peters, Crown Counsel, for the Crown.

Fawehinmi, for the Accused.

Duffus, J.: The accused is charged with rape contrary to section 357 of the Criminal Code.

The Crown alleged that the accused had unlawful carnal knowledge with a girl Baby Richards without her consent. According to the Medical evidence the complainant was about ten years of age when the offence was committed. The offence was alleged to have been committed as far back as the 7th April, 1958, and although the accused was arrested and charged on the 11th April, 1958, the case is only now being tried.

The defence of the accused is an absolute denial of the offence.

The evidence on which the Crown relies, is first that of the complainant Baby Richards herself. I accept the evidence of the Medical Officer, the first prosecution witness, that her age in April 1958 when he examined her was about ten years of age. I examined this witness and she did not appear to me to understand the nature of an oath, but I was satisfied that she was of sufficient intelligence to justify the reception of her evidence and understood the duty of speaking the truth. I therefore under the provisions of section 182 of the Evidence Ordinance allowed her to give her evidence without being sworn. By sub-section (3) of that section corroboration of her evidence is required and I have duly directed myself as to this. This girl gave her evidence intelligently and I formed the impression that she was being truthful. According to this witness the accused took her into his room, locked the door and put her on the bed and then had intercourse with her, and when she was shouting the accused covered her mouth with his hand. This is a charge of rape, and the question of her consent is material. I am satisfied that the complainant did not consent to the intercourse but I will deal with this more fully.

The Medical Officer, Dr Onifade examined the complainant and the accused. His evidence bears out the complainant's story that she had had recent intercourse. He found a recently perforated hymen, and in his opinion, intercourse had taken place up to six days previously, if the parts had not been washed. He found that the accused had a discharge and the complainant an infection of the vulva and the vagina. He gave the opinion that this might in both cases have been due to gonorrhea, but he could give no definite opinion and recommended examination by the Pathologist, but this was not apparently done. The medical evidence therefore whilst corroborating the girl that she had had recent intercourse was not evidence in any way implicating the accused. The fact that the accused had a white discharge cannot, in my opinion, be any evidence against him.

The real corroboration that the Crown relies on is the evidence of the father Richards Akpomudje. He gave evidence that on his observing a discharge from the girl's private parts he questioned her and she told him that the accused had intercourse with her. He then made a report to Ibeke—fourth prosecution witness who sent for the accused. According to the father the accused then admitted he had intercourse with the girl, and then on the following day, the accused brought him the Promissory Note Exhibit 2 whereby the accused promised to pay the father £20 for money he borrowed. Accused then said that Ibeke asked him to bring this so that his "mind might cool". I thought the father was an honest witness but there are certain matters to be considered in weighing his evidence. The first is that he delayed in reporting to the police, he did this he says on the third day after the incident; and then when he did report, he did not tell the police about the Promissory Note Exhibit 2, and then hand it over. It was in fact the accused who first mentioned Exhibit 2 to the police.

Ibeke gave evidence. According to him the father (fifth prosecution witness) did make a complaint to him and he sent for the accused, but that when the accused came, and he asked him about having intercourse with the complainant, that the accused got angry and wanted to fight. He does not corroborate the father's evidence that the accused admitted having had intercourse. He gave the father a poor character, and says he is full of lies and excuses.

Lance Corporal Jongbo arrested the accused, and on being cautioned the accused gave a long statement which is on evidence as Ehibit 1. In short the accused in his statement absolutely denied the offence. He admits he gave the Promissory Note for £20 after the date of the alleged offence, but said that he had said before he would marry the girl, and he gave this Promissory Note, on the suggestion of the father; and he would pay by small instalments and this would be taken as part of the dowry. He suggests that it was a dispute over the sale of illicit gin that caused the father to report him.

The accused gave evidence and he also called one of his wives as a witness.

The accused again absolutely denies the offence. He said he got very angry when the report was made and said he was going to report Richards (the father) to the police for defamation. Then he said that Richards got very sorry and apologised, and said he would give him his daughter in marriage, and the next day came to apologise and then asked him to give the Promissory Note for £20 according to the previous arrangement for marriage, and he then made out the paper Exhibit 2. Richards then demanded some money out of the £20, accused said he then shouted at him and said he was going to report him to the police for defamation of character, and it was then that Richards went and reported him. He stated that Baby Richards and his father have lied on him. The defence also called one of the accused's wives. She said, *inter alia*, that Richards told her that some one had sent him falsely to accuse the accused.

This is a short summary of the mere important facts of the evidence.

I have duly warned myself that the onus of proof is on the prosecution and remains with the prosecution. I have also warned myself that the evidence of the girl is unsworn evidence and must be corroborated.

This is a charge of rape. The Crown has not seen fit to charge the accused for carnal abuse of a girl under eleven years of age contrary to section 218 of the Criminal Code. In a charge of rape consent is most material, and the prosecution have to prove that the accused had carnal knowledge of the complainant, despite her age, without her consent.

On this question, I would like to refer here to the Judgment of Humphreys, J. delivering the judgment of the Criminal Court of Appeal: *R* v. *Harling* (1938) 2 A. E.R. 307, 26 C.A.R. 127 and to the following passage:—

"It is desirable for this Court to re-state the law, which is not subject to doubt. Upon a charge of carnal knowledge of a girl under 16, while such a girl is perfectly capable of consenting, and, as everyone who tries these cases knows, frequently does consent, to sexual intercourse, such consent affords no defence to the accused man. Where, however, the charge is one of rape, it is necessary that the prosecution should prove that the girl or woman did not consent, and that the crime was committed against her will. It may well be that in many cases the prosecution would not want much evidence beyond the age of the girl to prove non-consent, but in every charge of rape the fact of non-consent must be proved to the satisfaction of the jury".

This is a charge for rape and I have also borne in mind the danger of acting upon the uncorroborated evidence of the complainant.

In this case according to the complainant, after the first incident had occurred she went back to the accused's house on about three other occasions and the accused again had intercourse with her. This evidence must be weighed in the accused's favour as evidence of consent. There is also the fact that the girl made no complaint immediately after the first act of intercourse, which is the subject of this charge. On the other hand there is the fact that the complainant is an immature girl of only ten years of age and in my opinion she would not realise the full nature of what the accused was doing in having intercourse with her. I am however, satisfied from her evidence that she did not consent to the act and that she did resent the accused. She states that the accused locked the door and put her on the bed, and that when she was shouting the accused covered her mouth with his hand. The accused is a full grown man whose age is stated on his statement to be thirty-five years of age. The defence of consent was not raised.

On all the facts, I am satisfied and believe that the complainant and her father Richards—(third and fifth prosecution witnesses) have been truthful and honest witnesses. I believe the complainant's unsworn evidence. The fact that recent intercourse took place is borne out by the medical evidence. I do not regard the evidence of the complainant as being worthy of much weight. It of course affords no corroboration of her evidence.

There is however, ample corroboration of her evidence, by the evidence of her father. I accept the father's evidence that the accused admitted he had intercourse with complainant and handed him the Note Exhibit 2 in an attempt to settle the matter, and keep it out of the hands of the police.

I have carefully considered the defence. I am satisfied and found that the accused and his witness have not been truthful and I do not accept or believe his defence.

I have considered the evidence of the Crown witness Ibeke, which was of considerable assistance to the accused. I do not, however, believe Ibeke's evidence and I formed the impression that he was endeavouring to assist the accused.

I accept the case for the Crown against the accused and I find that the accused by force and without the consent of the complainant had unlawful carnal knowledge of her and is guilty of rape as charged.

Convicted of rape.

AMOS ADETOLA ... ... *Appellant*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: Ademola, F.C.J., Brett, F.J., Quashie-Idun, Ag. F.J., 6th November, 1959.]

Criminal Law and Evidence—murder—motive (if any) must be proved—possible motives —depositions tendered, contra *section 34 (1) Evidence Ordinance, Cap. 63—defence of suicide—possibility of suicide must be eliminated.*

The deceased was lying with a deep cut across the throat in a room occupied by the deceased and the appellant. The deceased was lying on the ground and the appellant was found helping her. An old pocket knife was found with the appellant and a clean razor blade in the room. There were no blood stains on these two articles. The appellant put up a defence that his wife committed suicide, but no lethal weapon was found on the scene other than a clean razor blade, apart from the pocket knife. This defence was rejected by the trial Court on the ground that the wife who had been ill for sometime could not have easily got rid of the instrument with which she was alleged to have committed suicide. The appellant was convicted and sentenced to death. Against this conviction and sentence he appealed.

Held: (*i*) That in law evidence of motive is not an essential ingredient in a case of murder. If there is motive, it should be proved; it strengthens the case for the crown and becomes part of it, but the existence of possible motives does not materially strengthen a weak case.

(*ii*) The onus is on the Crown to eliminate the possibility of suicide.

Appeal allowed. Conviction and sentence set aside.

Criminal Appeal from High Court, Western Region Appeal No. F.S.C. 255/1959.

Cases cited:

R. v. *Dumber* (1957) 3 W.L.R. 330

R. v. *Hycinath Egbe* 13 W.A.C.A. 105.

L. V. Davis, for the Appellant.

B. A. Adedipe, Senior Crown Counsel, for the Respondent.

Ademola, F.C.J.: The appellant in this case was on the 21st August, 1959, convicted of murder and sentenced to death. He has appealed against his conviction.

After we had granted the appellant's application for leave to appeal, Mr L. V. Davis his Counsel, filed three supplementary grounds of appeal which he was given leave to argue. The three grounds, indeed the only grounds of appeal argued before us, are as follows:

1. The learned trial Judge erred in law to have convicted the Accused/Appellant of murder, when all the circumstances of the case did not lead with irresistible force to his guilt.

2. The learned Judge erred in law in convicting the Accused/Appellant of murder based on some probable or possible motive.

The learned trial Judge was himself uncertain as to whether the motive was to get rid of an ailing wife or to victimise her for having at one time threatened to leave the Accused Appellant.

5. The learned trial Judge misdirected himself in law in failing to consider the defence of suicide in its entirety.

The deceased was the appellant's wife: they lived together. She had two children by him. Both died, the last died three months before the deceased met her death. It would appear the deceased was very unhappy as a result of the loss of her children and would not eat. She became weak and complained of pains all over her body. Later she started to take food. She was found early one morning with a deep wound across her throat in a room where she and her husband (the appellant) were sleeping. The next door neighbour who heard a choking noise from the direction of the room came to the room; he found, when he struck a match, the appellant beside the deceased who was lying on the ground. He sat by her, helping her. He saw a wound on the deceased's throat. The appellant was arrested. A knife with no blood-stains was found in his pocket. A clean razor blade was later found in the room.

The learned trial Judge formed an unfavourable opinion of the demeanour of the appellant in the witness box whom he described as having a furtive look. After weighing the evidence before him, he concluded that the appellant killed the deceased either with the knife found on him, of which he must have wiped the bloodstains, or with some other instrument, which he must have thrown away. He considered the possibility of the deceased committing suicide but dismissed this possibility on the ground that the deceased was weak and also because in such circumstances she could not have thrown away the weapon used, and no lethal weapon was found on the scene other than a clean razor blade, apart from the penknife to which reference has been made as found in the appellant's pocket.

The learned trial Judge made unfavourable comments on the incompetence of the Local Government Policeman who arrived earlier on the scene before the Nigeria Police took charge. He said the Local Government Policeman made no endeavour to look for any incriminating weapon or evidence. With respect, we do not think when a Policeman arrives at a scene what he looks for is an "incriminating" weapon or "incriminating" evidence. Naturally in such circumstances, he looks for a weapon or any other evidence tending to show what occurred, whether or not it incriminates any person. In circumstances other than this we might regard this as a serious misdirection, but we do not think it necessary in the present case to consider what effect it would have if it were the only ground for criticism.

On the first ground of appeal Counsel argued that the evidence in the case was such that the deceased could have been murdered by someone else and not the appellant and that the learned trial Judge did not consider sufficiently such possibility.

We are not particularly attracted by this argument; we are satisfied that the learned trial Judge has sufficiently considered the point and, rightly in our view, ruled out the possibility of an attack by a third party.

On the second ground of appeal, Counsel referred to the motives suggested by the Judge which could have motivated the appellant to kill his wife. We agree there was hardly any evidence of motive before the learned Judge excepting a statement alleged to have been made by the appellant, which he strenuously denied, that the deceased had

threatened to leave him. Since there was no clear motive established, it was hardly necessary and it was rather cynical in this case, in our view, for the learned Judge to have suggested various motives for which the appellant might wish to put his wife away.

We need hardly point out that in law evidence of motive is not an essential ingredient in a case of murder. If there is motive, it should be proved; it strengthens the case for the Crown and becomes part of it, but the existence of possible motives does not materially strengthen a weak case.

Counsel for the appellant arguing the third ground of appeal attacked the way the learned trial Judge ruled out the possibility of suicide without giving sufficient consideration to it.

It is the duty of the Crown to eliminate the possibility of suicide; the onus is on the Crown to do this. In his consideration of the onus the law places on the Crown, the learned trial Judge mentioned the degree of proof required of a defendant/accused which was referred to in the case *R.* v. *Dumber* 1957, 3 W.L.R. 330. Whilst we agree with the direction in that case, we do not think it applies here. Dumber's case is a case on diminished responsibility within the terms of section 2 (1) of the Homicide Act by which defence an accused is not liable to be convicted of murder but of manslaughter. The point in this case is whether the prosecution has proved that the appellant committed the act with which he was charged or whether the evidence is reasonably open to the construction that the deceased took her own life.

In this case the learned trial Judge came to the conclusion, without sufficient evidence, in our view, that the deceased was too physically weak to take her own life. There was hardly any evidence upon which the learned Judge could have arrived at this conclusion. The only evidence about the deceased's health was given by the appellant who said "she would not eat and complained of weakness and pain all over the body. She had just begun to eat when this incident took place".

Throughout the case the prosecution has not eliminated the possibility of suicide. The question was never put to Dr Costello, Medical Officer, who gave evidence at the preliminary investigation and whose deposition was received as evidence at the trial under section 34 (1) of the Evidence Ordinance—whether or not the wound on the deceased could have been self-inflicted. In the absence of this all important evidence, it was difficult for the learned trial Judge, and more difficult for us in the circumstances, to eliminate the question of suicide in the case of such a depressed woman.

To place upon the appellant responsibility for the crime, there must be that standard of proof and degree of certainty which the law requires in a criminal case and conclusions based on possibilities and probabilities must be excluded—*R.* v. *Hycinath Egbe* 13 W.A.C.A. 105.

The Judge held it as telling against the appellant that there was an opportunity for him to rid himself of the weapon used in this case but omitted to observe that the same opportunity was available to a number of other persons. It is far from clear that the weapon with which the woman was killed has been found. The evidence of the Medical Officer was clear that the wound on the deceased was a clean cut wound which only a sharp instrument would make; for the unstained and not so sharp penknife found in the appellant's pocket to produce such a wound, it was said, would require some considerable force which would be attended by a great struggle. There was not a scintilla of evidence about a struggle.

It is difficult, in all the circumstances of the case, to say that the case against the appellant has been proved beyond reasonable doubt.

We think, in the circumstances, that this appeal must be allowed. The judgment of the Court below will be set aside. We direct that a verdict of acquittal be entered and that the appellant be discharged.

Appeal allowed. Conviction and sentence set aside.

ADEDIRE OGUNLEYE ... ... *Appellant*

v.

GABRIEL AREWA ... ... *Respondent*

[FEDERAL SUPREME COURT: Ademola, F.C.J., Brett, F.J., Quashie-Idun, Ag.F.J., 3rd December, 1959.]

Civil Procedure—Statement of Claim filed by plaintiff—motion for extension of time to file Statement of Defence—order granting extension not complied with—motion for final judgment by plaintiff—absence of evidence on oath to prove facts alleged in the Statements of Claim—Order 27 rule 11 of the Rules of the Supreme Court of England applied in accordance with the provision of Order 35 rule 10 of the Western Region High Court (Civil Procedure), Rule, 1958.

The respondent was plaintiff claiming against the appellant who was the defendant a declaration of title in respect of land at Ife. Statement of Claim and Defence were ordered. The respondent filed his Statement of Claim. The appellant failed to file his defence. He brought three successive motions asking for extension of time, these applications were granted on each occasion; but the Statement of Defence was not filed. The respondent then brought a motion for final judgment. The respondent was given judgment in terms of his writ without leading evidence. Against this the appellant appealed on the ground that the facts alleged in the Statement of Claim should have been proved on oath.

Held: That the learned trial judge was right in giving judgment for the respondent in terms of his writ without hearing any evidence on oath.

Appeal dismissed.

Civil Appeal from High Court, Western Region. Appeal No. F.S.C. 116/1959.

S. Agbaje-Williams, for Appellant.

D. E. Olagbaju, for Respondent.

Quashie-Idun, Ag. F.J.: On the 2nd November, 1959 we heard this appeal and dismissed it and now give our reasons for judgment.

The respondent instituted an action against the appellant at the High Court, Ibadan, claiming a declaration of title to a piece of land. On the 7th January, 1957, the Court made an order for Statement of Claim and plan to be filed by the plaintiff within ninety days, and for Statement of Defence to be filed within sixty days after service of the Statement of Claim. The plaintiff duly filed his Statement of Claim and served the defendant on the 16th April, 1957. On the 26th August, 1957 the defendant's counsel applied by Motion for an extension of time within which to file the Statement of Defence. The Court granted the application and ordered the defendant to file his Statement of Defence and plan within ninety days upon payment, as a condition precedent of £8 8*s* 0*d* costs to the plaintiff before the expiration of thirty days. The order was made in the presence of counsel for the parties. On the 20th December, 1957, the plaintiff's Solicitor filed a Motion on Notice and applied that the Court should give final judgment for the plaintiff in default of filing of defence. The Motion was supported by an affidavit alleging that the defendant had not complied with the order made on the 26th August, 1957 granting the defendant an extension of time within which to file a Statement of Defence, and that the ninety days extension had expired on the 26th November, 1957. The Motion was adjourned by the Court to the 6th January, 1958.

On that date, however, the defendant applied by Motion for a further extension of time within which to file the Statement of Defence and Plan. The plaintiff's motion asking for final judgment and the defendant's application for extension of time were dealt with by the Court on the 6th January, 1958. The following notes appear on the Record of Proceedings:—

"Olagbaju to move

Agbaje-Williams to oppose.

Motion for final judgment.

"Agbaje-Williams to move

Olagbaju to oppose.

Motion for extension of time.

Motion for final judgment is withdrawn by leave of the Court. The Motion for extension of time to file Defence and Plan is granted and an extension is granted for three months from today. Six guineas costs to plaintiff."

On the 12th May, 1958 the plaintiff's Solicitor moved the Court for final judgment on the ground that the defendant has still failed to file a Statement of Defence and Plan. On the same day the defendant's Solicitor moved the Court for a further extension of time. The Court made an order granting the defendant a further extension of forty-five days within which to file the Statement of Defence and Plan, on the condition that an amount of 100 guineas was paid into Court by the defendant as security for costs, within thirty days, from the date of the order. The Motion for final judgment filed by the plaintiff was then withdrawn by his counsel.

On the 6th October, 1958, the plaintiff's counsel applied by Motion on Notice for final judgment on the ground that the defendant had not only failed to comply with the Court order but also that he had taken no steps to have the land in dispute surveyed.

The defendant did not swear to an affidavit to oppose or challenge the allegations contained in the plaintiff's affidavit filed in support of the Motion. He however, appeared before the Court and the brief of his counsel Mr Agbaje-Williams was held by Mr Omisade. The defendant admitted in Court that he had not paid the amount of 100 guineas into Court. The Court then gave judgment for the plaintiff in terms of his writ.

Against this judgment, the defendant appealed to this Court on two grounds, namely:—

(1) "The learned trial judge erred in law in giving judgment for the plaintiff in the absence of evidence on oath by the plaintiff in proof of the facts alleged in his Statement of Claim.

(2) The learned trial judge ought to have directed his mind to the rule that the plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's."

Counsel for the appellant, however, argued on the first ground only and submitted that there was no jurisdiction in the Court to give judgment for the plaintiff on his Statement of Claim and in default of filing of Statement of Defence as the High Court (Civil Procedure) Rules W.R.L.N. 293 of 1958 give no such jurisdiction to the Court.

We agree that the Rules do not specifically make provisions similar to Order 27 Rule 11 of the Supreme Court Rules in England, which read as follows:

> "In all actions, other than those mentioned in the preceding Rules of this Order and actions against the Crown, the plaintiff may, if the defendant does not within the time allowed for that purpose deliver a defence, apply for judgment by motion or summons, and on the hearing of the application the Court Judge shall give such judgment as the plaintiff appears entitled to on the Statement of Claim"—(Rule 10 of Order 27, relates to Probate and Admiralty actions)."

Order 35, rule 10 of the Western Region High Court (Civil Procedure) Rules reads:—

> "Where no provision is made by these rules or by any other written laws, the procedure and practice in force for the time being in the High Court of Justice in England, shall so far as they can be conveniently applied, be in force in the Court, provided that no practice which is inconsistent with these rules shall be applied".

The plaintiff's Statement of Claim contained averments that the land in dispute was granted to him by the Oni of Ife, who also granted a portion of land to the defendant; that following a boundary dispute which arose between the plaintiff and the defendant the Oni of Ife sent two Chiefs to demarcate the boundary between the parties and Peregun trees were planted accordingly to mark the boundary and that after the demarcation of the boundary the defendant continued to lay claim to the plaintiff's land.

As the defendant failed to deny these allegations of the plaintiff, we think that the provisions of the Western Region High Court Rules would be rendered ineffective if Order 27 rule 11 of the Rules of the Supreme Court, England were not applied, for it would mean that even though no defence has been filed in answer to material averments by the plaintiff, the Court would still be bound to hear evidence as if no Statement of Claim has been filed. This would also reduce the Rules and Practice of pleadings to absurdity. We are of the opinion that the learned trial Judge was right in giving judgment for the plaintiff and that there is no substance in the appeal.

Appeal dimissed.

ADETUTU AGBEKE ... ... *Plaintiff/Appellant*

v.

OYARINU ANIKE ... ... *Defendant/Respondent*

[HIGH COURT OF JUSTICE: Quashie-Idun, J., 11th January, 1960.]

Claim for damages for trespass and injunction—Magistrate's jurisdiction to entertain suit, under section 18 (1) of the Magistrates' Courts Law (No. 5) of 1955—jurisdiction ousted only if there is clear evidence before Magistrate that the claim of title by defendant was genuine or bona fide.

The plaintiff/appellant brought an action for damages for trespass and injunction against the defendant/respondent. The defendant/respondent raised a preliminary objection that the claim related to title to land and therefore the Magistrate had no original jurisdiction to try the case. This objection was upheld. The plaintiff then appealed.

Held: That the objection was premature and the Magistrate should have heard evidence in order to be able to decide whether or not the defendant had a genuine or *bona fide* claim to title before declining jurisdiction.

Appeal allowed. Case remitted to Magistrate's Court for hearing.

Cases cited—

Samuel Toriola and Others v. *Gabriel Arewa*, 12 W.A.C.A. 505.

Hervie and Others v. *Nana Osam Wirisi III*, 12 W.A.C.A. 256.

Laode Matonmi v. *Bakare Ibiyemi*, 14 W.A.C.A. 390.

Abutche Kponuglo and Others v. *Adja Kododja*, 2 W.A.C.A. 24

Anthony Aburime v. *Secretary, Assembly of God Mission and another*, 14 W.A.C.A. 185.

Civil Appeal from Magistrate Court, Ibadan. Appeal No. I/3A/59.

Olu Ayoola, for plaintiff/appellant.

E. B. Craig, for defendant/respondent.

Quashie-Idun, J.: This is an appeal against the decision of Mr Gomes, Magistrate, Ibadan, delivered on the 25th September, 1958, in which he struck out the plaintiff's claim and upheld the objection of Counsel for the defendant that the claim related to title to land therefore the court had no jurisdiction to hear it.

The plaintiff's claim before the learned trial Magistrate reads as follows:

"The plaintiff claims against the defendant:

(*i*) The sum of £25 being general damages for trespass committed by the defendant on the 4th July, 1958, by unlawfully entering and disturbing plaintiff's possession of her house comprising four rooms (awarded in a previous suit (Suit 52/52 Native Court, Ibadan) to plaintiff conteminously against the defendant) situate at Ayeye Quarter, Ibadan;

(*ii*) Perpetual injunction to restrain the defendant, her agents, servants or assigns from further entry thereof."

When the case came up for hearing Mr Craig, Counsel for the defendant, raised a preliminary objection and submitted that where a claim in trespass is joined with a claim for injunction, title to land is put in issue and that therefore the Magistrate's Court would have no original jurisdiction to hear it. Counsel further stated that the house, the subject matter of the suit was the property of the defendant.

Mr Ayoola, Counsel for the plaintiff, submitted in answer to the objection raised that the objection was premature and that it should be made clear to the Court by the defendant that the claim of the defendant that the house was the property of the defendant was a genuine one. He also submitted that section 18 of the Magistrates' Courts Law, W.R. No. 5 of 1955 gave jurisdiction to the Court to grant injunctions.

In his ruling on the submissions the learned Magistrate upheld the objection of Counsel for the defendant and struck out the plaintiff's claim.

Before this Court the following grounds have been argued by Counsel for the appellant, namely: (1) that the learned trial Magistrate erred in law in holding that he had no jurisdiction to entertain the suit; (2) that the learned trial Magistrate erred in law in holding that the suit related to title at that stage of the proceedings when no evidence had been led before him and no issue joined; and (3) the learned Magistrate erred in law in declining jurisdiction.

The three grounds were argued together. Mr Ayoola's first submission is that a claim for trespass to land is a personal action and that jurisdiction is conferred on Magistrate to hear such suits by section 18 of the Magistrates' Courts Law, W.R. No. 5 of 1955.

Section 18 (1) of No. 5 of 1955 reads as follows:

"Subject to the provisions of this or any other Law or Ordinance a Chief Magistrate shall have and exercise jurisdiction in civil causes—"

"(*a*) In all personal suits, whether arising from contract, or from tort, or from both whether the debt or damage claimed, whether as balance claimed or otherwise, is not more than five hundred pounds;

"(*b*) To grant in any suit instituted in the Court injunctions or orders to stay waste, etc."

"Provided that except in so far as the Governor may by Order in Council otherwise direct and except in suits transferred or ordered to be reheard under paragraphs (*f*) and (*g*) respectively, a Magistrate's Court shall not exercise original jurisdiction in suits which raise any issue as to the title to land or as to the title to any interest in land, or in which the validity of any devise, bequest or limitation under any will or settlement is or may be disputed or in any matter which is subject to the jurisdiction of a native court relating to marriage, family status, guardianship of children, inheritance or disposition of property on death."

By section 18 sub-section (2) of No. 5 of 1955 jurisdiction is given to Senior Magistrates and Magistrates to hear all cases in which a Chief Magistrate can exercise jurisdiction but the jurisdiction of the Senior Magistrate and Magistrate is limited to £200 and £100 respectively.

Mr Ayoola has referred to a number of authorities in support of his contentions (*a*) that the Magistrate's Court had jurisdiction to entertain the plaintiff's case and (*b*, that in order to deprive the Magistrate of his jurisdiction to hear the case, the defendant should show a *bona fide* title to the property the subject matter of the suit.

In the case of *Samuel Toriola and others* v. *Gabriel Arewa*, 12 W.A.C.A. page 505, the Court of Appeal held that a Magistrate's Court had jurisdiction in a case where the action is personal and founded in contract or in tort for damages for trespass.

In the case of *Hervie and others* v. *Nana Osam Wirisi III*, 12 W.A.C.A. page 256, the Court of Appeal held that in order to decide that a Court had no jurisdiction to hear a case, it should be possible for the Court to determine that question finally in the proceedings. In the case of *Anthony Aburime* v. *The Secretary, Assemblies of God Mission and others*, 14 W.A.C.A. page 185, the plaintiff sued in trespass; the 1st defendant alleged entry under a lease and the second defendant stated that he would contend that the issue was as to title to land. The trial Court raised the question of ouster of jurisdiction which was opposed by the plaintiff. The Court took no evidence but concluded that its jurisdiction was ousted, having assumed that there was a Native Court with jurisdiction to hear the case. On appeal, the Court of Appeal held that there was no admission that title to land was raised by the suit for damages for trespass which is a suit based on possession and does not necessarily involve any issue as to title to land or any interest in land and there was no evidence of that fact; further there was no admission that there was a Native Court having jurisdiction to hear the case and therefore the Court erred in concluding that the jurisdiction of the Supreme Court was ousted.

In the case of *Laode Matonmi* v. *Bakare Ibiyemi and others*, 14 W.A.C.A. page 390, the plaintiff sued in the Magistrate's Court claiming damages for trespass and averred that the first and second defendants who trespassed on the land had sued him in the Native Court claiming title to the land and had failed. The defendants denied the claim and alleged that the earlier suit was not relevant. The Magistrate refused to transfer the case and held on the evidence that the subject of the trespass was the same land as in the earlier suit, and gave judgment for the plaintiff. The Supreme Court, on appeal, set aside the judgment of the Magistrate on the ground that the Magistrate had no jurisdiction as there was a *bona fide* dispute about the land. On appeal to W.A.C.A. that Court held, allowing the appeal, that the test was whether the defendant raised a genuine issue of title and that the effect of the judgment in the earlier suit was that the defendants were estopped from re-litigating the title to the land and that as the plaintiff was in possession, the defendants could not have raised a genuine issue of title.

The contention of Mr Craig is that as the plaintiff claimed an injunction in addition to the claim for trespass, she has put her title to the property in issue, and that the jurisdiction of the Magistrate's Court was ousted. I do not agree that the mere fact of adding a claim for injunction to that of damages for trespass is sufficient to oust jurisdiction from the Magistrate's Court.

In the case of *Adja Kododja*, 2 W.A.C.A. page 24 to which Mr Craig has referred, it is clear that the issue between the parties was substantially one relating to a claim for a declaration of title to land; and I am unable to hold that on the present claim before the Magistrate's Court the plaintiff was not entitled to ask the Court to order an injunction against the defendant especially as she alleged in her writ of summons that she had previously obtained judgment against the defendant in respect of the property. As it was held in the case of *Matonmi* v. *Ibiyemi* (*supra*) the question to be decided in case of this kind where the Court's jurisdiction is raised is whether or not the person who raises the objection has shown a genuine or *bona fide* claim to the land the subject matter of the suit.

It is my considered opinion that the learned trial Magistrate was wrong in not giving himself the opportunity of ascertaining whether or not the defendant could put up a genuine claim to the property before coming to the conclusion that he had no jurisdiction to hear the case.

I therefore allow the appeal and remit the case to the Magistrate's Court for hearing. The defendant will be at liberty to raise a genuine issue as to title to enable the Court to decide whether it has jurisdiction to hear the case or not.

Appeal allowed. Case remitted to Magistrate's Court for hearing.

BINUTU FESTUS ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Duffus, J., 25th January, 1960.]

Criminal Law and Procedure—malicious damage to property, contra *section 451 of the Criminal Code, Cap. 42—tenant on premises let out by rooms occupying room other than that specifically let to him without the authority of the landlord or his agent —whether tenant a trespasser—use of excessive force in ejecting a trespasser.*

The appellant who was the agent and rent collector for the landlord, in respect of a house was convicted of malicious damage to property. The Magistrate found that the appellant had packed and thrown out of a room, the complainant's property, because the latter had occupied the room other than that which was let out to him against the express instructions of the appellant and without the authority and consent of the landlord.

Held: (*i*) That in these circumstances it appears clear on the evidence that the complainant had no right to occupy the room to which he had removed and that his entry and occupation of this room was that of a trespasser.

(*ii*) That the appellant had the right to eject the complainant from the room.

(*iii*) That the appellant would be guilty if it is proved that he acted maliciously and beyond what was reasonably necessary in exercise of his claim or right but this was not proved.

Appeal allowed. Conviction quashed.

Criminal Appeal from Ikeja Magistrate Court. Appeal No. HK/14CA/59.

Onalaja, for Appellant.

Osakwe, Crown Counsel, for Respondent.

Duffus, J: The appellant in this case was convicted by the Magistrate, Ikeja on a charge of malicious damage to property under section 451 of the Criminal Code.

The short facts are that the appellant was the rent collector and agent to the Landlord for premises which had been let out by rooms to various tenants. The complainant rented one room which needed repairing, and without any authority and indeed, on the findings of the Magistrate, against the express instructions of the appellant, the Landlord's agent, went and occupied another room which had become vacant. The appellant then threw the complainant's articles out of this room. The appellant in his defence claimed that the complainant was a trespasser in his occupation of this room, and he was justified in acting as he did.

The learned Magistrate in finding the appellant guilty found that the complainant was not a trespasser and the appellant, who was only a rent collector, had no authority, in any event, to act as he did.

The first ground of appeal argued was that the Magistrate was wrong in finding that the complainant was not a trespasser. In his judgment, the learned Magistrate said *inter alia*:

"If a tenant should pack into a different room other than the one allocated to him, without the consent of his landlord, I am of the view that he does not thereby become a trespasser."

As a general rule I cannot agree with this proposition. It would depend on the actual agreement in each case. In this case the evidence of the complainant himself shows that he rented a specific room from the appellant and his claim to be allowed to occupy the other room, room 6, is based on the fact that the appellant consented to his occupying room 6. The appellant denied giving his consent, and the learned Magistrate in his judgment finds that the complainant had occupied room 6, not only without his consent but against his specific instructions. In these circumstances it appears clear on the evidence that the complainant had no right to occupy room 6, and that his entry and occupation of this room was that of a trespasser.

The second ground of appeal argued was against the Magistrate's finding that the appellant as a mere rent collector had no right to occupy the room and treat the complainant as a trespasser. In my view the evidence established that the appellant was not only the rent collector but was in fact, the landlords' agent, who apparently had full authority to rent out, repair, and also to bring actions for arrears of rent, and generally to control the use and occupation of these premises. I am therefore of the opinion that the learned Magistrate misdirected himself when he found that the appellant "cannot therefore be heard to say that he treated prosecution witness 1 as a trespasser".

Learned Crown Counsel for the respondent submitted that even if the appellant was justified in ejecting the complainant as a trespasser, then he had used excessive force and as such would still be liable for this offence of malicious damage. I agree that this submission is correct and an offender will still be liable for malicious damage, if he acted maliciously and beyond what was reasonably necessary in exercise of his claim of right.

In this case, however, the learned Magistrate misdirected himself as to the law applicable on the important issues as to whether the complainant was a trespasser, and as to whether the appellant had authority to act against him as such, and I am unable to say that he would inevitably have come to the same conclusion if he had correctly directed himself on these issues.

The appeal is allowed, and the conviction and sentence quashed, and verdict of acquittal will be entered.

The appellant is discharged and acquitted, and will be refunded the amount of his fine if this has been paid.

Appeal allowed. Conviction quashed.

AINA EDU
(As Head of the Alashe Chieftaincy Family) ... ... *Plaintiff*

v.

FLORA COLE ... ... *Defendant*

[HIGH COURT OF JUSTICE: Duffus, J., 29th February, 1960.]

Declaration of title to land—defence denied plaintiff's claim—plaintiff's evidence disclosed land already sold—offer and conveyance executed by plaintiff—no evidence of plaintiff's present title and interest in the land—defendant gave no evidence—non-suit or dismissal,—order 28 rule 3 of the High Court (Civil Procedure) Rules, 1958, considered.

The plaintiff sued as head of a Chieftaincy Family for declaration of title to land. The plaintiff gave evidence and under cross examination admitted that her family had sold the land in dispute and had executed a conveyance in respect of same. The plaintiff did not give evidence of what her present title in the land was and what title she claimed. The defendant did not give evidence but relied on the submission that the plaintiff had not proved her case.

Held: That the plaintiff had had the opportunity to state exactly what title, if any, the family now has in the land and if necessary they could have applied to amend the claim. This however has not been done.

Claim dismissed.

Cases cited:

Kodilinye v. *Odu*, 2 W.A.C.A. 336.

Dawodu v. *Gomez*, 12 W.A.C.A. 151.

Nwakuche v. *Azubuike*, 15 W.A.C.A. 46.

Ikeja Suit No. HK/104/59.

V. O. Munis, (*Osinupebi* with him), for Plaintiff.

David and Moore, for Defendant.

Duffus, J.: This action was filed in Lagos in April 1948, and became suit No. 115/1948.

In November 1959, the suit was sent to this Region by order of the Federal Supreme Court, and then to this Judicial Division for trial. The land in dispute is in this Judicial Division.

The action then becomes Suit No. HK/104/59.

The plaintiff seeks a declaration of title to a parcel of land in the Oshodi District. The plaintiff sued as Head of the Alashe Chieftaincy Family. In their Statement of Claim the plaintiff claims that the land in dispute was granted by the then Chief Alashe to one Folabi about seventy years ago and that the land has now reverted to the plaintiff's family. The plaintiff claims that the defendant wrongly conveyed all the land to herself and has been interferring with the plaintiff on the land.

Paragraph 15 of the Statement of Claim reads—

"The plaintiff pleads that according to Native Law and Custom, the land has reverted to the plaintiff's family, and has been forfeited to the plaintiff's family by reason of the purported alienation."

In her defence, the Defendant admitted that the land was originally settled on by the plaintiff's ancestor. The defendant claims the land by a devise under the Will of Momodu Gbotire whom she states acquired the land by purchase. The defendant den ed the plaintiff's claim to ownership of the land, and put the plaintiff to prove their claim.

The whole of this trial depends now on the plaintiff's answer to the first question put to her under cross examination. The plaintiff said—

"I have sold the land in dispute and executed a Deed of Conveyance."

Mr Munis, learned Counsel, for the plaintiff objected to this question. The defendant did not plead in his defence that the present plaintiff had sold the land. I however, allow the question and answer as in my view these were matters clearly relevant.

This is a claim by the plaintiff for a Declaration of Title, the defendant has not admitted the plaintiff's title but has put her to strict proof of it. The onus is on the plaintiff to prove her title and right to a Declaration.

The plaintiff must prove her title as at the time of the trial, and the plaintiff should state accurately what is her present title to the disputed land.

If the plaintiff had, as she states, sold the land, when this is a matter that the plaintiff herself should have disclosed to the Court and stated her present title and interest to the land. She is asking the Court to declare her title, and in my opinion if the plaintiff fails to be truthful and honest in her evidence, the defendant is entitled to ask questions which would both go to her credit and to show what is in fact her title to the land.

That was not part of the defendant's case, and no part of their claim to title. I agree that this should have been pleaded if the defendant intended to call any evidence or to rely on this as a defence but the fact that this was not pleaded would not in my view prevent any question in cross-examination intended to test the plaintiff's title. The defendant did not admit the plaintiff's claim, and the plaintiff has to prove her right to title to the satisfaction of the Court. I therefore ruled that the question and answer were admissible.

The plaintiff was not asked to explain her answer in re-examination.

The case was adjourned on the application of plaintiff's Counsel before the plaintiff's case was closed, but on the resumption no evidence was called to explain or to refute the plaintiff's statement.

The defendant called no witnesses, but rested her case on the submission of Counsel that the plaintiff had not proved her case, as on her own evidence she now had no title to the land.

I agree with these submissions. I am now being asked by plaintiff to declare that her family were entitled to the land as owners according to Native Law and Custom, and the evidence before me is that the plaintiff had sold the land in dispute and executed a Deed of Conveyance. On the plaintiff's own case therefore it appears that the family now has no interest in the land in dispute and if they do have an interest then this Court has no evidence as to what this interest is. The onus is on the plaintiff to prove her right to the Declaration of Title and to this the plaintiff must prove what her title is. This the plaintiff has failed to do. I have considered whether the plaintiff should be non-suited under the provisions of Order 28 rule 3 of the High Court (Civil Procedure) Rules, 1958 (Western Region).

This matter has been considered in the case of *Kodilinye* v. *Odu*, 2 W.A.C.A. 336 and *Dawodu* v. *Gomez*, 12 W.A.C.A. 151, and more recently in *Nwakuche* v. *Azubuike*, 15 W.A.C.A. 46.

In this case, the plaintiff has had the opportunity to state exactly what title, if any, the family now has in the land and if necessary they could have applied to amend the claim. This however has not been done. I am of the view that the proper course is to dismiss her claim.

The claim is dismissed.

Claim dismissed.

BABALOLA KURE ... ... *Petitioner*

v.

SPEAKER, WESTERN HOUSE OF ASSEMBLY ... *Respondent*

[HIGH COURT OF JUSTICE: Irwin, Ag.C.J., 1st April, 1960.]

Constitution—Nigeria (Constitution) Orders in Council, 1954-1959 section 47—question relating to vacancy of the seat of an elected member, regulation 117 (1) Parliamentary and Local Government Electoral Regulations, (W.R.) 1955—reference to High Court—section 15 (2) of the Nigeria (Legislative Council) Order in Council, 1946, Volume XI Laws of Nigeria, 1948 and section 40 of the Trinidad and Tobago (Constitution) Order in Council, 1950 compared.

The Speaker of the Western House of Assembly received a letter from a member, Adeoye Adisa, signed by him resigning his seat from the House. The member alleged that it was sent without his authority. This letter was acknowledged. The member sent another letter to the Speaker saying that he did not resign. The petitioner who was a registered elector in Mr Adisa's constituency brought this petition to determine whether or not the seat of the member had become vacant.

Held: That any question as to whether the seat of any elected member of the House of Assembly has become vacant or not must be referred to the High Court by the House itself and that the proceedings by the petitioner could not be maintained.

Petition struck out.

Case cited:

Patterson v. *Solomon* (1960) 2 All E.R. 20.

Ibadan Suit No. I/211/1959.

R. O. Akinjide, for Petitioner.

F. R. A. Williams, Q.C., (*Eboh, Senior Crown Counsel* with him, for the Respondent).

Irwin, Ag.C.J.: These proceedings were instituted on the 10th December, 1959, by the filing of a petition by Babalola Kure, a registered elector for the constituency of Ibadan South. On the 26th June, 1958, Mr Adeoye Adisa whom the petitioner called as a witness, was elected to represent that constituency in the Western House of Assembly.

Section 47 of the Nigeria (Constitution) Order in Council, 1954, provides that:

"The seat in the House of Assembly of a Region or of the Southern Cameroons of any elected member of that House shall become vacant—

(*b*) if he resigns his seat in the House of Assembly by writing under his hand addressed to the Speaker of the House;"

On the 13th November, 1959, a letter in these terms, which Mr Adisa admits was signed by him, was received by the Speaker:

"Ibadan
13–11–59.

"The Speaker,
Western House of Assembly,
Ibadan.

Dear Sir,

"I beg most humbly and respectfully to resign my seat as a member of the House of Assembly, Western Region.

Date 13–11–59.

Yours faithfully,
(Sgd.) E. Ade. Adisa."

The Speaker on the same day wrote acknowledging the receipt of the letter and accepting his resignation with regret. Mr Adisa then replied that he had never sent any letter of resignation to the Speaker and that he considered himself still a member of the House of Assembly; no further communication from the Speaker was received by him. The House was not in session on the 13th November. The next session commenced in the month of January 1960.

No question in relation to the seat of the member for Ibadan South appears to have arisen in the House nor has the date of the holding of a by-election been fixed.

The Court is now invited to decide that the seat has not become vacant on the ground that the letter of resignation was dated and despatched without the authority of Mr Adisa and that it is consequently contrary to public policy that it should be accepted as valid.

It is provided by regulation 117 (1) of the Parliamentary and Local Government Electoral Regulations, 1955, that:

"Any question as to whether the seat of any elected member of the House of Assembly has become vacant shall be referred to and decided by the High Court in accordance with the procedure prescribed in this Part for the trial of an election petition, and the decision of the High Court, shall be final".

This regulation, in my view, contemplates a reference by the House to the High Court. It was also provided formerly by section 15 (2) of the Nigeria (Legislative Council) Order in Council, 1946, which is included in the Laws of Nigeria, 1948, Volume XI, that—

"All questions which may arise as to the right of any person to be or remain an elected member shall be referred to and decided by the Supreme Court in accordance with the provisions of any law for the time being in force in Nigeria".

The meaning of similar words in section 40 of the Trinidad and Tobago (Constitution) Order in Council, 1950, was considered by the Judicial Committee of the Privy Council in the case of *Patterson* v. *Solomon* (1960) 2 A.E.R. 20. The material clause in that section was as follows:

"(*i*) All questions which may arise as to the right of any person.....

(*ii*) to be or remain an elected member of the Legislative Council, shall be referred to the Supreme Court of the Colony in accordance with the provisions of any law in force in the Colony."

It was there held that a reference to the Supreme Court by the Legislative Council was contemplated by the section and that the question of the right to remain an elected member could only be entertained by the Court on such a reference made to it by the Legislative Council itself since it was only upon a proper reference that the Court became vested with jurisdiction to decide the question.

No question has in this case been referred under regulation 117 (1) of the Parliamentary and Local Government Electoral Regulations, 1955, by the House of Assembly to the High Court. This being so, I am of the opinion that these proceedings cannot be maintained by the petitioner. The petition is accordingly struck out.

Petition struck out.

THE QUEEN ... ... *Plaintiff*

v.

ONDO DIVISIONAL COUNCIL ... ... *Defendant/Respondent*

Ex Parte JOSEPH AKINBOTE ... ... *Applicant/Appellant*

[FEDERAL SUPREME COURT: (Ademola, F.C.J., Brett, F.J., Hubbard, Ag.F.J.) 4th April, 1960.]

Writ of certiorari—regulation 16 (7) of Part E, Western Region (Local Government) Staff Regulations—common desire of council expressed by resolution—whether ultra vires*—resolution of Council an administrative not judicial act—rights of subjects—aggrieved party.*

The appellant/applicant was engaged along with seven others as a Forest Guard on probation for three years. His appointment was terminated as a result of a resolution passed by the Council reinstating eight Forest Guards who had been previously dismissed and whose posts he and the seven others were engaged to fill.

He applied for a *writ of certiorari* to quash the resolution of the Council on the ground that the Council acted illegally. The application was refused. Against the order of refusal he appealed.

Held: (*i*) That the resolution of the Council was an administrative and not a judicial act.

(*ii*) That the applicant was not an aggrieved party, because he accepted an appointment which could be terminated at any time. It was terminated and he was given one month's salary in lieu of notice.

(*iii*) That if the Council acted illegally as alleged the action on illegality cannot be challenged by *certiorari*.

Appeal dismissed.

[FOOT NOTE.—High Court decision on this matter was reported in Part I 1959 W.R.N.L.R., p. 52.]

Case cited:

ex parte Stott (1916) 1 K.B.D. 7.

Civil Appeal, High Court, Western Region, Appeal. No. F.S.C. 187/1959.

A. G. O. Agbaje, for Appellant.

A. Soetan, for Respondent.

Hubbard, Ag.F.J.: This is an appeal against a judgment of the High Court of the Western Region, sitting at Akure, discharging an order *nisi* for a writ of *certiorari* to issue to the Ondo Divisional Council.

The applicant, by letter of appointment dated 29th March, 1958, had been appointed a Forest Guard by the Ondo Divisional Council, to whom I shall hereafter refer as the Council. The third paragraph of this letter reads as follows:

"For the first three years of your appointment, you will be on probation. The Council reserves the right to terminate your appointment at any time within this period without giving any reasons".

It is common ground that vacancies had occurred because eight Forest Guards had been dismissed. On 18th August, 1958, the Establishment and General Purposes Committee of the Council, to whom the Council had delegated its powers in that behalf, informed the applicant that his services under the Council would be dispensed with as from 20th August, 1958, and that he would be paid a month's salary in lieu of notice. The letter, addressed to the applicant and seven other guards contained the sentence—

> "This decision was taken as a result of the reinstatement of the Forest Guards whose places you are now occupying in the Council's Establishment."

The eight dismissed Forest Guards had been reinstated following upon a resolution of the Council, dated 25th July, 1958, adopting a recommendation from the Forestry Agricultural and Veterinary Committee of the Council to that effect.

It is this resolution of the Council which the applicant sought to have removed into the High Court and quashed, on the grounds (1) that it was *ultra vires*, since the approval of the Minister of Local Government to the reinstatement had not been obtained, as required by regulation 16 (7) of Part E of the Western Region (Local Government) Staff Regulations, and (2) that one of the dismissed Forest Guards, Councillor S. A. Akinmomi, took part in the vote on the resolution.

The learned Judge dealt very carefully and in detail with the issues before him, and considered a number of authorities on the law of *certiorari*. He came to the conclusion that the first ground of complaint was without substance, since the Council's resolution was merely a necessary step in formulating the common desire of the Council, before taking the next step and applying for the Minister's approval. Regulation 16 (7) does not forbid such a resolution, it merely forbids action being taken on it without the approval of the Minister. As regards the second ground, he came to the conclusion that, since Mr Akinmomi took no part in the deliberations either of the Forestry Agricultural and Veterinary Committee or of the Council, and merely voted on the resolution in the Council as one of a majority of fifty-nine, the fact that he voted was immaterial. He accordingly discharged the order.

I am of opinion that the learned Judge rightly discharged the order, but, with respect, I think he did so for the wrong reasons. In my view, the application for the writ was misconceived. The learned Judge found both that the Council was under a duty to act judicially in re-engaging the dismissed Guards and that the applicant was an aggrieved party. Both of these findings are, in my view, erroneous.

In the first place, it should be noted that the applicant did not allege that the Council failed to act judicially: he alleged that it acted illegally, in contravention of a regulation, which is quite another matter, and one which cannot on the mere ground of its illegality, be challenged by *certiorari*. Secondly, the resolution of the Council was, in my view, clearly an administrative, not a judicial, act. The Council, in re-engaging the Guards, was not determining questions affecting the rights of subjects, there was no "*lis*" before it. The expression "rights of subjects" refers to rights as to which there is a dispute which must be decided in a judicial manner, but never to the mere creation of contractual rights. All the Council was doing was exercising its power to engage employees, and this cannot, in my view, be regarded as a judicial function in which the conflicting interests of parties have to be considered and a decision made upon their rights.

As regards the proposition that the applicant was an aggrieved party, this appears to me without foundation. The applicant accepted an appointment which, by its terms, could be terminated at any time. It was terminated and he was given a month's salary in lieu of notice. He clearly had no legal grievance whatsoever. Indeed, Mr Agbaje, for the applicant, admitted that he could not contend that the applicant was wrongfully dismissed. His argument, however, was that if the other Guards had not been re-engaged, the applicant might have kept his post. This, however, does not make the applicant an aggrieved party in the legal sense. The case of *ex parte Stott* (1916) I K.B.D. 7, although not on all fours, is analogous, and illustrates the legal position. In that case the proprietor of a cinema held a licence to which was attached the condition that he was not to exhibit any film to which the licensing authority objected. A firm which had acquired the sole right of exhibition of a certain film in the district, entered into an agreement with the licensee for its exhibition. The licensing authority having given notice that they objected to the film, the firm applied for a writ of *certiorari* to bring up the notice to be quashed on the ground that the condition attached to the licence was unreasonable and void. It was held that, whether the condition was unreasonable or not, the applicants were not persons who were aggrieved by the notice and were not entitled to apply for *certiorari*.

For the reasons which I have given I would dismiss this appeal.

Appeal dismissed.

ALFRED OMODION ... ... *Plaintiff/Applicant*

v.

ABAKE OMOYEMI FASORO ... ... *Defendant/Respondent*

OLANIRAN BABA IBEJI ... ... *Co-respondent*

[HIGH COURT OF JUSTICE: Duffus, J., 4th April, 1960.]

Writ of Habeas Corpus—original jurisdiction of the High Court, under section 12, Western Region High Court Law, 1955—customary marriage between parties—status of the parties—guardianship of a child of such marriage—section 7 of the Infant Law, 1958, Part III, not applicable.

The applicant and respondent were married under Native Law and Custom. The respondent had a child, whose paternity was in doubt. The applicant wanted custody of the child and he applied for a writ of Habeas Corpus.

Held: (*i*) That the matter concerned marriage and guardianship of a child subject to the jurisdiction of a customary Court and therefore the High Court had no original jurisdiction to entertain the application.

(*ii*) That by section 7 of the Infants Law, 1958, Part III of that law which relates to the guardianship and custody of children did not apply to children who were subject to the Customary Law relating to the guardianship of children.

Application for the writ refused.

Ikeja Suit No. HK/14/59.

Onalaja, for Applicant.

Respondents in person.

Duffus, J.: This is an application for an order for the issue of a Writ of Habeas Corpus. The motion was at first *ex-parte* but I ordered both the respondents to be placed on notice.

This is an application in respect of an Infant child. The affidavit in support of the motion shows that there does appear to be considerable doubt as to the paternity of this child. The petitioner and 1st respondent were married according to Native Law and Custom and both respondents now appear to live together as man and wife with the child in a village in this area.

The main issue first to be determined is as to the custody of the child. The proviso to section 12 of the Western Region High Court Law No. 3 of 1955, states that this Court shall not exercise original jurisdiction in any matter which is subject to the jurisdiction of a Native Court relating to marriage, family status, or guardianship of children. This matter relates to the marriage between the parties, and also as to the present status of the parties concerned and of the child, and also as to the guardianship of the child, and would appear to be a matter within the jurisdiction of the Customary Court in the area. This being so, it would be better that the question as to the custody of the child should first be determined by the Customary Court having jurisdiction and not by this Court on these proceedings.

By section 7 of the Infants Law, 1958 (Western Region Law) Part III of that Law which relates to the guardianship and custody of children does not apply to children who are subject, as appears to be the case here, to the Customary Law relating to the guardianship of children.

This application is therefore refused.

Application for the writ refused.

OLOMU OF OKWODIETE ... ... } *Plaintiff/*
(For himself and on behalf of the Okwodiete people } *Appellant*

v.

IVBIGHRE OF UGHWAGBA ... ... } *Defendant/*
(For himself and on behalf of the Ughwagba people) } *Respondent*

[FEDERAL SUPREME COURT: Abbott, Brett, F.JJ., Hubbard, Ag.F.J., 4th April, 1960.]

Claim for declaration of title—plea of res judicata*—effect of order for rehearing under section 40 (1) (b) of the Native Courts Ordinance, Cap. 142.*

The appellant had instituted a criminal action against the respondent for trespass to the land in question. In those proceedings the respondent was convicted and cautioned. He appealed to the Odogun Clan Court of Appeal. This Court proceeded to quash the decision of the Court of first instance and without being asked to do so by either party, ruled that the appellant and the respondent should use the land together because the land had originally belonged to a common ancestor. The respondent began a civil claim in 1943 and the appellant did not put forward as a defence the decision of the Odogun Clan Court of Appeal. In an action for declaration of title brought by the appellant, the respondent raised a plea of *res judicata* which the trial Court upheld. On appeal—

Held: That the fact that both parties are dissatisfied with a judgment was not, of itself, a ground for holding that it is not binding on them but the decision in the criminal action was one of a kind for which neither party had asked and the jurisdiction of the Native Court to make it must be regarded as open to doubt. In the circumstances, it was not possible to say that it could be regarded as binding on the parties in this case so as to entitle the respondent to succeed in a plea of *res judicata.*

Plea of res judicata failed.

Case remitted to High Court, Warri for rehearing on its merits.

Civil Appeal, High Court, Western Region: Appeal No. F.S.C.133/1958.

Cases cited:

Apena v. *Shonusi*, 9 W.A.C.A. 95.

Lateju v. *Iyanda*, F.S.C. No. 156/1959.

Akpan Udo Etuk v. *Akpan Umana and others.*, F.S.C. 124/1959.

H. A. Lardner, for Appellant.

Chike Idigbe, for Respondent.

Abbott, F.J.: This is an appeal from the decision of Onyeama, Ag.J. (as he then was) given at the High Court, Warri, on the 1st December, 1956, when it was held, on a plea of *res judicata* advanced by the respondent, that there was a valid subsisting judgment of a Court of competent jurisdiction in the matter at issue before the Warri High Court, and between the same parties, and that therefore the plea of *res judicata* must succeed.

The land in dispute has had a somewhat chequered history in litigation before various Courts. The earliest proceeding which was put in evidence was a criminal case No. 35 of 1941, instituted by the appellant in Oha Village Group Court, (*see* Exhibit "B") and this was a prosecution of the respondent for trespassing into the land in dispute.

In those proceedings the respondent was convicted and cautioned, and then he appealed to the Odogun Clan Court of Appeal. This Court proceeded to quash the decision of the Court of first instance and, without being asked to do so by either party, ruled that the appellant and the respondent should use the land together because the land had originally belonged to a common ancestor. This judgment was appealed to the District Officer, but upheld.

Some two years later the respondent began an action against the present appellant for Declaration of Title to the land in dispute (*see* Exhibit "G"), and the Court of first instance decided in favour of the appellant. The respondent then appealed and the Odogun Clan Court of Appeal said "No other choice is open to the Court than to divide the land in both sides, as we have done". Having so pronounced, the judgment of the Court of first instance was set aside. The quotation refers obviously, to the previous judgment of the Odogun Clan Court of Appeal in the 1941 criminal proceedings.

The appellant then appealed to the Magistrate's Court where, after various vicissitudes, on the 30th June, 1953, the Magistrate's Court allowed the appeal and dismissed the respondent's claim. The respondent appealed to the then Supreme Court, which reversed the judgment of the Magistrate's Court and remitted the case back to that Court for rehearing and determination. At the rehearing before the Magistrate, Counsel on both sides agreed to withdraw the case with a view to settlement, and the appeal was struck out.

The learned trial Judge, in dealing with this latter part of the course of the proceedings, says this—

> "I therefore hold that when, on the 16th August, 1955, the Magistrate struck out the case, he struck out the appeal before him, leaving the judgment of the Odogun Clan Court of Appeal as the subsisting judgment."

I find that I cannot agree with the learned Judge's view which I have just quoted. The case of *Apena* v. *Shonusi* 9 W.A.C.A. 95 decided, in effect, that once a re-hearing is ordered under paragraph (*b*) of s. 40 (1) of the *Native Courts Ordinance* all the previous judgments in that suit are set aside. The decision in this case was explained and reaffirmed in *Lateju* v. *Iyanda* F.S.C./156/1959 and also in *Akpan Udo Etuk* v. *Akpan Umana and others* F.S.C./124/1959, judgment in which was delivered on the 3rd March, 1960 at Enugu.

That being my view, we now have to go back to Exhibit "C", which is the proceedings and judgment of the Odogun Clan Court of Appeal in the criminal proceeding of 1941, where, as I have mentioned, the Court decided that the appellant and respondent must use the land together because the land belonged to their common ancestor.

The present respondent, giving evidence in his civil action, Exhibit "G", stated that after the judgment of the Odogun Clan Court of Appeal in Exhibit "C" had been upheld by the District Officer, Warri, he appealed to the Resident, Warri, because he was not satisfied with the decision of the Odogun Clan Court of Appeal that both parties should use the land together. He went on to say that all the proceedings of the Odogun Clan Court and before the District Officer, were annulled by the Resident. The truth—or otherwise—of this statement was never investigated at the Court below, as it should have been, and had it not been for other matters with which I am about to deal, I should have thought it necessary to send the case back to the High Court for this particular matter to be properly investigated and decided.

But the action of the respondent in beginning a civil claim in 1943 and the corresponding action of the appellant in those proceedings in never putting forward as a defence the decision of the Odogun Clan Court of Appeal in Exhibit "C", shows in my view, that neither of these parties regarded that last mentioned decision as binding. The fact that both parties are dissatisfied with a judgment is not, of itself, a ground for holding that it is not binding on them but this decision was one of a knid for which neither party had asked and the jurisdiction of the Native Court to make it must be regarded as open to doubt. In the circumstances I do not feel it possible to say that it can be regarded as binding on the parties in this case so as to entitle the respondent to succeed in a plea of *res judicata*.

That disposes of the only two decisions which could possibly have operated as *res judicata* and therefore I would allow this appeal and remit the case to the High Court, Warri, for hearing on the merits.

Plea of res judicata failed. Case remitted to High Court, Warri, for rehearing on its merits.

SUNDAY ALBERT ... ... *Appellant*

v.

THE QUEEN ... ... *Respondent*

[FEDERAL SUPREME COURT: (Myles John Abbott, Lionel Brett, F.JJ., Percival Cyril Hubbard, Ag.F.J.), 14th April, 1960.]

Criminal Law and Procedure—Charge of attempted murder—contra *section 320 of the Criminal Code—application for leave to appeal—an actual intent to kill must be proved—miscarriage of justice.*

The facts are fully stated in the judgment.

Held: (*i*) That in case of attempted murder an actual intent to kill must be proved, although if death results an intent to cause grievous harm will be sufficient to sustain a charge of murder.

(*ii*) That the facts which the judge found proved were consistent with an intent to kill, therefore there was no miscarriage of justice.

Application refused.

Criminal Appeal, High Court, Western Region Appeal No. 11/1960.

Case cited:

R. v. *Whybrow* 35 Cr.App.R. 141.

Appellant absent and not represented.

E. A. Ademola, Senior Crown Counsel for Respondent.

Brett, F.J.: This was an application by Sunday Albert for leave to appeal against his conviction on a charge of attempted murder, contrary to section 320 of the Criminal Code. The evidence amply supported the charge, but the learned Judge, without expressly finding that there was no intent to kill, found that the appellant inflicted a serious wound, with intent to cause grievous harm. The Criminal Code lays down exactly the same rule in this matter as the law of England, namely, that a on charge of attempted murder an actual intent to kill must be proved, although if death results an intent to cause grievous harm will be sufficient to sustain a charge of murder: *R.* v. *Whybrow* 35 Cr.App.R. 141. There was thus a clear misdirection in law.

We were satisfied, however, after careful consideration, that the facts which the Judge found proved were consistent only with an intent to kill, and that if the Judge had directed himself correctly he must have found that intent proved. We therefore held that no miscarriage of justice had occurred, and we refused leave to appeal.

Application refused.

THE QUEEN
v.
ANOFI SEIDU

[HIGH COURT OF JUSTICE: Charles, J., 17th April, 1959.]

Criminal Law and Procedure—defilement of a girl under the age of eleven years, section 218 of the Criminal Code, Cap. 42—corroboration required in rape—no clear evidence of penetration—indecent treatment of a girl under thirteen, section 222 of the Code—Indecent assault of females, section 360 of the Code—charge with rape conviction of indecent assault, section 175 of the Criminal Procedure Ordinance, Cap. 43—where offence proved is included in offence charged, section 179 of the Procedure Ordinance, Cap. 43.

The accused was charged with the offence of defilement of a girl under the age of eleven years. The girl was found sitting on the lap of the accused who was wiping her thigh with a cloth. The accused identified the cloth as his and it was found to contain human semen. On the examination of the girl's private parts human semen was found but no blood. The doctor could not say that the rupture of the hymen, as well as the condition of the outer parts of the girl's vagina was recent.

Held: (*i*) That what the accused did was to obtain some form of sexual gratification without penetration and he was therefore not guilty of rape or attempted rape.

(*ii*) That the accused cannot be convicted of the offence of indecent treatment on a charge of rape but could be convicted of indecent assault on a female.

Convicted of indecent assault on a female.

Case referred to:

R v. *Anokwu and others* (1952) 20 N.L.R. 103.

Ikeja Criminal Case No. HK/2c/59.

B. O. Obisesan, Crown Counsel, for the Crown.

Accused not represented.

Charles, J.: The accused is charged with defilement of a girl under the age of eleven years, contrary to section 218 of the Criminal Code in that, on the 8th November, 1958, at Oreta Village, Ikorodu, in the Ikeja Judicial Division, he had unlawful carnal knowledge of Wasi Omowumi, a girl under the age of eleven years.

The accused is guilty of the offence charged if, but only if, the evidence established beyond reasonable doubt each of the following:—

(*a*) That on the 8th November, 1958, he had carnal knowledge, involving penetration to some extent, of Wasi Omowumi.

(*b*) That such carnal knowledge took place in the Western Region.

(*c*) That at the time of such carnal knowledge Wasi Omowumi was not married to the accused and was under the age of eleven years.

The second and third of those matters were not really in dispute and I have no doubt, on the relevant evidence, that, if the accused had carnal knowledge or attempted to have carnal knowledge of Wasi, those two matters are established in relation to his act. The real issue therefore is whether the accused did have carnal knowledge of Wasi as mentioned, or if he did not, whether he attempted to have such carnal knowledge.

The latter alternative is relevant because if only an attempt is proved against the accused he is not entitled to an acquittal on the charge but may be convicted of the attempt. The evidences as to the real issue is circumstantial, and is as follows: a girl, Taiwo, gave sworn evidence that about four or five months ago she was sent by her aunt to call Wasi in for a meal: that she went out and called Wasi who answered her from a neighbouring house: that she entered that house and, in a room, saw Wasi crying and seated on the lap of the accused who was wiping Wasi's thighs with a cloth: that she also saw that the flap of the accused's trousers was undone: and that she caught hold of Wasi and took her home, the accused begging her not to mention the incident to her aunt. Taiwo, also identified the apron with which she saw the accused wiping Wasi and the dress which Wasi was wearing at the time. The aunt gave evidence that Taiwo returned with Wasi who was crying after about a quarter of an hour from when the former had been sent to call the latter: that as a result of something Taiwo said, she examined Wasi and found semen on and around her vagina; and that she then took the two girls to the Bale, who sent for the accused. She also stated that she was a married woman and that Wasi was six years old. The Bale gave evidence that the aunt, Taiwo and Wasi attended before him and made a complaint that he examined Wasi and saw semen upon her: that he sent for the accused and kept him at his house until the Police, for whom he later sent, arrived and took the accused away. Evidence was given by a constable that on the 8th November, 1958 he went to the Bale's house, in response to a call, and there took the accused into custody and took possession of the apron mentioned: that he also took possession of the dress mentioned as belonging to Wasi: that he took the accused to his house and there made the accused remove the pair of trousers which he was wearing: that later he sent the apron, dress and trousers for medical report and in due course received them back with a report. He identified the other garments with the wrappings in which they came. The wrappings contained identifying letters and a number to which the report referred. The report stated that the other articles were all stained with human semen and that the apron and dress were also stained with human blood. The constable also deposed to having taken a voluntary statement from the accused. In this statement the accused said that Taiwo had come to his house with Wasi and other children, and that Taiwo asked what Wasi was doing there and also he had replied that she and other children had not been playing in the house. He then allegedly said that he had gone to the waterside in a canoe, and washed his face, hands and legs. The accused did not admit or deny expressly in this statement that he had interferred with Wasi but he said that he had denied the allegation before the Bale. Finally, for the Crown, a doctor gave evidence that he had examined both Wasi and the accused on the 8th or 9th of November, 1958: that he found nothing unusual about the accused: and that he found that Wasi's hymen had been ruptured and that the outward parts of her vagina had the appearance of having been interferred with recently.

In evidence the accused denied having had intercourse or interferred in any other way with Wasi and that Taiwo had seen Wasi on his lap. He stated that both were frequent visitors to the house in which he lived as a relative of theirs also lived in it but they never visited him. He also denied having made the statement as recorded by the Police, stating that all he had said to the Police was that he knew nothing about the alleged offence and that such an allegation had not been made against him before during the three years which he had been living at Oreta. He admitted that the barber's cloth and trousers, which are exhibits belonged to him but could not explain how they come to be stained, stating with reference to the trousers, that he shared his room with four other men and the four of them were always using each other's clothes. With reference to that explanation, it is proper to add, as perhaps lending some support to it

that the police found, under a bed in the sitting room of the accused's house, a white cap as to which there is evidence that it was seminal stained and as to which there is no evidence of it being connected in any way with the alleged offence.

The case against the accused is obviously dependent upon the acceptance of Taiwo's evidence. Because of the nature of the charge and because Taiwo's evidence was unsworn that later evidence cannot be acted upon unless it is corroborated in some material part which implicate the accused in the alleged crime by evidence from an independent source or sources. Putting aside Taiwo's evidence, therefore, for the moment, the other evidence leaves me with no doubt as to the following facts:—

(*i*) That on the 8th November, 1958 Taiwo brought Wasi to their aunt about a quarter of an hour after the aunt had sent Taiwo to look for Wasi, and that Wasi was then crying.

(*ii*) That an immediate inspection of Wasi's private parts showed what appeared to be semen on them and that after a Medical examination showed that the dress which she was wearing at the time was similarly stained.

(*iii*) That a medical examination of Wasi later in the same day, or early next day, showed a condition of her private parts which strongly indicated that she had suffered interference.

(*iv*) That on the same day, sometime after the alleged offence the accused was found to be wearing trousers which were stained with semen.

The inference—the only inference—to be drawn from first three of those facts is, I think, that Wasi had suffered sexual interference from some one on the 8th November, 1958. The other five facts in themselves are insufficient to identify the accused as that "some one" but they also corroborate Taiwo's evidence that she saw Wasi crying on the accused's lap and the accused engaged in wiping her thighs with the cloth, tending to render the truth of that evidence probable. If that evidence of Taiwo is true, the only inference to be drawn from it and the other facts already found is that the accused did sexually interfere with Wasi.

I have no doubt that Taiwo's evidence is true. The fact that, according to it, the accused permitted Wasi to answer her preliminary calls, does not affect that conclusion, although it is a matter to be weighed in assessing her credibility. No doubt it may be expected that a person engaged in an unlawful act upon another would try to prevent the other from crying out. The fulfilment of that expectation has brought many rapists to the gallows for murder—but individuals differ in their reactions to situations and failure to observe the apparent normal pattern cannot prevail so as to cast doubt on evidence which is otherwise conclusive in all the circumstances. Neither, do I think, can the impression which Taiwo left on my mind, that she was hesitant and shifty when cross-examined as to previous visits to the house in which the accused resided, nor her identification as to the apron in evidence as the one with which he accused was wiping Wasi, without being able to say why she so identified it, affect the credibility of her evidence on the point of substance. Taiwo may well have been prevaricating as to visiting the house, and after all, the accused did not suggest any other purpose in such visits than to visit a relative. As to the identification of the apron, the accused has identified it as his, so that whether her actual identification of it was true or not is really immaterial: the fact is established, as I have found that the accused's barber's apron had seminal stain upon it. The three matters just mentioned, being capable of explanation in favour of Taiwo, cannot prevail against the failure of the

accused to give a reasonable explanation as to the five stained articles and the impression which he left upon me as a witness that he was a liar. His evidence was very contradictory. Thus first, he admitted that Taiwo had come to the house on the day of the alleged offence and then in cross-examination, he stated that he had not seen her that day until he was at the Bale's house. He was equally contradictory as to having seen Wasi on the same day. His denial as to having made the statement recorded by the police was equally contradictory, particularly as, it is to be expected, that if the police were going to concoct a statement against him, they would have concocted a more damning one. Then, in his manner of giving his evidence he was hesitant and crafty.

The result is, as I have said that I have no reason to doubt that Taiwo's evidence is true and that, therefore, the proper inference to draw from it is that the accused did sexually interfere with Wasi. The question then arises whether I am satisfied beyond reasonable doubt that the inference to be drawn from the fact of that interference is that the accused had carnal knowledge of Wasi.

There are three alternative inferences open:—

(*i*) That the interference was an intentional penetration of Wasi's vagina to some extent, in which case, having regard to the fidings on the other elements, the accused is guilty of the offence charged.

(*ii*) That the interference was an unsuccessful attempt to penetrate Wasi's vagina to some extent, in which case the accused is not guilty of the offence charged but is guilty of an attempt to commit the offence.

(*iii*) That the interference was done with the intention of obtaining some form of sexual gratification without penetration. In that case, as there could be no real consent on the part of a child between six and eight years of age—and Wasi's appearance confirms her aunt's evidence that Wasi was six years of age—and there could be no other legal justification or excuse for the interference, the accused is guilty both of indecent treatment of a girl under thirteen years of age, contrary to section 222 of the Criminal Code, and indecent assault of a female, contrary to section 360 of that Code.

As to the first of these alternatives, the doctor who gave evidence left me with the impression that he was unable to say, whether from absence of his notes or from the nature of the examination itself, that the rupture of the hymen, as well as the condition of the outer parts of the vagina, were recent. As any one with experience in case of this type knows, that rupture of a hymen can be caused by causes other than sexual interference although sexual intercourse is the usual cause. That, coupled with the age and the size of Wasi and some uncertainty in the doctor's recollection of the detail of his findings gives me reason to entertain a doubt whether the accused's interference with her involved even a partial penetration by him. I am, therefore, not satisfied that the accused did commit the offence charged, and he will be found not guilty of it.

As to the second alternative, again one must have regard to one's knowledge and experience in the practice of the law both as Counsel and Judge. The border line between properly substituting them for evidence is fine but certain elasticity is, in any case, allowed in favour of the accused. According to my knowledge and experience gained in having, unfortunately, to try many cases of this kind in the past, many of the perverts who seek gratification for their lust from young children seek their gratification by means other than normal intercourse. As there is no evidence to lend probability to the accused not being content to seek gratification in the normal way, and again

having regard to the age and size of the child, I doubt whether he intended to penetrate the child. The fact that he inflicted some external injury to her does not resolve that doubt. I am therefore unable to find the accused guilty of attempting the offence charged. The position, therefore, is that the accused is guilty of two lesser offences, that of indecent dealing and that of indecent assault, of the latter, he can clearly be convicted on a charge of defilement by reason of section 175 of the Code of Criminal Procedure. In my judgment he cannot be convicted of the offence of indecent treatment on such a charge. Section 179 of the Code of Criminal Procedure is intended to give effect, with a possible extension, to the common law principle that where only some of the constituent elements of the offence charged are proved and they amount to an offence of the same degree, that is felony or misdemeanour, the accused may be convicted of the offence so proved. The possible extension is that the limitation as to the lesser offence being of the same degree is removed, so that the accused may be convicted on a charge of felony, of a misdemeanour the essential elements of which are included in the essential element of the felony charged. This, except as to the "possible extension", as to which no opinion was expressed, seems to accord with the view of Bairamion, J. in *R.* v. *Anokwu and others* 1952, 20 N.L.R. 103. In my opinion neither all the elements of indecent assault nor of indecent treatment are comprised in the offence of unlawful carnal knowledge of a girl under eleven years and, consequently, section 179 of the Code of Criminal Procedure cannot apply to those offences. As already stated, section 175 specially makes provision for a conviction of indecent assault on a charge of defilement, but similar provision has not been made for the other offence, the accused can only be convicted, of indecent assault of a female. He will be so convicted.

Convicted of indecent assault on a female.

ALASAN BABATUNDE, AJAGUNNA II, OLUKARE OF IKARE ... ... *Applicant/Appellant*

v.

THE GOVERNOR, WESTERN NIGERIA ... *Respondent*

[FEDERAL SUPREME COURT: Ademola, F.C.J., Abbott, F.J., Hubbard, Ag.F.J., 20th April, 1960.]

Writ of certiorari—jurisdiction of court, section 3, Administration of Justice (Crown Proceedings) Law, 1959—procedural law—pending actions—aggrieved party—deposition under section 22 (1) of the Western Region Appointment and Recognition of Chiefs Law, 1954—chieftaincy matters, jurisdiction of Court, section 34 (i) of the 1954 Law—section 3, Chieftaincy Disputes (Preclusion of Courts) Ordinance, 1948 considered.

The appellant was deposed from the post of the Olukare of Ikare. Another person was appointed a new Olukare. The appellant brought an application to quash the order of appointment of the new Olukare. The High Court refused to make the order absolute and discharged the order *nisi* which it had previously made.

On appeal, Counsel for the respondent raised the point that the Court (Appeal Court) has no jurisdiction to make the order sought by the appellant in view of section 3 of the Administration of Justice (Crown Proceedings) Law, 1959.

Held: (1) That section 3 of the Administration of Justice (Crown Proceedings) Law, 1959 came into operation after the appellant has started his action and that its purpose is to preclude the jurisdiction of the High Court to issue prerogative orders and cannot apply to pending actions unless it is so expressly stated;

(2) That the appellant, having been deposed by the Governor, clearly had no such interest in the appointment of a new Olukare as to make him an aggrieved party.

(3) That section 34 (1) of the Western Region Appointment and Recognition of Chiefs Law, 1954 is wide enough to exclude the application brought by the appellant.

[*Quare.*—Whether or not it leaves room for the principle that even where *certiorari* had been taken away by statute, it may still issue on the ground of manifest lack of jurisdiction in the tribunal, or the person who made it or manifest fraud in the person procuring it, it is not necessary to decide.]

Appeal dismissed.

Cases cited:

In re *Joseph Suche and Co. Ltd.*, (1875) 1 Ch.D. 48.

Nakkuda Ali v. *Jayaratine* (1951) A.C. 66.

The Resident, Ibadan Province v. *Memudu Lagunju*, 14 W.A.C.A. 549.

The Colonial Bank of Australia v. *Williams*, (L.R. 1874) 5 P.C. 417.

Appeal from High Court, Western Region. Appeal No. F.S.C. 207/1959.

Olu Ayoola (*Mr A. Ayoola* with him) for the Appellant.

Chief F. R. A. Williams, Q.C., for the Respondent.

Hubbard, Ag.F.J.: This is an appeal by Alasan Babatunde against the discharge of an order *nisi* by the High Court of the Western Region sitting at Ibadan. The appellant had obtained an order *nisi* for a writ of *certiorari* to issue to the Governor of the Western Region to bring up and quash his order of approval and recognition of the appointment of Amusa Momoh as the Olukare of Ikare.

Chief Rotimi Williams, for the respondent, objected *in limine* before us that, having regard to the provisions of section 3 of the Administration of Justice (Crown Proceedings) Law, 1959, this Court had no jurisdiction to make the order which the appellant had wanted the Court below to make. It is common ground that this law did not come into force until after the Court below had discharged the order *nisi*, but Chief Rotimi Williams contends that section 3 deals with a matter of procedural law and that it will, therefore, bind this Court in dealing with this appeal. In my view, this is not so. The purpose of section 3 of the law is to preclude the jurisdiction of the High Court to issue prerogative orders in respect of chieftaincy matters. In re *Joseph Suche and Company Limited* (1875) 1 Ch.D. 48, to which Chief Rotimi Williams himself was good enough to refer us, Jessel, M.R. (at p.50) said—

> "It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them."

I have no doubt that the same principle applies to proceedings by way of the prerogative orders, and the appellant, having commenced these proceedings at a time before the jurisdiction of the High Court was precluded, is entitled to have his appeal heard and determined.

I am of opinion, however, that the learned Judge, on the whole of the case put forward by the appellant, was right in discharging the order.

The first ground on which I think the discharge was right is not one taken in the Court below, nor indeed in this Court, and it is this: that the appellant was not in law an aggrieved party in relation to the order complained of. The order was made on 17th December, 1956. On 6th October, 1956, the Governor of the Western Region, acting under section 22 (1) of the Western Region Appointment and Recognition of Chiefs Law, 1954, had deposed the appellant from his office of Olukare of Ikare on the ground that his deposition was necessary in the interest of peace, order and good government. This order was published as W.R.N. No. 14 in the *Western Region of Nigeria Gazette* No. 2 of 3rd January, 1957. The present proceedings were commenced in the High Court on 18th February, 1957. In my view, the appellant, having been deposed by the Governor, clearly had no such interest in the appointment of a new Olukare as to make him an aggrieved party. Mr Ayoola, for the appellant, contended that the appellant might possibly have been appointed again. This Court, however, must deal with these matters on a common sense basis, and in my view there can be no doubt that the appellant would certainly not have been reappointed. He had, of course, an interest in his own deposition, and had there been any grounds for challenging that order, then he would have had in relation to it the standing of an aggrieved party. He has, however, taken no action to have that order set aside. In this connection I ought, perhaps, to refer to the case of *Nakkuda Ali* v. *Jayaratine* (1951) A.C. 66, which was cited to us by Chief Rotimi Williams, and to mention that the judgment in that case makes it arguable whether in acting under section 22 (1) of the Western Region Appointment and Recognition of Chiefs Law the Governor is amenable to *certiorari* at all.

In the second place, section 34 (1) of the Western Region Appointment and Recognition of Chiefs Law, the law under which Amusa Momoh was appointed, and which was in force when these proceedings were commenced, provides that "..... no Court shall have jurisdiction to entertain any civil cause or matter calling in question anything done in the execution of any provisions of this law or in respect of any neglect or default in the execution of any such provisions by the Governor.....". This is a much wider exclusion than that which was considered in *The Resident, Ibadan Province*, v. *Memudu Lagunju* (14 W.A.C.A. 549), which was cited to us by Mr Ayoola for the respondent. There jurisdiction was taken away "to entertain any civil cause or matter instituted for the determination of any question relating to the selection, appointment, installation, deposition or abdication of a chief" (s. 3 Chieftaincy Disputes (Preclusion of Courts) Ordinance, 1948), and it was held by the Court that the terms of the exclusion did not include *certiorari* brought "with the object of compelling the executive to perform its *quasi* judicial function of holding" the inquiry which, in the case of a dispute, was required by law to be held prior to the approval of the appointment of a chief. Under the law applicable in the present case jurisdiction is taken away in relation to any civil cause, which is defined to include *certiorari* proceedings, which calls in question anything done in the execution of any provisions of the law or in respect of any neglect or default in the execution of any such provisions by the Governor. This exclusion appears to me so wide that it must exclude the appellant's application. Whether or not it leaves room for the operation of the principle stated in *The Colonial Bank of Australia* v. *Williams* (L.R. 1874 5 P.C. 417 at 442) that, even where *certiorari* has been taken away by statute, it may still issue to remove and quash an order on the ground of manifest lack of jurisdiction in the tribunal or person who made it, or of manifest fraud in the party procuring it, it is not necessary to decide, since the appellant does not allege any lack of jurisdiction in the Governor to approve and recognise the appointment, nor does he allege any fraud.

For these reasons I would dismiss this appeal.

Appeal dismissed.

STEPHEN EWENZERIKE ... ... *Defendant/Appellant*

v.

THOMAS OBANUKU ... ... *Plaintiff/Respondent*

[HIGH COURT OF JUSTICE: Quashie-Idun, J., 26th April, 1960.]

Claim for damages for assualt—compensation awarded by Customary Court in charge of assault—whether bar to subsequent claim for damages for same assault—section 36 Customary Courts Law, 1957 compared with sections 74 and 75 of the Gold Coast (now Ghana) Criminal Code—section 136 of the Gold Coast (now Ghana) Criminal Procedure Code—proof of special damages.

The defendant/appellant was convicted of assault, fined and ordered to pay thirty shillings compensation to the plaintiff/respondent by Customary Courts Grade B. The plaintiff/respondent brought an action for damages for the same assault in the Magistrate Court and he was awarded £80 damages. The appellant contended that since the plaintiff/respondent had been awarded 30*s* compensation by the Customary Court, he was barred from suing for compensation in respect of the same assault. This contention was rejected. The defendant/appellant appealed against the decision of the Magistrate.

Held: (1) That under section 36 of the Customary Courts Law, 1957 the injured person has an option to reject or accept the offer of compensation;

(2) that since the plaintiff/respondent had not taken any step in receiving the compensation awarded by the Customary Court, he is not barred from bringing an action for damages for the assault.

Appeal dismissed.

Cases cited:

John Mark v. *Sampson Toe*, 2 W.A.C.A. 170.

Appiah Kwamie v. *Omanhene Kobina Ngansah II*, 14 W.A.C.A. 269.

Civil Appeal from Ibadan Magistrate. Appeal No. I/40A/59.

S. A. Fagbenro, for Defendant/Appellant.

E. B. Craig, for Plaintiff/Respondent.

Quashie-Idun, J.: This is an appeal against the decision of Senior Magistrate (Begho) in which he gave judgment for the plaintiff/respondent and awarded him damages on his claim for assault.

The defendant/appellant was charged before the Ibadan Grade B Customary Court on the 20th October, 1958 for that he had unlawfully wounded the plaintiff/respondent. He pleaded guilty and was ordered to pay a fine of £1 10*s* or to go to prison for one month in default of payment of the fine. He was also ordered to pay a compensation of £1 10*s* to the plaintiff.

On the 23rd December, 1958, the plaintiff instituted the present action claiming £200 being general and special damages from the defendant for the assault committed on him. The learned Senior Magistrate heard evidence from both parties and gave judgment for the plaintiff awarding him £80 general damages and £7 2*s* special damages.

Against the decision the defendant has appealed to this Court and on his behalf two grounds of appeal have been argued by his counsel. They are (1) that the learned Magistrate was wrong in law in holding that the plaintiff was not debarred from bringing

the action and (2) that special damages were not strictly proved as required by law. In support of the 1st ground argued, Mr Fagbenro has submitted that the Customary Court which convicted the defendant on the charge of wounding had power to order compensation to be paid by the defendant to the plaintiff and that as soon as the compensation was paid, whether it has been received by the plaintiff or not, it operates as a bar against the plaintiff in a claim for damages for the assault. Learned counsel has referred to section 36 of the Customary Courts Law which reads as follows:

> "In addition to awarding a fine or sentence of imprisonment in any case a customary court shall have power to award to any person injured or aggrieved by the act or omission in respect of which such fine or imprisonment has been imposed compensation to be paid by the accused on condition that such person if he shall accept the same shall not have or maintain any suit for the recovery of damages for the loss or injury sustained by him by reason of such act or omission."

Learned counsel has also referred to the case of *John Mark* v. *Sampson Toe*, 2 W.A.C.A., page 170 and *Appiah Kwamie* v. *Omanhene Kobina Ngansah II*, 14 W.A.C.A. page 269.

The case of *John Mark* v. *Sampson Toe* was decided by the Court of Appeal on the interpretation of section 75 of the Criminal Code of Gold Coast (now Ghana). That section reads as follows:

> "Where any person who is injured by any offence punishable by this code, or under any other statute, receives compensation for such injury under the order of the court, or where the offender having been ordered to make such compensation suffers imprisonment for non-payment thereof the receipt of such compensation or the undergoing of such imprisonment, as the case may be, shall be a bar to any action for the same injury; but except as aforsaid, nothing in this code shall bar the action of any person in respect of any injury sustained by him or his property."

The legal point taken by counsel is an interesting one but a careful perusal of the judgments of the Court of Appeal in the cases cited and a comparison of section 75 of the Criminal Code of the Gold Coast and section 36 of the Customary Courts Law make it easy to solve the legal problem involved in this appeal.

Section 36 of the Customary Courts Law provides that if the compensation ordered by the Court to an injured person is accepted by him then he should be debarred from instituting or maintaining any suit for the recovery of damages for loss or injury sustained.

The Gold Coast Criminal Code does not make the acceptance a condition precedent to the loss of the right in an injured person to sue for damages. It states firstly that the receipt of the compensation shall be a bar. The Court of Appeal held in the case of *John Mark* v. *Sampson Toe* that "receipt of the compensation" had the same judicial interpretation as "having opportunity to receive". Secondly, the relative section 74 clearly indicates that in default of payment of the compensation, the accused person can be imprisoned. The Court therefore stated as follows in its judgment in that case:

> "It seems to be the obvious intention of the two sections that in appropriate cases the Court should be able to avoid multiplicity of proceeding by dealing at one and the same time with both the public wrong and the private injury, and should have power to protect a convicted person from undue harshness in pursuing him on the part of the person injured."

Section 36 of the Customary Courts Law contains no provision to the effect that in default of the payment of the compensation, the accused should suffer the punishment of imprisonment. The position seems to be that whereas in Ghana the payment of the fine from which the amount of compensation is to be deducted or the imprisonment of the accused in default of the payment of the fine whether the compensation was accepted or received is a bar against the institution of a civil action for damages by the complainant, in this Region it is the acceptance of the offer of compensation or the receipt of which bars the civil action. I am of the opinion further that given section 36 of the Customary Courts Law its ordinary meaning, the injured person is given an option to accept or reject the offer of the payment of the compensation. The question, therefore, arises: when is he entitled to exercise that option? My answer is that he can accept or reject it at the time the court offers it to him. If he accepts it the court would proceed to make the order, but if he refuses or indicates that he would not accept it, then the court would make no order. If in spite of his refusal to accept the compensation, the Customary Court proceeds to make the order, then the injured person should not be debarred from instituting a claim for damages, unless he withdraws the amount of compensation paid into Court or unless he receives it direct from the accused person.

I am also of the opinion that to ensure the proper exercise of the authority vested in the Customary Courts by section 36, the Court should make a note in its record book to the effect that the offer of compensation was either rejected or accepted by the complainant. This would prevent the state of affairs found in the present case.

The plaintiff stated in his evidence before the trial Magistrate that when the Customary Court awarded him £1 10*s* as compensation, he there and then told the court that he would not accept £1 10*s* as compensation for his ear that had been bitten off.

It is hardly necessary for me to say in this judgment that the plaintiff's refusal, if it was made, was very reasonable indeed. The learned trial Magistrate rightly remarked in his judgment that in the absence of an indication that the plaintiff accepted the offer of compensation, it would be most unfair to presume that he did. The plaintiff's evidence was denied by the defendant in his evidence, but, as I have already stated, if a record had been made at the time, it would have helped in deciding who is speaking the truth.

I now consider the case of *Appiah Kwamie* v. *Omanhene Kobina Ngansah II*, cited by learned counsel for the appellant. In that case, an injured person was awarded compensation to be paid out of the fine imposed by the Court. The order was made under section 136 of the Gold Coast Criminal Procedure Code which provided that where the Court imposed a fine and was of the opinion that a substantial compensation was recoverable in a civil suit, the Court could order the fine or part of it to be paid to the injured person who may sue and recover damages, but that the *quantum* of damages shall have regard to what he may have received out of the fine.

The plaintiff instituted an action for damages and the trial court held that the plaintiff was debarred on the authority of *Mark* v. *Toe* already referred to in this judgment.

The Court of Appeal, held, reversing the decision of the trial court, that the provisions of the Criminal Code on which the decision in *Mark* v. *Toe* was based did not apply. The Court held that whereas under section 72 (formerly 75) of the Gold Coast Criminal Code an order for the payment of compensation was part or the whole

of the punishment and was clearly intended to be a final adjudication on the matter, section 136 of the Criminal Procedure Code under which the decision was based empowered the Court to order that part of the fine which would otherwise go into the public treasury should be paid to the injured person, pending his obtaining relief by way of a civil action for damages when the Court is of the opinion that substantial compensation is recoverable by civil suit. The Court then proceeded and awarded the plaintiff-appellant £22 10*s* having taken into consideration the award of £17 10*s* compensation made by the Magistrate who convicted the defendant.

The case of *Kwamie* v. *Ngansah II* does not support the contention of counsel for the appellant particularly as there is no provision in the Customary Courts Law similar to section 136 of the Gold Coast Criminal Procedure Code.

With regard to the submission that the special damages claimed were not strictly proved, there was evidence which was accepted by the Court and this Court will not interfere with the Court's decision on that claim.

For the reasons given, I dismiss the appeal.

Appeal dismissed.

JACOB ABIODUN IJOSE ... ... *Petitioner*

v.

1. OLU AKINFOSILE ... ...
2. RETURNING OFFICER FOR OKITIPUPA NORTH CONSTITUENCY ... ... } *Respondents*

[HIGH COURT OF JUSTICE: Thomas, J., 5th May, 1960.]

Election Petition—votes cast in some stations exceeded number of registered electors—whether this irregularity substantially affects the result of the election—ballot papers account and verification account not made—unmarked ballot papers—consent in circumventing regulation 92 (2) of the Election (House of Representatives) Regulations, 1958—issue of ballot papers, regulation 67 of the 1958 Regulations—marking of ballot papers regulation 68 (a) of the 1958 Regulations—non-compliance with regulations does not necessarily invalidate election, regulation 7 of the Federal Legislative Houses (Disputed Seats) Regulations, 1959—absence of proof of quantity of unmarked ballot papers, election invalidated by reason of non-compliance with regulation 6 (1) (b) of the 1959 regulations, as the non-compliance affected the result.

The petition was brought on the ground of several irregularities and non-compliance with some provisions of the Election (House of Representatives) Regulations, 1958. In some polling stations it was proved that more than the registered number of voters voted. Also that there were many unmarked ballot papers which were counted.

Held: (*i*) That there were more voters than the number on the list in two polling stations, but it is clear that if the votes, cast at these two polling stations (Okeraiye A and Lapoki B), were discounted, the result of the election would not be thereby affected.

(*ii*) That the parties could not dispense by consent with the formalities of the Regulations that the ballot papers should be stamped.

(*iii*) That the first respondent having admitted in his reply that unmarked ballot papers had been included in the count, the onus was thereupon on him to prove the quantity of such unmarked ballot papers and that their inclusion did not affect the result of the election.

(*iv*) That the Court cannot proceed to scrutinise the thousands of ballot papers which have been tendered *en block* in the absence of evidence to assist the Court in the task of deciding which of the ballot papers were genuine or otherwise.

(*v*) That the cumulative effect of the evidence left the Court with the settled impression that the election was not conducted substantially in accordance with the Nigeria (Electoral Provisions) Order in Council, 1958 and the Court is unable to say that the non-compliance did not affect the result of the election.

Petition allowed.

Case cited:

Islington West Division Case, Medhurst v. *Lough and Gazquet* (1901) 17 T.L.R. 210.

Akure Suit No. AK/65/1959.

Omisade for Petitioner.

Ogundare, for first Respondent.

Ogundere, for second Respondent.

Thomas, J.: The Petitioner, Abiodun Ijose and the first respondent, Olu Akinfosile, were candidates for Okitipupa North Constitutency, at the Federal Elections of the 12th December, 1959.

The Returning Officer, the second respondent returned the first respondent as being duly elected.

The Petitioner contested on the platform of the Action Group and the first respondent on the platform of the N.C.N.C.

The petitioner scored 4,324 votes and the first respondent 6,053 and the Returning Officer, the second respondent, returned the first respondent as being duly elected.

The petitioner prays that the said first respondent had not been duly elected and that the election had been invalidated by substantial non-compliance with the Nigeria (Electoral Provisions) Order in Council, 1958, on the following grounds:—

(1) "And your petitioner states that in Registration Area 213/A02A Okeraiye A, the total number of votes counted was 322 whereas not more than a total of 315 persons were registered as voters in the said Registration Area.

(2) And your petitioner states that in Registration Area 213/A09B Lapoki B, the total number of votes counted was 291 whereas not more than a total number of 156 persons were registered as voters in the said Registration Area.

(3) And your petitioner states that at many polling stations a large number of ballot papers were counted which did not bear the official secret mark".

Reply of the first respondent.

(1) "The first respondent is not in a position to admit or deny paragraphs 4 and 5", *i.e.*, 1 and 2 of the grounds referred to *supra*.

(2) "With regard to paragraph 6 of the petition, *i.e.*, paragraph 3 of the grounds referred to *supra*, "the first respondent states that it was at the insistence of the petitioner that ballot papers not bearing the official secret marks were counted."

(3) "The first respondent avers that in any case he was duly elected and returned by a majority of lawful votes".

Reply of the Returning Officer, second respondent *inter alia*.

"As to paragraph 4 of the petition, *i.e.*, (1) of the grounds referred to *supra* "this respondent admits that a total of 315 registered voters were assigned to vote at polling station A 3 (situate at the Cherubim and Seraphim Church, Idepe serving registration area 213/A02A Okeraiye A); but says that the ballot boxes marked and intended for use at that polling station were inadvertently delivered to and used in polling station A 4 (situate at the Methodist School, Idepe serving registration area 213/A02B Okeraiye B) to which 423 registered voters were assigned at which 322 valid votes were cast".

"As to paragraph 5 of the petition, *i.e.*, paragraph 2 of the grounds referred to *supra*, "this respondent admits that a total of 156 registered voters were assigned to polling station A 16 (situate at the Local Authority School B), Igboluwoye but says that the ballot box of the first respondent used a polling station A 20 (situate at the Methodist School, Ladawo serving registration Area 213/A11B: Igorisha B) to which

335 registered voters were assigned, which said ballot box contained 223 valid votes, was inadvertently entered in the schedule of votes cast as having been cast at polling station A 16, whereas seventy-eight votes were cast for the first respondent at that polling station".

"This respondent denies that by reason of the matters set out in paragraphs 2 and 3 of this reply the result of the election was affected or could have been affected.

This respondent admits that some ballot papers which did not bear the official seal or mark were counted with the knowledge and consent of the petitioner, but says that such ballot papers bore such other distinguishing official marks by which the prevention of fraud could be assured.

This respondent avers that the election was conducted substantially in accordance with the Elections (House of Representatives) Regulations, 1958, and if there was any non-compliance with the said regulations (which is denied) such non-compliance did not affect the result of the election".

The petitioner's allegation in respect of Okeraiye A, is that the total number of votes counted was 322 whereas only 315 individuals were registered as voters there. Alleged excess of votes cast was seven.

The first respondent had no explanation to give. Explanation of second respondent.

The second respondent, defence witness 1, Thomas Aduba, testified that there were 315 registered voters at Okeraiye A and that the ballot boxes for that station had been labelled A 3, but that due to an error in distribution they were used at Okeraiye B, polling station A 4. He testified further that the votes cast at Okeraiye A, were placed in two boxes labelled A 7. That the total votes cast was 264, *i.e.*, 212 for the petitioner and fifty-two for the first respondent.

The third witness defence witness 3, Akinranu testified that he was the Presiding Officer at Okeraiye A, and that the two boxes labelled A 7, were used there.

The petitioner also alleged that the total number of votes cast at Lapoki B, was 291 whilst the total number of registered voters was 156.

First respondent had no explanation. Explanation of the second respondent. From the evidence of the second respondent, it appears that a total number of sixty-eight votes was cast in favour of the petitioner and seventy-eight for the first respondent making a total of 146.

But in the schedule, Exhibit 1 and Exhibit 6 they were incorrectly recorded as sixty-eight votes for the petitioner and 223 for the first respondent, making a total of 291.

Furthermore it appears that the first respondent scored 223 votes not at Lapoki B, where he actually scored seventy-eight, but at Igorisha B.

These figures appear to have been transposed in error.

Reviewing the evidence as a whole, the explanation of the second respondent is not improbable, but I am however disturbed because of two reasons.

Firstly, Agboola Aboaba defence witness 2, the Electoral Officer testified that after the petition had been filed and that about three weeks after the election, they received a query and he went to the second respondent to check the records. That

this respondent was unable to explain what had transpired at Okeraiye A, but that he only had suspicions of what might have occurred. He testified further that second respondent had not signed all the ballot papers account and so he had refused to accept them from him.

Secondly, second respondent has not up till now signed and completed the ballot paper account and verification statement, particularly in respect of Lapoki B. He is still in possession of the ballot papers and records contrary to regulation 100 of the Electoral Provisions, 1958.

If the explanation was as simple as he now wants the court to believe, I find it difficult to fathom why he has up till now been unable to sign the ballot paper account and verification statement and comply with the provisions of Regulation 100 of 1958.

However that may be, it is clear that if the votes, cast at Okeraiye A, and Lapoki B, were discounted, the result of the election would not be thereby affected.

The petition, therefore, fails in respect of these two grounds. I now come to the last ground of the petition:—

"And your petitioner states that in many polling stations a large number of ballot papers were counted which did not bear the official secret mark".

The 1st respondent admitted that ballot papers were counted which did not bear the official secret mark and that the petitioner insisted on this.

The 2nd respondent made a similar admission in his reply, and went on to plead that "such ballot papers bore such other distinguishing official marks by which the prevention of fraud could be assured, and further, that the election was conducted substantially in accordance with the Regulations and that if there was non-complicance with the said Regulations (which is denied) such non-compliance did not affect the result of the election".

Both respondents aver that such ballot papers as did not bear the official mark or seal were counted with the consent of the petitioner.

Neither of the respondents suggested to the petitioner, in cross examination, that he had so consented and did not indeed make any effort to lead such evidence.

Even so, the parties could not by consent circumvent the regulation in this respect.

Regulation 92 (2) of the Electoral Provisions, 1958 enacts as follows:

"Any ballot paper which does not bear the official mark shall not be counted."

There can be no doubt that the inclusion of these unmarked ballot papers was manifestly illegal. The 1st respondent having admitted in his reply that unmarked ballot papers had been included in the count, the onus was thereupon on him to prove the quantity of such unmarked ballot papers and that their inclusion did not affect the final results of the election. He led no evidence on this point whatsoever.

The 2nd Respondent testified on this point as follows:

"I produce the ballot papers in respect of this Constituency Exhibit 3. Some of these ballot papers do not bear the official stamp. I do not know how many these are. I noticed these unstamped ballot papers during the counting. The Electoral Officer issued the ballot papers."

Counsel for 2nd respondent has argued that all the ballot papers having been tendered during the trial, the court could sort them out for itself and establish the facts."

Before I deal with this submission of Counsel, I will refer to a passage in Schofield Parliamentary Elections, 3rd Edition, page 352.

"Void or registered ballot papers.

"There are four classes of ballot papers which are wholly void and these are—

"A ballot paper which does not bear the official mark.

It will be remembered that it is the duty of the presiding officer or poll clerk to mark the ballot paper with the official mark, either embossed or perforated immediately before it is handed to the voter. The absence of the official mark is absolutely fatal. The presence of such a paper may be accounted for in two ways; first, the failure of the presiding officer or poll clerk properly to mark the paper, or secondly, the introduction of the paper being either a forgery, a stolen paper or an additional unstamped paper torn out of the book of ballot papers inadvertently by the poll clerk when tearing out the unstamped paper intended for the voter, or even spare ballot papers procured at the printers".

In view of the above passage and other considerations of the rules of evidence, I cannot accept the submission made by Counsel for 2nd respondent that I shall accept the ballot papers which have been tendered *en bloc* and sort out the facts for myself and for the following reasons.

Firstly, no evidence has been tendered in this court by either of the respondents as to the official mark on the ballot paper, as envisaged by regulation 68 (*a*) of the Regulations of 1958 (Electoral Provisions) and I therefore have no means of identifying it on the ballot papers.

Secondly, the unmarked ballot papers were not extracted and tendered as a separate parcel, for the quantity to be easily determined with certainty.

Thirdly, no evidence has been tendered, by the 2nd respondent, in support of his contention, in his reply that the unstamped ballot papers bore "other distinguishing official marks by which the presence of fraud could be assured."

Fourthly, there is no evidence as to the source of these unmarked ballot papers which were counted.

Fifthly, there is no evidence as to how they got into the ballot boxes and it is impossible to determine how they were distributed in the 96 polling stations of the Constituency, especially as there is evidence on record that the 2nd respondent has not up till now signed all the ballot papers accounts. I have only seen two of them, Exhibit 4 and Exhibit 5. The latter exhibit was never completed and signed by the 2nd respondent. There is no evidence as to how he arrived at such figures as are shown on the verification statement side of the Exhibit and there is no proof that they are genuine or correct. I realise that it might be argued that these omissions or dereliction of duty are *ex post facto* the actual polling; but when they are considered in relation to the issues and counting of ballot papers, they do tend to reinforce my doubts as to whether the election was carried out substantially in accordance with the Regulations as the petitioner has prayed the court to invalidate the election on the grounds of non-compliance as provided by regulation 7 of the Federal Legislative Houses (Disputed Seats) Regulations, 1959.

It would therefore serve no useful purpose if I were to proceed to scrutinise the thousands of ballot papers which have been tendered *en bloc* in the absence of evidence to assist me in the task of deciding which of the ballot papers were genuine or otherwise.

Regulation 7 of the Federal Legislative Houses (Disputed Seats) Regulations, 1959 enacts as follows:

"An election shall not be invalidated by reason of non-compliance with the Election (House of Representatives) Regulations, 1958, if it appears to the Court having cognisance of the question that the election was conducted substantially in accordance with those regulations, and that the non-compliance did not affect the result of the election."

There is no evidence of the number of unmarked ballot papers that were counted. The petitioner avers in his petition that they were in respect of many polling stations. I am not in a position to say that owing to the relatively insignificant numbers of those ballot papers, the quantity could be excluded and that the final results of the election would not be affected. I cannot on the other hand say, from the evidence before me that they were so many that the final result of the election was thereby affected. It is in my view open to reasonable doubt in view of the pleadings and the evidence tendered, whether the counting of these unmarked ballot papers may not have affected the result. *In the Islington West Division Case, Medhurst* v. *Lough and Gasquet* (1901) 17 T.L.R. 210, at page 230.

"An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election where the court is satisfied that the election notwithstanding those transgressions, of an election really and in substance conducted under the existing election law, and that the result of the election that is the success of the one candidate over the other was not and could not have been affected by those transgressions. If on the other hand the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by a majority of persons voting in accordance with the laws in force relating to the elections the court is bound to declare the election void. It appears to us that this is the view of the law which has been generally recognised and acted upon by tribunals which has dealt with election matters."

The principle laid down in the above case has been enacted in Regulation 7 of 1959.

It is clear from the evidence that regulation 68 (*a*) of the Nigeria (Electoral Provisions) Order in Council was never complied with in respect of several unspecified ballot papers. The possibility of non-compliance with the remaining paragraphs of regulations 68, 67 (1), (2) and (3) cannot be ruled out in the circumstances of non-compliance with regulation 68 (*a*) in respect of an unspecified quantity of ballot papers.

The Register of Elections was never tendered during the whole course of the trial; regulation 92 (2) of 1958 was not complied with. It is impossible to say whether regulation 92 (3) and 4 of 1958 were complied with.

In the final result and after a review of the whole of the evidence, the cummulative effect of the evidence has left me with the settled impression that the election was not conducted substantially in accordance with the Nigeria (Electoral Provisions) Order in Council, 1958 and I am unable to say that the non-compliance did not affect the result of the election.

I will therefore grant the petitioner's prayer.

I hereby declare the election null and void for non-compliance with the Elections (House of Representatives) Regulations, 1958 as provided for by regulation 6 (1)B of the Federal Legislative Houses (Disputed Seats) Regulations, 1959.

Petition allowed.

WESTERN REGION TRADERS SYNDICATE ... *Plaintiff/Judgment-Creditors*

v.

G. A. FASHUGBE ... ... *Judgment-Debtor*
AFRICAN CONTINENTAL BANK ... ... *Claimants*

[HIGH COURT OF JUSTICE: Quashie-Idun, J., 13th May, 1960.]

Civil Procedure—interpleader summons—legal mortgage—notice of equitable mortgage by the legal mortgagee—sale of mortgaged property subject to prior equitable mortgage—power of sale—writ of attachment.

Two properties of the judgment-debtor were attached. One was mortgaged to the judgment-creditors. The other was not. The judgment-debtor had created an equitable mortgage on the two properties in favour of the claimants. The judgment-creditors obtained an order for sale of the two properties. The claimants contended that the two properties must be sold subject to their equitable interest.

Held: That, in respect of the 2nd property attached which was not conveyed by the mortgage to the judgment-creditors, the claimants were entitled to have their equitable mortgage declared prior to the attachment of that property. The 2nd property should only be sold subject to the claim of the claimants.

Claims succeeded in respect of one property.

Cases cited:

Labiran v. *Shonibare*, 13 N.L.R. 122.

Khoury v. *Azar*, 12 W.A.C.A. 261.

Ibadan Suit No. 1/144/59.

A. G. O. Agbaje, for Judgment-creditors.

M. A. Adekunle, for Claimants.

Quashie-Idun, J.: This is an interpleader suit in which the claimants seek to have two properties seized in execution released from attachment on the ground that the properties have been equitably mortgaged to the claimants.

The judgment-creditors contend that by a Deed of Mortgage dated on the 5th day of December, 1953, and executed by the judgment-debtor in favour of the judgment-creditors the property described thereon was conveyed to the judgment-creditors to secure the payment of monies advanced to the judgment-debtor for the purpose of buying produce for the judgment-creditors. The judgment-debtor incurred a deficiency in respect of which the judgment-creditors instituted an action and obtained judgment. They then applied for a writ of *Fifa* and attached two properties belonging to the judgment-debtor. It is clear from the Deed of Mortgage executed in favour of the judgment-creditors, exhibit E, that only one of the properties attached was mortgaged to the judgment-creditors. The document relied upon by the claimants is dated on the 14th July, 1957 and it is an equitable mortgage which conveyed no interest in the property to the claimants. It is contended, however, on behalf of the claimants that on the authorities of *Labiran* v. *Shonibare*, 13 N.L.R., page 122 and *Khoury* v. *Azar*, 12 W.A.C.A., page 261, this Court should make a declaration that the claimants' equitable interest should be prior to the attachment and that a sale of the properties should be subject to the claimants' prior equitable mortgage. It is my view that exhibit E created

a legal mortgage from the judgment-debtor to the judgment-creditors and that the judgment-debtor conveyed no interest in the property conveyed in exhibit E to the claimants when they executed the equitable mortgage, exhibit A, in favour of the claimants. As the legal mortgage, exhibit E, contained no power of sale, the judgment-creditors were entitled to obtain an order of the Court for the sale of the property, which they have done by first obtaining judgment and secondly applying for a writ of attachment. The contention, therefore, of the claimants that their claim should have priority is not maintainable as far as the property legally mortgaged is concerned. In respect of the 2nd property attached which was not conveyed by the mortgage to the judgment-creditors, I hold that the claimants are entitled to have their equitable mortgage declared prior to the attachment of that property. The judgment-creditors have a right in law to sell the right and interest of the judgment-debtor in that property but they must do so subject to the equitable mortgage of the claimants.

The judgment of this Court is that the claimants' claim in respect of the property covered by exhibit E is dismissed and the 2nd property should only be sold subject to the claim of the claimants in respect of that property.

Claims succeeded in respect of one property.

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THE FEDERAL ADMINISTRATOR-GENERAL ... *Plaintiff*

v.

1. JAMES ADESHOLA
2. EMMANUEL MOTESHO
3. ZACHEUS BALAKALE
4. SAMUEL ADESHOLA
5. JOHN ODUWOLE

... ... *Defendants*

[HIGH COURT OF JUSTICE: CHARLES, J., 19TH OCTOBER, 1959.]

Landlord and Tenant—licensee must be given notice to quit—notice to quit not necessary in the case of a trespasser—Recovery of Premises Ordinance, Cap. 193—evidence of notice to quit not pleaded—admissible if not objected to.

The plaintiff being the administrator under letters of administration granted in 1949 of the real and personal estates of one John Saint Matthew Daniel, deceased, took this action to recover from the defendants severally certain pieces of land out of a large area belonging to the deceased, and also to recover damages for trespass to the same pieces of land. For many years before the deceased's death in 1948 the first defendant had been in occupation of a piece of the large area as caretaker for the deceased. After the deceased's death the first defendant's appointment as caretaker was terminated but the first defendant remained on the piece of land and built a house on it. In 1953 the other four tenants each accepted a yearly tenancy of one of the pieces of land claimed from one John Bankole Saint Matthew Daniel, the deceased's eldest son, and each built a house on his own piece.

At the trial a daughter of the deceased gave evidence to the effect that the plaintiff gave first defendant notice to quit in 1949. The service of the notice to quit was not pleaded but the first defendant did not object to the evidence relating to it. It was argued for the first defendant that the case was not governed by the Common Law but by the Recovery of Premises Ordinance (Cap. 193) and that as there was no evidence that the plaintiff had complied with the procedure for recovery of permises as laid down in that Ordinance, the first defendant was still a licensee and that both claims against him be dismissed.

On behalf of the second defendant it was contended that he was let into possession by the deceased's son, and that some time after his entry on the land he approached the plaintiff who told him to remain on the land until further communication. It was further contended on behalf of the second defendant that even if he was a trespasser, he nevertheless was entitled to notice to quit under the Common Law and that as there was no evidence that he was given such a notice, an order for possession could not be made against him.

The defence of the third defendant was that he was let into possession by the deceased's son and that subsequently, in 1954, he had seen an officer in the plaintiff's office who had told him that he could build a house on the land and that he would be informed later about the rent he was to pay. No evidence was led by the plaintiff to contradict this.

The defences of the fourth and fifth defendants were similar. They stated that sometime in 1956 they saw an officer of the plaintiff's office and informed him of the tenancies they had taken from the deceased's eldest son, that the officer had told them

to remain on their piece of land until further notice, but that they did not hear from the plaintiff until service on them of the writs in the present action. The evidence led in support of these allegation was not contradicted by the plaintiff.

Held: (1) that although the evidence that the plaintiff had told the first defendant in 1949 to quit the land was vague and could have been objected to on the ground that the plaintiff had not pleaded the giving of the notice to quit, nevertheless such evidence could be received in proof of the giving of the notice to quit, the defendant not having objected to the evidence;

(2) following the case of *Akpiri* v. *The West African Airways Corporation*, 1952, 14 W.A.C.A. 195, that the Recovery of Premises Ordinance, Cap. 193 applied and that since the plaintiff had not complied with the provisions of that Ordinance his claims against the first defendant were bound to fail.

[*Note.*—The Court was strongly of the opinion that the Recovery of Premises Ordinance did not apply to a case of this nature as the definition of "Tenant" in section 2 thereof could not be construed to include a "licensee" but on the authority quoted above the court felt itself bound to decide as reported].

(3) that as the plaintiff was the only person legally able to deal with the land and that since the second defendant had not discharged the onus on him to prove that the deceased's son was the agent of the plaintiff, his entry on the land was a trespass;

(4) that there was no evidence that the second defendant was at any time granted a licence to occupy the land by the plaintiff and that there was no evidence that he had ceased to be a trespasser before the commencement of his action;

(5) that the second defendant being a trespasser was not entitled to Common Law notice to quit;

(6) that as the trespass alleged against third defendant was subsequent to the permission given by the plaintiff to the third defendant to occupy the land, the third defendant could not be a trespasser;

(7) that the acts of the fourth and fifth defendants before they obtained permission from the plaintiff to remain on the land amounted to trespass but that after the permission they became licensees, and that as licensees they could not become trespassers until a reasonable time after service of the writ of summons on them.

Claims against first defendant dismissed.

Judgment against second defendant for damages and for recovery of possession.

Claim against third defendant for damages dismissed and claim for possession struck out.

Judgment against fourth and fifth defendants for damages but claims against them for possession dismissed.

Cases Cited:

Minister of Health v. *Bellotti* (1944) 60 T.L.R. 228 C.A.

Armstrong v. *Sheppard and Short Limited* (1959) 3 W.L.R. 84 C.A.

Midland Railway Company v. *Ambergate, etc.* (1853) 10 Hare 359 42 E and E Dig. 679.

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Fahn v. *Ogbojulogun and Anor* [1935] 12 N.L.R. 47.
Jones v. *Martins*, [1943] 9 W.A.C.A. 100.
Canadian Pacific Railway v. *The King*, [1931] A.C. 331.
Ikeja Suit No. AB/38/57.
Moore (*J. O. Coker* with him) for Plaintiff.
Lambo, for first, second, fourth and fifth Defendants.
Somolu, for third defendant.

Charles, J.: In this action the plaintiff, as the administrator of the estate of John Saint Mathew Daniel deceased, claims £250 as damages from each defendant for trespass by him upon a different piece of land at Mushin and possession of four of the pieces of allegedly trespassed upon. A claim for possession of the piece of land allegedly trespassed upon by the third defendant was abandoned at the hearing, as that piece of land has been compulsorily acquired by the Western Region Government.

The following facts have been admitted expressly or tacitly. John Saint Mathew Daniel died on the 25th April, 1948 and Letters of Administration of his real and personal estate were granted to the plaintiff on the 1st February, 1949. From 1937 until his death the deceased had been in possession of a large area of land in which was included the five pieces to which this action relates. The deceased's title and interest to and in the large area of land vested in the plaintiff under the Letters of Administration and his title and interest in the five pieces claimed was so vested at the time of the issue of the writ in this action. For many years before the deceased's death the first defendant had been in occupation of a piece of the large area mentioned as caretaker for the deceased. After the deceased's death the first defendant's appointment as caretaker was terminated, as admitted by that defendant in his statement of defence, but the defendant remained on the piece of land and built a house upon it. In 1953 the other four tenants each accepted a yearly tenancy of one of the claimed pieces of land and subsequently erected a house upon it. These yearly tenancies were granted by John Bankole Saint Mathew Daniel, the eldest son of the deceased.

A daughter of the deceased stated in evidence that the plaintiff told the first defendant to quit at the time when his appointment as caretaker was terminated. In cross-examination, she also stated that the plaintiff had given the first defendant notice to quit in 1949 and, again, that the plaintiff had served such a notice upon him. The first defendant denied that he had ever been given any notice to quit by the plaintiff before the service of the writ in this action upon him in 1957. He also stated that he had been a yearly tenant of the deceased at an annual rent of five shillings and that after the deceased's death he saw an officer of the plaintiff and was told by him to remain on the land and to continue to collect the rents, and that he would be advised later about his own rent. Although the latter evidence was uncontradicted, I am not prepared to act upon it by finding that the first defendant had been a yearly tenant of the deceased and that he had been given any express permission to remain on the land and to collect rents by the plaintiff. The first defendant was a shuffling, hesitant and contradictory witness and no reliance can be placed on his evidence. As the deceased's daughter appeared to be a credible witness I accept her evidence that the plaintiff had told the first defendant in 1949 to quit. Her evidence as to that was vague but it was not objected to, as could have been done on the ground that the plaintiff had not pleaded the giving of notice to quit, and her means of knowledge was not challenged.

The position which has thus been established in respect of the first defendant is that originally he was in occupation of one of the pieces of land claimed as a licensee of the deceased and that in 1949 he was given notice to quit by the plaintiff. At Common Law a licensee who has been given notice to quit becomes a trespasser after the lapse of such time from the notice to quit as is reasonable in the circumstances. (*Minister of Health* v. *Bellotti*, 1944, 60 T.L.R. 228 C.A.; *Armstrong* v. *Sheppard and Short Limited*, 1959, 3 W.L.R. 84 C.A.). Consequently, if the Common Law applies in this case, the plaintiff is entitled to damages against the first defendant for trespass and to an order for possession of the piece of land occupied by him.

Mr Lambo has submitted for the first defendant, however, that the case is not governed by the Common Law but by the observance of the Recovery of Premises Ordinance (Cap. 193) and, as there is no evidence of the procedure prescribed by that Ordinance for an owner of land to recover possession, the first defendant is still a licensee and both claims against him must be dismissed.

If that point were not covered by authority I would say that there was no substance in the submission. While it is true that the definition of "tenant" in section 2 of the Recovery of Premises Ordinance is wide enough to cover licensees, it is a recognised rule that the definition of a word in a definition section shall only apply so far as the context of the enacting sections admits whether or not that qualification is expressed in the definition section. (*See Midland Railway Co.* v. *Ambergate, etc.*, 1853, 10 Hare 359, 42 E & E Dig, 679; *Stevens* v. *Colonial Sugar Refining Co. Ltd.*, 1920 28 C.L.R. 330, 19 Aust. Dig. 331). Section 7 of the Ordinance, which provides for the termination of tenancies by notice to quit, and section 8, which provides for the length of notice to quit, are in terms which are only applicable to tenancies and not to licences. The former refers only to the termination of the term of interest of the tenant and a bare licensee, of course, has no term or interest. The latter section provides only for the length of notice necessary for the termination of a tenancy at will, a weekly tenancy, a monthly tenancy, a quarterly tenancy, and a yearly tenancy. Those two sections indicate the Legislature did not intend that the Ordinance should apply to licences, notwithstanding the wide definition of tenant which it had adopted.

The point raised by Mr Lambo is, however, covered by the authority to which he referred me. In *Akpiri* v. *The West African Airways Corporation* 1952, 14 W.A.C.A. 195, the West African Court of Appeal held that the licensee of a canteen who had been ejected from the Ikeja Airport without the steps prescribed by the Recovery of Premises Ordinance having been taken was entitled to damages for trespass. The basis of that decision was that the licensee was in occupation of the site of his canteen and was therefore a tenant within the definition of the Ordinance. While it would seem from the short judgment of the learned President that the considerations to which I have referred were not present to the minds of the members of the Court, I feel bound to follow that decision, leaving it to a higher Court to decline to follow it if it sees fit. The plaintiff's claims against the first defendant will therefore be dismissed.

I turn now to the second defendant. No evidence has been given whether or not the eldest son of the deceased was authorised by the plaintiff to let the piece of land occupied by that defendant. As the plaintiff was the only person legally able to deal with the land (*Fahn* v. *Ogbojulogun and Another*, 1935, 12 N.L.R. 47; *Jones* v. *Martins* 1943, 9 W.A.C.A. 100) and the onus is upon the defendant to prove that the eldest son was the plaintiff's agent, and not upon the plaintiff to prove that he was not, the second defendant's entry upon the land was a trespass. His defence, however, is in effect

that sometime after his entry he approached the plaintiff and, on the position being explained to the latter, he was told to remain as he was and he would be communicated with again later. He did not give evidence in support of that plea, his evidence merely being that he knew that the fourth and fifth defendants had seen the plaintiff and that they had told him that the plaintiff had told them to remain as they were for the time being. Both the two other defendants gave evidence of having interviewed an officer of the plaintiff and having been told to remain as they were for the time being, but they did not depose to having sought or been given that permission for the second defendant. Consequently, whatever may be the position of the fourth and fifth defendants there is no evidence that the second defendant was at any time granted a licence to occupy the land by the plaintiff and that he had ceased to be a trespasser before the commencement of this action.

Mr Lambo has submitted on the second defendant's behalf that even a trespasser is entitled at Common Law to notice to quit, and, as there is no evidence here that the second defendant was given such notice, an order for possession cannot be made in respect of this piece of land. In support of that startling proposition Mr Lambo relied upon the decision of the *Canadian Pacific Railway* v. *The King*, 1931 A.C. 331. Whether he intended that proposition also to be an answer to the claim for damages is not clear. Mr Lambo also submitted that, apart from the position at Common Law, the second defendant, as an occupier of the land upon which he was trespassing was a tenant within the meaning of the Recovery of Premises Ordinance, and he relied upon the reasoning in *Akpiri's* case (*supra*) in support of that submission.

The *Canadian Pacific Railway* case (*supra*) which was considered in *Bellotti's* case (*supra*), is not an authority for the proposition that a trespasser is entitled to notice to quit; what it is authority for is that a licensee does not become a trespasser until a reasonable time after the revocation of his licence. As the second defendant entered upon the land as a trespasser and never became a licensee before the issue of the writ in this action the *Canadian Pacific Railway* case does not assist him.

As to *Akpiri's* case (*supra*), although I feel bound to follow it in relation to licensees, I am not prepared to extend its application to trespassers. If the Legislature had intended to depart from the pre-existing law by protecting trespassers from ejectment unless given notice to quit it is to be expected that it would have said so expressly. In the absence of any such express provison the definition of "tenant" in section 2 of the Recovery of Premises Ordinance is to be read, in my judgment, as covering, by necessary implication, only persons lawfully occupying premises.

The result is, in my judgment, that the plaintiff is entitled to damages against the second defendant for trespass and to an order for possession of the piece of land occupied by him. No evidence of actual damage for the second defendant's trespass has been given except that he deposed to his rent under the unlawful tenancy granted to him by the deceased's eldest son being £1 per annum. In all the circumstances I think that a fair assessment of damages will be £5.

The trespass alleged against the third defendant is the erection of a house on the land purportedly let to him by the eldest son of the deceased. His defence is that he received permission from the plaintiff to erect the house. In evidence, the third defendant deposed that in 1954 he saw an officer of the plaintiff about his tenancy and explained to him that he had paid rent to the deceased's eldest son, and that the officer had told him to build his house and he would be informed later about the rent. That evidence was not contradicted. As the third defendant appeared to be a truthful

witness, his evidence was not seriously challenged in cross-examination, and there is no improbability in his account of having been given permission to erect his house, I find his defence established. The result is that his erection of the house was not a trespass and the claim for damages in respect of it fails.

The cases in respect of the fourth and fifth defendants may conveniently be considered together. Their defences were that they obtained permission from the plaintiff to remain on the pieces of land occupied by them until they heard to the contrary. Each deposed that, in 1956, after his house on the land had been damaged by intruders, he, with the other, saw an officer of the plaintiff and informed him of the tenancy from the deceased's eldest son and of the damage to his house, that the officer told them to remain on the land until they heard further, and that they did not hear anything further from the plaintiff before the service of the writ in this action upon them. According to the fifth defendant, the plaintiff's officer told him and the fourth defendant that the administration of the deceaseed's estate was proving difficult, that the plaintiff was about to divide and convey the land among and to the children of the deceased and that the defendants should remain as they were until they heard from those children. This evidence was also uncontradicted and for similar reasons to those mentioned with reference to the third defendant I feel bound to accept it as being substantially correct.

The result is that after the fourth and fifth defendants had trespassed upon the land each had received permission to remain on the land. That permission did not convert the two defendants into licensees retrospectively or discharged them from liability for their initial trespass, so that they are subject to that, and the claims for damages against them must succeed. The permission did however convert them into licensees from the date when it was given. The question which arises is: Does the non-revocation of the licence before the service of the writ afford an answer to the claims for possession? On the authority of *Akpiri's* case (*supra*) the permission does afford an answer as the defendants cannot be ejected except in accordance with the Recovery of Rent Ordinance and the requirements of that Ordinance had not been satisfied.

The permission also supplies an answer, I think, at Common Law. The service of the writ upon the defendants was itself a termination of their licence but as the termination would not take effect until a reasonable time for the defendants to remove themselves from the land had elapsed, that termination cannot be availed of in this action because, at the time of the service of the writ, the plaintiff's cause of action for ejectment had not accrued. The cause of action in ejectment is that at the time of the service of the writ the plaintiff was entitled to the immediate possession of the land claimed and he was out of possession. A licensor is not deprived of possession by his licensee until the licensee becomes a trespasser and as the fourth and fifth defendants did not become trespassers until a reasonable time after the service of the writ upon them the plaintiff did not have a cause of action in ejectment at that time.

The result is, in my judgment, that the plaintiff is entitled to judgment against the fourth and fifth defendants on the claims for damages but the claims for possession of the land occupied by them fail. As the only evidence relevant on the question of damages is that the rent of each defendant under his purported tenancy was £1 per year I assess the damages against each defendant in respect of the period of his trespass at £3.

There will be judgments as follows:

Judgment for the first defendant on both claims, the same being dismissed.

Judgment for the plaintiff against the second defendant in the sum of £5 on the claim for damages and that the plaintiff recovers possession of the premises shown in Exhibit "C" as occupied by the second defendant.

Judgment for the third defendant on the claim for damages, the same being dismissed. The claim for possession is struck out.

Judgment for the plaintiff against the fourth defendant in the sum of £3 on the claim for damages and for the fourth defendant on the claim for possession, the same being dismissed.

Judgment for the plaintiff against the fifth defendant in the sum of £3 against the fifth defendant on the claim for damages and for the fifth defendant on the claim for possession, the same being dismissed.

Claims against first defendant dismissed.

Judgment for plaintiff against second defendant.

Claim against third defendant for damages dismissed and claim for possession struck out.

Judgment against fourth and fifth defendants for damages but claims against them for possession dismissed.

AKGHENOBOR ONOBREDEFE ... ... *Appellant*

v.

1. EDOHOREN
2. URGEGBEYERE } ... ... *Respondent*

[HIGH COURT OF JUSTICE: Kester, Ag.J., 10th December, 1959.]

Criminal Law and Procedure—conduct likely to cause a breach of the peace—right of appeal by prosecutor in a Customary Court—section 48 (2) of the Customary Courts Law, 1957, construed.

The respondent had been prosecuted by the appellant in a Customary Court for conduct likely to cause a breach of the peace and convicted. He appealed to a Customary Court of Appeal and the conviction was set aside. On further appeal by the prosecutor (the present appellant) the respondent relying on section 48 (2) of the Customary Courts Law, took a preliminary objection that the appeal could not be entertained because there was no provision in the Customary Courts Law giving a right of appeal to a prosecutor.

Held: that section 48 (2) of the Customary Courts Law does not confer a right of appeal on a prosecutor.

Preliminary objection upheld and appeal struck out.

Warri Criminal Appeal No. W/42C.A./1959.

Ekeruche, for appellant.

Ovie-Whiskey, for respondents.

Kester, Ag.J.: The present appellant who was the complainant took action against the respondents in the Abraka Grade "C" Customary Court for conducting themselves in a manner likely to cause a breach of the peace by uprooting his newly planted young rubber trees at Egheregugu bush in Abraka. It was an action taken and heard in the Abraka "C" Customary Court in its Criminal jurisdiction. The respondents were found guilty and sentenced to a fine of three pounds or one month I.H.L. each. In addition the Court ordered both respondents to pay the complainant the sum of ten pounds the value of 1,600 trees destroyed by them. The respondents appealed to the Western Urhobo Grade "B" Customary Court which allowed the appeal and quashed the conviction. The sentence and order for payment of ten pounds to the appellant were also set aside. It is against this decision of the Grade "B" Customary Court of Appeal that the complainant/appellant now appeals to the High Court.

At the hearing, Counsel for the respondent took a preliminary objection that the appeal cannot be entertained by the High Court because of the absence of any provisions in the Customary Courts Law, 1957 giving a right of appeal to a complainant (prosecutor). He relies on section 48 (2) of the Law.

The right of appeal to the High Court from the decision or order of a Customary Court of appeal or a decision or order of a Magistrate's Court given or made on appeal from a Customary Court is conferred by section 48 (2) of the Customary Courts Law, 1957.

Section 48 (2) reads thus—

"Any party aggrieved by a decision or order of a Customary Court of Appeal or a decision or order of a Magistrate's Court given or made on appeal from a Customary Court in—

(*a*) A criminal cause or matter in which a term of imprisonment or a fine exceeding five pounds has been ordered, or

(*b*) A civil cause or matter in which the subject matter is of the value of fifty pounds or upwards, may within thirty days of the date of the decision or order, appeal to the High Court."

Section 48 (2) (*a*) relates to the right of appeal from a Customary Court of Appeal or from the decision or order of a Magistrate's Court given or made in a Criminal cause or matter, and sub-section (*b*) in like manner relates to appeal to the High Court in a Civil cause or matter. From the wording of section 48 (2) (*a*) it is clear and unambiguous that the right conferred by it is only for the benefit of a person who has been sentenced to a term of imprisonment or to a fine exceeding five pounds. While the right of appeal from a Customary Court of Appeal to the High Court is accorded an aggrieved party who has been sentenced to say, one or two or three days imprisonment, it is not accorded to an aggrieved party sentenced to a fine of five pounds with an alternative term of one month's imprisonment in default. It follows therefore that an aggrieved party within the meaning of section 48 (2) (*a*) cannot be any other person or persons than those it categorically stated, and certainly not a prosecutor or complainant for that matter.

By way of comparison it would be seen that the limitation contained in section 48 (2) (*a*) is not found in sections 46, 47 and 48 (1) of the Law in respect of appeals to a Customary Court of Appeal, appeals to a Magistrate's Court, and appeals from the decision or order of a Grade "A" Customary Court in its original jurisdiction to the High Court. In these three sections the meaning of an aggrieved party therefore in my opinion would include the complainant or prosecutor. Coming back to section 48 (2) (*a*) of the Customary Courts Law, it is plain that it was not the intention of the legislature to confer a right of appeal on a complainant or prosecutor in a Criminal matter or cause to appeal from the decision or order of a Customary Court of Appeal or the decision or order of a Magistrate's Court given or made in its appellate jurisdiction, to the High Court. If it was the intention of the legislature to confer such a right it would have stated so in clear terms as one finds in section 70 of the Magistrate's Courts (Western Region) Law, 1954. Section 70 states "where an accused person has been acquitted or an order of dismissal made by a Magistrate the prosecutor may appeal to the appeal Court from such acquittal or dismissal on the ground that it is erroneous in law or is in excess of the jurisdiction of the Magistrate".

In the circumstances therefore, I rule that the appellant in this case being the complainant or prosecutor has no right of appeal against the decision or order of the Western Urhobo Grade "B" Customary Court of Appeal to this Court. The appeal is struck out.

Preliminary objection upheld and appeal struck out.

A. C. OBIANWU ... ... *Plaintiff*

v.

UKWUANI DISTRICT COUNCIL ... ... *Defendant*

[HIGH COURT OF JUSTICE: Kester, Ag.J. 31st December, 1959.]

Claim for breach of contract against a local government council—contract for building of class-rooms—suit brought after six months of alleged breach of contract by defendants—whether section 242 of Local Government Law, 1957 affords protection.

The plaintiff instituted this action against the defendants claiming damages for breach of an agreement to build for them five class-rooms. The breach was alleged to have taken place on 6th December, 1956, when the defendants' secretary wrote to the plaintiff a letter wrongly terminating the contract. In their statement of defence the defendants averred that the plaintiff's action was statute barred by virtue of section 242 of the Local Government Law, 1957 since the cause of action accrued on 4th December, 1956, but the notice of intention to commence action against the defendants was not given by the plaintiff until 19th April, 1958, more than six months after the alleged breach.

Held: That since there was no evidence that the contract to build the class-rooms was entered into in the execution or intended execution of any public duty or authority by the defendants, the mere fact that they had the power to enter into the contract would not be sufficient to afford them protection under section 242 of the Local Government Law, 1957.

Judgment for plaintiff.

Cases cited:

Bradford Corporation v. *Myers*, [1916] 1 A.C. 242.

Griffiths and Another v. *Smith*, [1921] A.C. 170.

Warri Civil Suit No. W/97/1958.

Ovie-Whiskey, for Plaintiff.

Egbe, for Defendant.

Kester, Ag.J.: The Plaintiff's claim against the defendants, a Local Government Council is for the sum of £1,800 being general and special damages for breach of contract. The facts of the case as presented by the Plaintiff are that in consequence of the Tender Notice dated 16th October, 1956, Exhibit 2, issued by the Secretary of the Council, he applied for the contract which was in respect of building of six class-rooms in the Ukwuani District Council Secondary Modern School at Obiaruku. On 20th November, 1956, a letter of even date was received by the Plaintiff inviting him to call at the office of the Secretary of the Council to enter into an agreement in respect of the building of the class-rooms. The letter is Exhibit 3. In consequence of Exhibit 3, an agreement dated 20th November, 1956, was executed by the Plaintiff and the Secretary of the Council about the building of five class-rooms of the Council's Modern School at Obiaruku. The agreement is Exhibit 4. According to the Plaintiff the Secretary of the Council handed him a copy of the agreement and retained two other copies. Plaintiff said that the Secretary told him that the work was urgent and that he should get the buildings ready against January 1957 for the Pupils to occupy. Because of the urgent nature of the work Plaintiff said that he diverted 1,000 cement blocks from another

building contract he was doing at Kwale for £1,400 at the time. He tendered an agreement with the D.A., Aboh Division in respect of the work. It is Exhibit 5. Plaintiff gave a detailed account of all the materials he bought and brought to the School building site and what he paid for labour. After work had started on the School buildings on 21st November, 1956, and was in progress, Plaintiff said that on 1st December, 1956, three Councillors of the Ukwuani District Council came to the site and told him to stop the work because he did not come to see them before he started work. Plaintiff did not heed them but continued with the work. On 4th December, 1956, the three Councillors made another visit to the site and this time they went there with about fifteen men armed with diggers and shovels. According to the Plaintiff the Councillors broke down the walls erected at the site as well as the door and window frames there. The matter was reported to the Divisional Adviser in the area who wrote a letter Exhibit 11 to the Council.

As a result of the action of the three Councillors and their men, the Plaintiff and his workmen for fear ran away from the building site. Plaintiff said that up to 4th December, 1956, he had expended the sum of £421 11*s* in respect of the work at the School building site.

The third plaintiff's witness who was bricklayer working for Plaintiff at the time confirmed Plaintiff's evidence about the visits of the three Councillors and the action the men they brought, took in pulling down the building erected by the plaintiff. I believe his evidence and that of the Plaintiff on this point. The first witness for the Plaintiff, Mr Egbunwe who was the Education Officer, Kwale Division at the time, and who was the Chairman of the Board of Tender which awarded the contract for the five school-rooms to the Plaintiff said that in his official capacity he visited the site of the School building about five times and saw the progress of the work Plaintiff was doing. He said that about 15th December, 1956, when he last visited the site he saw that the walls of the class-rooms erected by the Plaintiff had been demolished and the ground levelled up. He described the state of the wall before it was demolished as being above ground level, *i.e.*, D.P.C. He also said that before the visit of about 15th December, 1956, on his previous visits he had seen cement blocks at the site. When he left the Division on 19th December, 1956, no new building had begun at the site. I accept and believe the evidence of this witness in its entirety.

In addition to the claim of £421 11*s* value of work done, Plaintiff also claim the sum of £300 for loss of profit and another sum of £1,078 9*s* as general damage.

The defendants' case is that when Exhibit 4 was executed and the Plaintiff was taken with it by the Secretary of the Council third defence witness before the Chairman of the Council, first defence witness; the first defence witness said that he did not like the wording of clause 8 of Exhibit 4 because it did not stipulate that payment will not be made in advance. He said that in consequence he told third defence witness to take back the agreements with the Plaintiff and Ogbemi and that a fresh agreement in the terms he wanted it as to clause 8 should be entered into and that Exhibit 4 should be cancelled. Third defence witness said that in view of what the Chairman said, he did not hand any copy of the agreement to the Plaintiff but kept them in his office. He further said that when Plaintiff was called to come and sign the new agreement he did not do so. Third defence witness said that six days after he had taken the Plaintiff and Exhibit 4 before the Chairman, he discovered that one copy of the agreement was missing from where he kept it in his office. Later he got to know that the Plaintiff had secretly obtained it and wanted to start the building. He wrote a letter dated

26th November, 1956 Exhibit 20 to the Plaintiff asking him to return the agreement. He sent the letter through the Council Messenger one Gold Odulu, fourth defence witness. The fourth defence witness said that he delivered the letter to the Plaintiff in the house of one Judo in Kwale. Plaintiff denied seeing fourth defence witness or receiving Exhibit 20. When Plaintiff did not return Exhibit 4, another letter dated 27th November, 1956 marked Exhibit 21 was sent to him by registered post. Plaintiff did not claim the letter and it was later returned by the post office to the Council. Exhibit 21, like Exhibit 20 was addressed to the Plaintiff care of No. 2 Rest House, Kwale. It should be noted that at the time, the Plaintiff was not in Kwale but at Obiaruku where work on the School building was in progress. Two other witnesses, the second and fifth defence witnesses were called by the defence. The Plaintiff denied tha the was taken before the Chairman on 20th November, 1956 after Exhibit 4 had been executed. He said that the Chairman was away in Warri on the day. First defence witness admitted that he was in Warri as from 19th November, 1956 to 20th November, 1956 and that he arrived back at Amai at about 1 p.m. on 20th November, 1956. I believe the evidence of the Plaintiff that after he had signed Exhibit 4, he was not taken before the first defence witness. I do not believe the third defence witness that the Plaintiff secretly obtained Exhibit 4 from where he kept it in his office. I believe and find as a fact that it was he who handed the agreement to the Plaintiff as his copy after the execution. The evidence of first defence witness that he asked third defence witness to take back the agreements with Plaintiff supports this. If the evidence of the third defence witness is true, the act of the Plaintiff would have been reported to the Police and he would have been arrested. The Chairman, first defence witness, said that he ordered that Exhibit 4 be cancelled and a fresh agreement be entered into because clause 8 of Exhibit 4 did not stipulate that payments would not be made in advance. I have examined clause 8 of Exhibit 4 while it did not say that payments would not be made in advance it did not say that they would be in advance. The fact that the Plaintiff started the work and carried it to the stage it was before it was demolished, shows that Plaintiff himself knew that payments would not be made in advance, and that fact should have satisfied the first defence witness instead of his demanding a fresh agreement. I do not believe that a fresh agreement was demanded before the Plaintiff started the work; the evidence about a fresh agreement was an afterthought when the Plaintiff did not heed the three Councillors about his coming "to see them" before starting the work. The threat contained in the closing part of paragraph 2 of Exhibit 21 that Plaintiff would not be allowed to put one block on the Secondary School premises....." was no doubt the reason for the action of the three Councillors and the gang of labourers they took to the building site. On the evidence before me I find as a fact that the contract (Exhibit 4) was duly entered between the Plaintiff and the Council and that in consequence of the agreement Plaintiff did some work and that the performance of the contract to the end was interferred with by the defendants or their agents. I do not believe that the letter of 26th November, 1956, Exhibit 20 was delivered by fourth defence witness to the Plaintiff asking him to return the agreement. I have considered the evidence of George Madu, fifth defence witness. I do not believe a word of what he said. There is no doubt about his being a bought witness.

Plaintiff's contract was wrongly terminated by the letter from the Secretary of the Council dated 6th December, 1956, Exhibit 12.

In their statement of defence, the defendants aver that Plaintiff's action is statute barred by virtue of section 242 of the Local Government Law, 1957. It is contended on behalf of the defendants that the cause of action accrued on 4th December, 1956 and

that the notice of intention to commence action against the Council was dated 19th April, 1958 and therefore that the period between the two dates is more than six months allowed by the Local Government Law, 1957. The action itself was not brought until 10th November, 1958. It was submitted that the action is statute barred. In short the defendants seek the protection afforded by the section of the Local Government Law, 1957.

The Provisions of section 242 of the Local Government Law, 1957 are similar to those of the Public Authorities Protection Act, 1893 in England. In order to ascertain what activities of a Local Government body are protected a look into some of the decided cases on the point will be necessary since not all the activities of a public body are protected. In the case of *Bradford Corporation* v. *Myers*, [1916] I.A.C.; 242 Lord Buckmaster L. C. said.....

> "it is not because the act out of which the action arises is within their power that a public authority enjoy the benefit of the Statute. It is because the act is one which is either in direct execution of a Statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty to the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply".

The view in *Myers'* case was upheld by the House of Lords in the case of *Griffiths and Another* v. *Smith*, [1941] A.C. 170. In the latter case Lord Porter observed:

> "I think it true to say that a private contract even if entered into in pursuance of an act of Parliament is not thereby protected, but an act which is done in performance of a public duty is still done in execution of a public duty though it is performed through the medium of a contract."

If there is no obligation to perform the duty the public body has no more rights than a private individual. So also the performance, or breach, of a contract which a public authority has the power, but not the duty, to make, is not within the protection.

Applying these principles to the present case, there is no evidence to show that the contract to build the five class-rooms was entered into in the execution or intended execution of any public duty or authority by the defendants. The mere fact that they have the power to enter into the contract is not sufficient to afford them protection. There must be evidence of an obligation on the part of the defendants to build the class-rooms. The defendants are not protected by the provisions of the Local Government Law, 1957 and the action by the Plaintiff is not statute barred. It is the six years period of limitation that applies and the action is brought within that period.

As stated earlier I find that there is a breach of contract by the defendants by the wrongful termination of their agreement Exhibit 4 with the Plaintiff and that they are liable. I am satisfied on the evidence that the Plaintiff did the work for which he claimed £421 11*s* before the agreement was terminated and that the sum of £300 loss of profit claimed by him is not exaggerated. In addition I hold that he also is entitled to general damage, which I assess at £50.

There will therefore be judgment for the Plaintiff against the defendants for the sum of £770.

Judgment for Plaintiff.

ONYOWE OCHINYE ... ... *Appellant*

v.

THE COMMISSIONER OF POLICE ... ... *Respondent*

Criminal Law—cheating contrary to section 421 of the Criminal Code—necessity for proof of a device or token—animus furandi *in offence of stealing, contrary to section 390 of the Criminal Code, may be subsequent to the original taking.*

The appellant, sometimes in 1957, left in his house a woman who was living with him as a wife and went to a fishing camp. The woman later left the house but took her belongings to another man for safe keeping. On 27th November, 1957 the appellant went to the house of the other man and told him that the woman had asked him (the appellant) to remove her belongings which she was keeping with him. The appellant was allowed to remove them and he took them away. When the appellant's house was subsequently searched by the police the box which had contained most of the woman's belongings was found empty even though it was found locked. He was subsequently charged before a Magistrate's Court for the offences of cheating, and stealing contrary to sections 421 and 390 respectively of the Criminal Code. Against his conviction and sentence the appellant has brought this appeal.

Held: (1) that since there was no evidence that any device or token was used by the appellant in getting the owner of the goods to part with them, the conviction of the appellant for the offence of cheating was wrong;

(2) that although the appellant had no intention of depriving the owner of the goods permanently of them at the time of the taking, the subsequent *animus furandi* would make the original taking a felony.

Appeal on count one allowed; but appeal on count two dismissed.

Warri Criminal Appeal No. W/50.C.A./59.

Irikefe, for Appellant.

Eboh, Senior Crown Counsel, for Respondent.

Kester, Ag.J.: The appellant was charged with cheating *contra* section 421 of the Criminal Code and with stealing *contra* section 390 of the Criminal Code, in respect of the same property, goods belonging to first prosecution witness.

The facts of the case are briefly that the appellant and first prosecution witness were living together as husband and wife. No evidence that they were married. In 1957 when appellant left home for three months for his fishing camp he left first prosecution witness at home. While he was away, first prosecution witness packed her things from the house and left. She kept her belongings, the subject matter of the charge with second prosecution witness. On 27th November, 1957 the appellant went to second prosecution witness and told her that first prosecution witness had asked him to remove the box and the basin she left with her. First prosecution witness was out of town at the time. Second prosecution witness allowed the appellant to remove the box and basin. Later when first prosecution witness returned and demanded her things, second prosecution witness told her how the appellant had come to collect them. The matter was reported to the Police. A search warrant was executed in the house of the appellant where a box, one basin, one plate and one head tie were found. The box was locked

and when it was opened, it was found to be empty. First prosecution witness alleged that the clothes and beads she kept in the box were missing. Some of the other articles were recovered from the house of the second accused. The learned trial Magistrate found the appellant guilty of cheating for taking first prosecution witness's properties from second prosecution witness in the manner he did. He also found him guilty of stealing the goods. He was sentenced to six months on count one—cheating, and nine months on the second count—stealing. The sentences were to be concurrent.

The only gound of appeal argued is that the decision is erroneous in point of law in that (*a*) no offence of cheating under section 421 was disclosed and (*b*) that the conviction under section 390 of the Criminal Code is misconceived in law having regard to the evidence. As to (*a*), cheating contrary to section 421 of the Criminal Code, the learned Crown Counsel for the respondent did not support a conviction by the Magistrate on this count since there was no evidence that any device or token was used by the appellant in getting second prosecution witness to part with the goods to him. As to (*b*)—stealing —the point of complaint is that since in his judgment the learned trial Magistrate held that when on 27th November, 1957 appellant took the properties from second prosecution witness his original intention was to hold them, and by so doing compel first prosecution witness to return to him, and that when the idea failed he decided to deprive her permanently of them, he was wrong in convicting appellant for stealing the properties on 27th November, 1957 because there was no intention on that day at the time of the taking. Counsel for appellant contended that the charge should have been amended as to the date when appellant decided to deprive first prosecution witness of the properties before convicting him. It was submitted that appellant was convicted for an offence not charged before the Magistrate.

By the pretence to second prosecution witness, the appellant obtained the properties wrongfully. If he had been charged with obtaining property by false pretence contrary to section 419 instead of cheating, the conviction would have been good. The Crown Counsel urged that since there is evidence to support a charge of false pretence, the Court should apply the provisions of section 174 (2) of the Criminal Procedure Ordinance and alter the finding on count two to one of obtaining goods by false pretence. Although there i power to do this, but it cannot be exercised in this case since the fraudulent misrepresentation was not made to the first prosecution witness but to the second prosecution witness. The provisions of section 174 (2) of the Criminal Procedure Ordinance would in my view only apply in cases where a person is charged with stealing the property of *A* but the evidence reveals that it is a case of obtaining the goods from *A* by false misrepresentation.

Coming back to the finding of the learned trial Magistrate on the charge of stealing I do not agree with Counsel for appellant that it was wrong to have convicted the appellant since the intent to deprive first prosecution witness of her goods was not formed at the time of the taking.

The evidence before the Court shows that appellant wrongfully came by the goods by falsely pretending to second prosecution witness that the owner had sent him to collect them, although at the time he had no *animus furandi*. If there was no intent to deprive the owner of the goods at the time of the taking, subsequent *animus furandi* would make the original taking a felony. The supervening *animus furandi* at any moment of a continuing trespassing possession will complete the offence of Larcency and make the trespasser a thief. (*Pollock on Torts*, 14th Edition, page 309).

It was a fact that appellant had no intention of depriving first prosecution witness of her goods when he obtained them from second prosecution witness in the manner in which he did, but his depriving her of them subsequently after 27th November, 1957 amounted to stealing and in my opinion he was rightly convicted by the Magistrate.

The appeal on count one is allowed and the conviction and sentence quashed.

The appeal on count two is dismissed. Conviction and sentence affirmed.

Appeal on count one allowed; but appeal on count two dismissed.

IN RE KASALI ANIKILAYA ... ... *Applicant*

IN THE MATTER OF AN APPLICATION BY KASALI ANIKILAYA FOR AN ORDER OF COMMITTAL FOR CONTEMPT OF COURT.

[HIGH COURT OF JUSTICE: Charles, J., 9th February, 1960.]

Contempt of Court—alleged contempt by Governor in Council for approving appointment to a chieftaincy after an order Nisi for a writ of Prohibition—what amounts to criminal cotempt of court.

This application is for the committal of the Governor in Council for criminal contempt of court for approving the appointment of one Sikiru Adetona as the Awujale of Ijebu-Ode even after the Governor in Council had become aware that the validity of the appointment was being challenged by proceedings for a writ of *prohibition* for which an order *nisi* had been cbtained by the applicant.

Held: (1) that the approval of the appointment of the said Sikiru Adetona as the Awujale of Ijebu-Ode by the Governor in Council even after the order *nisi* for the issue of the writ of *prohibition* has been obtained was not a contempt of the Court;

(2) that as a general rule of law a person who has been sued in respect of an alleged wrongful act is free to continue or complete his alleged wrongful act until the suit has ended adversely to him unless the Court has specifically enjoined him not to do so.

Quere: Whether the Governor in Council (or the Executive Council without the Governor) can be guilty of a contempt of Court.

Application dismissed.

Cases cited:

The Queen v. *Gray* [1900] 2 Q.B. 36.

The Queen v. *Oldham Press Ltd.* [1956] 3 All E.R. 4941.

Abeokuta Civil Suit No. AB/43/59.

Charles, J.: This is an application on motion for an order for committal for contempt of court against the Governor in Council and the Minister of Local Government of the Western Region.

The circumstances which have given rise to the application are as follows: On the 26th November, 1959, the applicant took out a notice of motion *ex parte* for an order *nisi* for a writ of *prohibition* to issue against the Governor in Council restraining him from considering with a veiw to approval the declaration of the appointment of Sikiru Adetona as the Awujale of Ijebu-Ode. As a Judge was not immediately available in the Division to hear the motion the space in the notice of motion for the hearing date was left blank. On the 11th December, 1959, the applicant took out another notice of motion, the proposed motion being for an interlocutory injunction to restrain the Governor in Council from considering and approving the declaration of appointment referred to pending the determination of the proceedings for a writ of *prohibition*. This second notice of motion, in which the date for hearing was also left blank, was served on the Governor in Council. On the 4th January, 1960, which was before the Administration of Justice (Crown Proceedings) Law, 1959 came into force and substituted orders for the prerogative writs, the Governor in Council announced the recognition of Sikiru Adetona as the Awujale of Ijebu-Ode. At that time dates for the hearing of the applicant's two motions had not been fixed. The applicants case is

that the Governor in Council was guilty of a criminal contempt of court by dealing with the appointment after he had become aware that its validity was being challenged by proceedings for a writ of *prohibition*. Although the present application is in form for an order of committal, learned counsel for the applicant has stated that he does not desire that order but will be content with an order for either a fine or binding over the Governor in Council.

In my judgment the application must fail on the ground, irrespective of other grounds of objection which have been taken to it, that the approval of the appointment or purported appointment of Sikiru Adetona as the Awujale of Ijebu-Ode was not a contempt of court.

In the *Queen* v. *Gray* [1900] 2 Q.B. 36, page 40, Lord Russells, C.J., made this statement with referencet o contempt of court—a statement which has been quoted with approval in subsequent cases:—

> "Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Court is a contempt of Court".

Learned counsel for the applicant cited several authorites, based on the statement, for the purpose of showing that the respondent's act was a contempt of Court as being one which was inconsistent with the authority of this Court and which interfered or was calculated to interfere with the due administration of justice by this Court, in that it was a presentation of a *fait accompli* to the Court. None of the authorites cited, either in its facts or as an application of the principle underlying Lord Russell's statement, supports that submission. That is not surprising. If the submission of learned counsel for the applicant were to have any validity, it would be, and could only be, upon the basis that, the moment a plaintiff or applicant for relief in respect of an allegedly wrongful act of the defendant or respondent commences proceedings in a Court of competent or apparently competent jurisdiction, the defendant or respondent is automatically restrained, or enjoined from continuing to do the allegedly wrongful act. That proposition is clearly not the law as otherwise there would have been no occasion for equity to give its remedies of interim and interlocutory injunctions in respect of claims at common law. It is significant, moreover, that the granting of leave, under the modern procedure, to apply for an order of prohibition does not restrain the continuation of the act sought to be prohibited pending the determination of the application for the order unless the Court, when granting leave, so directs (Hals. 3rd Ed., Vol. 8, page 72).

The position as it appears to me, is that, as a general rule, a person who has been sued in respect of an alleged wrongful act is free to continue or complete his alleged wrongful act until the suit has ended adversely to him unless the court has specifically enjoined him not to do so, the basis being that the suing party has the onus of proving both the doing of the act which is alleged to be wrongful and the wrongfulness of that act. No doubt the sued person acts at his peril lest the Court should decide, and award damages, against him or declare his act a nullity, but the continued doing of the act, in the absence of an interim order of the Court, does not flout the Court's authority and does not prevent the Court from administering justice in due course, that is, by pronouncing upon the validity of the act impartially and according to law.

It may well be that this general proposition, like most general propositions, is subject to exceptions, so that cases may arise in which the doing or continued doing of an act which is the subject of commenced litigation has the tendency to flout the authority of the Court or to interfere with or prevent its due administration of justice. I use the word "tendency" as preferable to "calculated", having regard to the decision in *The Queen* v. *Oldham Press Ltd.* [1956] 3 All.E.R. 494, where it was held that a guilty mind is not an element in criminal contempt of court. Whether such exceptions can arise it is unnecessary to consider here, as I cannot regard the respondents act of approving or purporting to approve the challenged appointment of the chief as tending to flout the authority of this Court or prejudice it in determining by due course of law, the application for writ or order of prohibition. The Court, as yet, has made no order against the respondents and consequently its authority has not been flouted to date by them. Further, to succeed on his application, which has since been amended to one for an order of prohibition, the applicant will have to satisfy the court on various grounds that he is entitled to the order sought. If he does succeed in that, the respondents' act will legally be a nullity; if he fails in that, the respondents will merely have done what they were entitled in law to do, and that cannot be a contempt of court. Finally, it cannot be seriously suggested for one moment that the respondents' act, the act of an executive authority, can have any real tendency to influence this Court to decide eventually in its favour.

Having decided the application on the ground stated, it is perhaps as well that I should expressly state that I do not decide impliedly any more than expressly upon any of the other points which were raised including whether the Governor in Council, that is under the Interpretation Ordinance as amended, the Executive Council without the Governor can be guilty of a contempt of Court.

The application will be dismissed.

Application dismissed.

SALAMI LAWAL ... ... *Appellant*

v.

THE COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Kester, Ag.J., 25th February, 1960.]

Criminal Law and Procedure—mode of proving signatures—acceptance of evidence of non-expert—Magistrate himself compared admitted signatures of appellant with disputed signatures—section 60 (1) and (2) of the Evidence Ordinance, Cap. 63.

The appellant was convicted in a Magistrate's Court for stealing various sums of money. At the trial the Magistrate accepted the evidence of a witness who was not an expert but who stated he was conversant with appellant's signature as they had worked together, as proof that the appellant had made certain signatures in dispute. The signatures acknowledged the receipt of certain sums of money which ought to have been paid into a bank by the appellant but which were not paid. The defence of the appellant was that he did not receive the sums of money nor did he make the signatures acknowledging their receipt. In addition to the acceptance by the Magistrate of the evidence of the witness referred to above the Magistrate himself compared the disputed signatures with others admitted by the appellant to be his own and came to the conclusion that the disputed signatures were made by the appellant.

Held: (1) that the trial Magistrate being a judge of fact and law was within his rights in making the comparison referred to and acting upon his conclusion of fact;

(2) that the trial Magistrate was right in law in accepting the evidence of the witness referred to above.

Appeal dismissed.

Criminal Appeal No. W/96CA/59.

Ororoh, for *Egbe*, for appellant.

Apara, Crown Counsel for respondent.

Kester, Ag.J.: The appellant ws convicted by the Senior Magistrate, Sapele on four counts of stealing contrary to section 390 of the Criminal Code. He was sentenced to three months I.H.L. on each count. The sentences were ordered to be consecutive. At the time mentioned in the charge, the accused, a police officer was the person receiving monies paid by the Bank of West Africa Limited, Sapele for Police Specie Escorts. The sums of money mentioned in the charge were alleged to have been paid by the Bank to the appellant through the office of the Sergeant Major. The system was that the Bank would send the money to the Sergeant Major's office, and from where it would be dispatched to the office of the accused who was to issue receipts. No receipts were issued in respect of some payments made by the Bank for Specie escorts and as a result this case came to light. The sums of money paid to the Sergeant Major's office by the Bank were sent to the appellant in a dispatch book which he signed when he received them. The dispatch book is Exhibit "C" in the proceedings. Accused admitted his signatures or initials in some of the entries in Exhibit "C" as having received them; he denied other signatures or initials in the dispatch book and said that he did not receive the items to which they relate. In short he said that the sums of money from the Bank covered by these items in the dispatch book Exhibit "C" were not received by him. The fifth prosecution witness who was the recorder in the Sergeant Major's office and the person

who made the entries in Exhibit "C" said that he took the sums of money to the appellant and that he signed for them. He said that the signatures denied by the appellant were made by him when he received the money. The learned trial Magistrate after a careful examination of the evidence before him accepted the story of the prosecution and found that the appellant received the various sums of money and that he was the person who made the signatures or initials relating to these sums of money in Exhibit "C". He convicted the appellants on all four counts. It is against the decision that this appeal is brought. The first ground of appeal argued was that the trial Magistrate misdirected himself in law in holding that he had compared the disputed signatures with the undisputed ones in the dispatch book, Exhibit "C" and that in his opinion they were all made by one and the same person; and thereby came to a wrong decision on the acceptance of proof in support of the charge. It was contended on behalf of the appellant that the trial Magistrate had no legal right to make the comparison of the signatures as he did. Reference was made to section 60 of the Evidence Ordinance, Cap. 63, as to proof of handwriting by a person who is acquainted with the handwriting of the person by whom it is supposed to be written or signed.

Although this is one way of proving a disputed handwriting, counsel for the appellant argued that another method of doing it is for the court to compare the disputed writing with one admitted by the person by whom it is supposed to have been made. But he mentioned that this could only be done by the jury and not by a Judge sitting without jury. On this basis he argued that since the trial of cases in this country is not by jury but by a sole Judge that method of proving a handwriting in dispute cannot apply. It is a well known principle of law that questions of law are for the Judge to decide and that the jury decide questions of fact. The fact whether a disputed handwriting was that of a person is a question of fact and one for the jury. But where a sole Judge sits without a jury he has to decide both questions of law and fact. The learned trial Magistrate was in that position when he took upon himself to compare these signatures in Exhibit "C" admitted by the appellant with the ones he denied. The comparison may be made either by witnesses acquainted with the writing or by experts or without the help of either by the jury. *Phipson on Evidence*, 9th Edition, page 117.

The comparison in this case by the learned trial Magistrate is within his rights and there is nothing wrong in what he did. There is no substance in this ground of appeal and it must fail.

The second ground of appeal taken up was that in his judgment the learned trial Magistrate erred in law in accepting the opinion of the Sergeant Major, fourth prosecution witness as to the signature when it was obvious from the cross-examination that he (fourth prosecution witness) did not satisfy the requisite conditions in law. The conditions referred to are those contained in sections 60 (1) and (2) of the Evidence Ordinance as to opinion in respect of handwriting. Sub-section 2 says—

"a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him".

In his evidence fourth prosecution witness said that he saw the signatures in the dispatch book, Exhibit "C", and that all the twenty-two entries in it, the subject matter of the charge were signed for as having been received. He also said that he was conversant with the signature of the appellant and that he was satisfied he signed for the despatches. Under cross-examination he said that he was quite conversant with the signature of the accused because they had worked together. Although he did not see appellant sign, but the signatures were his. He refused to accept the suggestion by counsel for the defence that appellant did not sign the despatches in dispute.

"A Statement that a witness is acquainted with the party's handwriting is generally sufficient in chief, it being for the opponent to cross-examine as to means and extent". *Phipson on Evidence*, 9th Edition, page 416. It is for the purpose of ascertaining the means and extent of the witness being acquainted with a party's handwriting that the tests in section 60 (2) of the Evidence Ordinance are to be applied by the opponent. It is not necessary for the witness to state them in his evidence in chief to prove that he was acquainted with the handwriting. The learned trial Magistrate did not therefore err in law in accepting the evidence of the fourth prosecution witness on that point. Apart from the evidence about handwriting the learned trial Magistrate believed and accepted the evidence of the fifth prosecution witness that it was the appeallnt who made the disputed signatures. This is a finding of fact which this court cannot, on the whole evidence before the Magistrate disturb.

In my view the Magistrate came to a right conclusion in the case and the appeal against conviction must be dismissed.

As to the ground of appeal relating to sentence I see no substance in the argument by counsel for the appeallant. If there is anything wrong with the sentences passed by the Magistrate, it is that he erred too much on the side of leniency.

The appeal against sentence is also dismissed. The conviction and sentences are affirmed.

Appeal dismissed.

ROURAFRIC AND FAR EASTERN LIMITED ... *Plaintiff*

v

THOMAS PHOTO AND SONS ... ... *Defendant*

[HIGH COURT OF JUSTICE: Kester, Ag.J., 1st March, 1960.]

Power of Attorney—power duly executed in England but not stamped in Nigeria—its admissibility not objected to by parties—document not admissible until properly stamped —section 21 (1) of the Stamp Duties Ordinance, Cap. 209 construed.

The plaintiffs, a company trading in England, took action against the defendants, a firm trading in this country. The plaintiffs appointed an attorney for purposes of this suit. At the hearing the attorney tendered the power of attorney under which he was appointed. It was later discovered that although the power was duly executed in England it was not stamped in Nigeria as provided for under section 21 (1) of the Stamp Duties Ordinance, Cap. 209. The defendants then objected to the attorney giving evidence but on behalf of the plaintiffs it was contended that since the document was already admitted in evidence, the defendants had waived their rights and could not later object to its being admitted in evidence.

Held: (1) that the mere fact that a power of attorney was properly executed in England does not exempt it from duty in this country as provided for under the Stamp Duties Ordinance;

(2) that it is the duty of the Court not of the parties in a case to reject an unstamped or insufficiently stamped document sought to be tendered in evidence.

Power of attorney ordered to be withdrawn.

Case cited:

Stonelake v. *Babb*, 5 Burr 2674.

Izuora, for Plaintiffs.

Ekeruche, for Defendants.

Warri Civil Suit No. W/98/1958.

Kester, Ag.J: In this case a trading Company in England took action against another firm trading in this country. The plaintiff appointed the first prosecution witness as their attorney to represent them and gave him powers to do so under a letter of power of attorney. At the hearing the first witness for the plaintiff tendered the power of attorney and it was admitted in evidence and marked as Exhibit 1. Later on in the proceedings it was discovered by the defendants that the power of Attorney although executed in England was not stamped in Nigeria as provided for under the Stamp Duties Ordinance, Cap. 209. The power of attorney is not one of those documents exempted from stamping under the Schedule to the Ordinance. The defendants objected to the witness giving evidence. Counsel for the plaintiffs submitted that since the document was already admitted in evidence, the defendants have waived their rights and cannot later object to it being admitted in evidence. The power of attorney, Exhibit 1, although executed in England is an instrument chargeable with duty in Nigeria. The mere fact that it was executed in England does not exempt it from duty

in this country. It is in the same position as the power of Attorney in the case of *Stonelake* v. *Babb*, 5 Burr. 2674, quoted in *Law of Stamp Duties* by Alpa, 23rd Edition, page 47. In that case the power of attorney executed in England to receive debts in Newfoundland was held to be chargeable.

Although the power of attorney tendered in this case was admitted in evidence by the court without objection on the part of the defendants, it is waiver on the part of the latter. It is not the duty of the party to object to a chargeable instrument without stamp being admitted in evidence but that of the court. It is the duty of the Judge to reject an unstamped or insufficiently stamped document tendered in evidence. The objection cannot in any way be got rid of, even by consent of the parties. In the circumstances therefore the power of attorney, Exhibit 1, is to be withdrawn because it was not stamped and in the exercise of the discretion contained in section 21 (1) of the Ordinance, Cap. 209 I order that payment of the unpaid duty and penalty payable on stamping it plus a sum of 20*s* be paid to the officer of the court to enable the document to be received in evidence.

Power of attorney ordered to be withdrawn.

THE QUEEN
v.
AKANBI LAYIWOLA

[HIGH COURT OF JUSTICE: Charles, J., 2nd March, 1960.]

Criminal Law and Procedure—charge of Manslaughter—possibility of conviction for an offence contrary to section 18 (1) of the Road Traffic Ordinance—section 179 (1) and (2) of the Criminal Procedure Ordinance applied—proof of death in the absence of medical evidence.

The accused was charged with the manslaughter of one Yesufu Bello. The case for the prosecution was that the accused drove a vehicle in which the deceased was a passenger negligently in his approach to a Railway crossing, so that when the railway gate was shut against him he was unable to stop until his vehicle straddled the railway lines and he then found himself in a sitation in which he had to reverse quickly. It was while reversing that he struck and killed the deceased who had got out apparently in a fit of panic. It was argued for the Crown that if the facts did not amount to manslaughter, the court could, by virtue of section 179 (1) of the Criminal Procedure Ordinance, find the accused guilty of an offence contrary to section 18 (1) of the Road Traffic Ordinance. There was no formal medical evidence as to the death of the deceased.

Held: (1) that the facts did not establish a case of manslaughter against the accused;

(2) that the court could, acting under section 179 of the Criminal Procedure Ordinance, properly on a charge of manslaughter find an accused guilty of an offence contrary to section 18 (1) of the Road Traffic Ordinance, but that the facts of the present case did not satisfy the court beyond reasonable doubt that the accused was guilty of negligent driving;

(3) that although there was not tendered to the court formal medical evidence as to the death of the deceased, the evidence as to the circumstances in which he received his injuries and that he was found dead immediately after clearly established that fact.

Accused found not guilty.

Cases cited:

Andrews v. *The Director of Public Prosecutions*, [1937] A.C. 576.
R. v. *Joseph Williams*,3 W.A.C.A. 289.
R. v. *Adokwu* (1958) 20 N.L.R. 103.

Abeokuta Charge No. AB/43c/59.

Apara, Crown Counsel, for the Crown.
Sofola, for the accused.

Charles, J.: The accused is charged with manslaughter, contrary to section 325 of the Criminal Code in that, on the 6th July, 1959, at Wasimi Railway Crossing on the Lagos-Abeokuta Road, he unlawfully killed Yesufu Bello. The charge arises out of a motor accident.

Manslaughter by negligence may be described as the causing the death of another by a reckless disregard of those precautions which a reasonable and prudent person would take in the prevailing conditions and circumstances to avoid inflcting death or

injury to those to whom he owes a duty of care. As to recklessness being a requirement, *see Andrews* v. *the Director of Public Prosecutions*, [1937] A.C. 576 H.S.; R. v. *Joseph Williams*, 3 W.A.C.A. 289; Glanville Williams, *Criminal Law*, *vol. 1*, Arts 19, 21, 29, 30). Hence, in any judgment, the accused is guilty of the offence charged if, but only if, the evidence, when considered in its entirety, established beyond reasonable doubt each of the following:—

(*i*) That Yesufu Bello sustained injuries in an accident with a motor vehicle.

(*ii*) That Yesufu Bello died as a result, wholly or partly, of the injuries so sustained.

(*iii*) That the accused was the driver of the motor vehicle involved in the accident.

(*iv*) That the accident was caused, wholly or in part, by the accused failing to exercise that care in the driving of his motor vehicle which a reasonable and prudent driver would have exercised in the prevailing conditions and circumstances so as to avoid an accident.

(*v*) That the accused's failure to exercise the care last mentioned was more than momentary and was such as to render him a danger to the lives of his passengers or other users of the road.

(*vi*) That the accused drove his motor vehicle knowing that he was not observing the ordinary standard of care mentioned and that consequently he could be a danger to the lives of other users of the road or with indifference to the need to observe that standard of care and to that possibility. Indifference, in this connection, is some such state of mind as that "Rules are necessary for the other fellow" or "accidents don't happen to me".

It was submitted on behalf of the Crown that, if the accused were acquitted of manslaughter but the Court was satisfied that he had committed one of the offences under section 18 of the Road Traffic Ordinance, No. 43 of 1947, he could be convicted of such offence under the charge of manslaughter by reason of section 179 of the Criminal Procedure Ordinance (Cap. 43). Counsel for the accused submitted, on the other hand that, as the usual practice is for the Crown to add, in an information for manslaughter, one or more counts each alleging an offence under section 18 of the Road Traffic Ordinance, section 179 of the Criminal Procedure Ordinance cannot, or should not, be invoked when the charge of manslaughter was not proved.

I agree with the submission of learned Counsel for the Crown. The effect of section 179 of the Criminal Procedure Ordinance was considered by Bairamian, J., in the *Queen* v. *Adokwu* (1958) 20 N.L.R. 103. I only desire to add to that Learned Judge's remarks the following:—

> The common law rule is that a person acquitted of a felony or misdemeanour charge against him can be convicted of a lesser felony or misdemeanour, as the case may be, provided that all the essential elements o fthe lesser felony or misdemeanour have been proved and they form part of the elements of the felony or misdemeanour charged against him.

The rule does not apply, however, so as to permit a person acquitted of a felony charged against him being convicted of a misdemeanour of which all the constituent elements are comprised in the elements of the felony charged. It seems to me that section 179 (1) of the Criminal Procedure Ordinance is intended to apply the common law rule without the restriction to offences of the same degree, so as to permit a person acquitted of a felony charged against him being convicted of a misdemeanour or simple

offence, and not only of a lesser felony, or a person acquitted of a misdemeanour charged against him being convicted of a simple offence, and not only of a lesser misdemeanour. The common law conditions as to proof of the essential elements of the lesser offence and as to those elements forming part of the offence originally charged still remain, of course.

As for sub-section (2) of section 179, which apparently gave Bairamian, J., some concern, I agree that it appears to be superfluous or redundant at present. It cannot apply to a charge of an offence as to the onus of proving which is entirely upon the Crown. Its object apparently is to meet a case where the accused has the burden of proof.....upon him and he discharges that burden only to the extent of reducing the offence from that charged to a lesser one. An instance where that could happen at present does not readily come to mind, and the provision may well have been inserted in order to give completeness to what is intended to be a code of criminal procedure.

It follows, having regard to the analysis above, that if the evidence fails to establish elements (1) and (2) or either of them, but establishes the other elements, the accused must be acquitted of manslaughter but may be convicted of reckless driving contrary to section 18 (1) of the Road Traffic Ordinance. If the evidence fails to establish element (6) but establishes elements (3), (4) and (5) with or without the first two elements, the accused may be convicted of dangerous driving contrary to the same section, or if it establishes elements (3) and (4) with or without the first two elements but it does not establish elements (5) and six the accused may be convicted of negligent driving. The fact that it is a common practice for the Crown to add one or more counts, each specifying an offence under section 18 of the Road Traffic Ordinance, to a count for manslaughter cannot affect the interpretation or application of section 179 of the Criminal Procedure Ordinance.

I turn now to the evidence in this case. I have no doubt that the first three elements mentioned above have been established against the accused. Formal medical evidence as to the death of Yesufu Bello was not available but the evidence as to the circumstances in which he received his injuries and that he was found dead immediately after clearly establishes that fact.

The evidence, however, does not satisfy me as to the fourth element, that of negligence. The Crown's case is that the accused was negligent in his approach to the Railway Crossing, so that, when the Railway gate was shut against him, he was unable to stop until his vehicle straddled the Railway lines, and he then found himself in a situation in which he had to reverse quickly. It was while reversing that he struck and killed the deceased, who had been a passenger in his vehicle and had got out apparently in a fit of panic.

It is tempting to say that, whatever may be the merits of the conflicting evidence as to the accused's speed, his failure to stop immediately upon the gate being shut against him itself shows that he was not approaching the crossing at a proper speed and keeping a proper look-out. The evidence, however, admits of the possibility that the gate-keeper may have been at fault, particularly as he was not called as a witness nor was a statement even obtained from him. Consequently, I am not prepared to consider the mere fact that the accident happened at a Railway Crossing establishes beyond reasonable doubt that the accused was negligent.

As I have mentioned, the evidence as to the accused's speed was conflicting. It was also far from satisfactory. The first prosecution witness stated that the accused from the start of his journey was driving fast and that he had warned the accused of that. He also stated that the accused said that he would overtake another lorry which was ahead of him, and which shortly afterwards crossed at the Railway Crossing before the gate was shut. The evidence was denied by the accused who stated that he had been travelling all the morning at between fifteen and twenty miles per hour until he reached a warning sign when he slowed down to below fifteen miles per hour.

That evidence was corraborated by the second witness for the prosecution, who said that the accused had been travelling slowly, and by the first prosecution witness himself, as he gave evidence to the effect that the accused has taken about an hour and half to cover the distance between Abeokuta and the Railway Crossing which, according to the evidence is nearly twenty-one miles. The first prosecution witness appeared to be honest but I cannot regard his opinion that a vehicle was travelling fast as being reliable. Further, the accused himself appeared to be an honest witness.

There was one other piece of evidence upon which the Crown relied, a sketch of the scene of the accident which was made by a constable. It showed, *inter alia*, the distance of skid marks which the accused allegedly had admitted as having been made by his vehicle. The accused denied having made the admission and signed the sketch. After comparing the purported signature of the accused on the sketch with a specimen signature made by him and the writing of the accused's name which the constable had placed on a copy of the sketch, so as to show that the accused had signed the original, I have considerable doubts whether the accused did sign the original sketch. I cannot, therefore, act on the sketch as containing evidence of the accused's speed.

The result is that while it appears to me probable that the accused was guilty at least of negligent driving, I am not satisfied beyond reasonable doubt that he was so guilty. Consequently not only does the charge of manslaughter fail but the implied alternatives. The accused will be found not guilty.

Accused found not guilty.

OTOBO AGBODE ... ... *Appellant*

v.

THE COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Morgan, J., 14th March, 1960.]

Criminal Law—accusation of witchcraft—section 210 (b) of the Criminal Code—appeal against sentence—reduction of sentence on appeal.

The appellant along with another, was charged at a Magistrate's Court for the offence of accusing one Otobene Agbro with having the power of witchcraft contrary to section 210 (*b*) of the Criminal Code and also for assaulting the same woman and causing her harm contrary to section 351 of the Criminal Code. There was evidence that the appellant assaulted the complainant and accused her of being a witch and of having bewitched her husband thus causing him to be ill. He was convicted on both offences and sentenced to imprisonment for three months on each count.

Held: (1) that although two offences are created by section 210 (*b*) of the Criminal Code, a person who accuses another of being a witch can be guilty of accusing the other of having the power of witchcraft;

(2) that since there was nothing on record to indicate the reasons why the trial Magistrate imposed the sentences he did, the Appeal Court would look into the facts as they appear on the record and decide whether the sentence should be allowed to stand; and that there being no evidence that the appellant had a previous record in respect of either or both offences, the sentences would be reduced.

Appeal against conviction dismissed but sentence reduced.

Cases cited:

Samuel Gumbs, 19 C.A.R. 74.

Warri Criminal Appeal No. W/71.CA/1959.

Ovie-Whiskey, for Appellant.

Osinibi, Crown Counsel, for Respondent.

Morgan, J.: This is an appeal from the decision of the Magistrate, Warri, given at Kwale on the 20th day of January, 1959.

At the Magistrate's Court the appellant and another person, a woman, were charged in count one with accusing one Otobene Agbro with having the power of witchcraft. contrary to section 210 (*b*) of the Criminal Code and in count two with assaulting the same woman and causing her harm contrary to section 351 of the Criminal Code.

The case for the prosecution was that the complainant went with her brother-in-law and another person to consult the Ifa Oracle in the house of the appellant in connection with her husband's sickness. The complainant said that the appellant called her a witch and accused her of bewitching her husband and being responsible for his illness. She said that she denied being a witch and asked the appellant to refund to her the sum of £3 18*s* 6*d* which she paid him and that the appellant, being annoyed, slapped her and asked the members of his house-hold to beat her. She said that she was beaten up and injured.

At the trial second accused accepted responsibility for causing injury to the complainant while the appellant denied calling the complainant a witch. He said that he did not even know that she was assaulted.

The learned trial Magistrate in his judgment said "first accused not only accused first prosecution witness (appellant) of witchcraft but also assaulted her". He found both accused guilty on count 1 and the appellant guilty of common assault. He passed on each of them a sentence of three months imprisonment with hard labour on each count, the sentence to run concurrently in respect of each accused person. It is against the judgment and the sentence that the appellant has appealed to this Court.

Three grounds of appeal were filed and argued, namely:—

1. That the decision is altogether unwarranted, unreasonable and cannot be supported having regard to the weight of evidence.

2. That the learned Magistrate erred in law when he found that the accused persons called the first prosecution witness a witch but convicted them of a different offence: that of accusing one Otobene Agbro of having the power of witchcraft.

3. That the sentence passed by the learned Magistrate on conviction is excessive.

In respect of the first ground there was evidence that the appellant accused the complainant of being a witch and of having bewitched her husband and of being responsible for his illness. This was evidence upon which a conviction can be based either for calling the complainant a witch or accusing her of having the power of witchcraft. For to say that she had bewitched her husband and was responsible for his illness is, in my view, to accuse her of having the power of witchcraft. If the learned Magistrate believed the complainant's evidence both in respect of the accusation relating to witchcraft and to assault there will be no justification for quashing the conviction. I have no reason to say that he was wrong to accept the complainant's evidence and her own version of the incident as being the true one.

As regards the second ground of appeal it is well to point out that section 210 (*b*) of the Criminal Code deals with two offences. One, the accusing of any person with being a witch and the other, of accusing any person with having the power of witchcraft. The section reads as follows:

"Any person who accuses or threatens to accuse any person with being a witch or with having the power of witchcraft is guilty of a misdemeanour, and is liable to imprisonment for two years".

Although two offences are created by the sub-section the two offences are interrelated. In my view a person who is accused of being a witch is by necessary implication accused also of having the power of witchcraft, although the reverse inference does not necessarily follow in respect of a person who is accused of having the power of witchcraft, because it is conceivable that a person may have any such power as is credited to persons called witches without necessarily being a person who should be so called.

In this case the evidence adduced to the lower Court by the complainant was that the appellant accused her of being a witch and of bewitching her husband and being responsible for his illness. The learned Magistrate believed the evidence of the complainant that the appellant called her a witch and assaulted her. In my judgment this finding of fact and the inference that must be deduced from it, as well as the views

taken by the learned Magistrate of the credit-worthiness of the complainant, leave no room for doubt that the learned Magistrate accepted her evidence that the appellant accused her of bewitching her husband and of making him ill; in effect of having the power of witchcraft.

In my judgment there was evidence before the learned Magistrate to support a conviction either of an accusation of being a witch or an accusation of possessing the power of witchcraft. And even though the learned Magistrate has not so explicitly found, there is no doubt, having regard to the evidence before him and his finding that the appellant accused the complainant of being a witch, that he was justified in convicting the appellant of the offence charge in count one of the charge and of common assault in count two. In any event, the appellant has suffered no miscarriage of justice by the omission of the learned Magistrate to find explicitly that the appellant accused the woman of having the power of witchcraft.

For the foregoing reasons I hold that the first two grounds of appeal fail and I dismiss the appeal against conviction. In respect of the third gound of appeal the learned Magistrate gave no reason whatever for the sentence he passed on the appellant. In the case of *Samuel Gumbs*, 19 C.A.R. 74, at page 75, Hewart, L.C.J., said that there must be some error in principle for the appellate Court to reverse a sentence and that the Court never interferes with the discretion of the Court below merely on the ground that it might itself have passed a different sentence. In my view unless there is on the record some indication of the reason for imposing a particular sentence the High Court is thereby obliged to look into the facts as they appear on the record and decide whether the sentence ought to stand or be varied. In the present case, as there is no evidence that the appellant had a previous record in respect of either of both offences I am of the view that the sentences are rather stern for a person who appears to be a first offender. I therefore alter the sentences and order that they be varied to be as follows:

First Count ten pounds or one month I.H.L.

Second Count five pounds or two weeks I.H.L.

Sentences to be consecutive and fines cumulative.

Appeal against conviction dismissed but sentence reduced.

FELIX OMODION ... ... *Appellant*

v.

THE INSPECTOR-GENERAL OF POLICE ... *Respondent*

[HIGH COURT OF JUSTICE: Morgan, J., 15th March, 1960.]

Criminal Law and Procedure—charge of making false statement to a public officer, contrary to section 125A (1) (b) of the Criminal Code—whether omission of particular words is fatal—onus of proof of knowledge of the falsity—sections 125 (3) and 166 of the Criminal Procedure Ordinance—sentence of imprisonment based on right considerations, appeal court will not interfere.

The appellant was on 22nd day of December, 1958 convicted on a charge framed as follows:

"That you, Felix Omodion on the 2nd of May, 1956, at the Nigeria Police Station, Ughelli, in the Warri Magisterial District, made a statement to P.C. No. 3844 2 C.C. Stephen Iduoze, a person employed in the Public Service, to wit: a Police Officer, that your B.S.A. Bicycle No. H 75838 was stolen by (1) Ekibodo, (2) Orezi, (3) Ohwomuro, (4) Ojukiri and (5) Machine, a statement which you knew to be false, and in order that the said P.C. No. 3844 2 C.C. Stephen Iduoze may use his lawful Police powers to the annoyance of the said men mentioned above, and thereby committed an offence punishable under section 125A (1) (*b*) of the Criminal Code".

The Magistrate in sentencing him to a term of four months imprisonment with hard labour gave as his reasons the fact that the offence of giving false information was rampant in the district and that he viewed the offence with great concern. Against the conviction and sentence the appellant has brought this appeal. It was argued on his behalf that the charge was bad in law because the essential ingredients were omitted namely "with the intention" and "employed in the public service" and that the second ingredient should have been alleged after the words "Stephen Iduoze", and also that the words "such powers" ought to have followed "powers". It was also contended that there ought not to be a conviction under the section of the law unless there was positive proof of the knowledge of the accused or the belief of it, as to the falsity of the information. Finally it was argued that the sentence was excessive.

Held: (1) that although it is best to employ the expression used in the Criminal Code in stating the ingredients of an offence, a conviction based on a charge in which such expressions have not been specifically used will be good if they give the accused person reasonable information as to the nature of the charge;

(2) that the issue as to what an accused knows or does not know, or what he believes or does not believe is a matter particularly within his own knowledge and that, barring cases in which an accused person confesses to such knowledge or belief, this can only be proved by inference from the evidence;

(3) that for the reasons given by the trial Magistrate, the nature and *quantum* of the punishment imposed is justified.

Appeal dismissed.

Cases cited:

R. v. *James and another* (1871) 12 Cox 127, 128.

R. v. *James Ernest Bandoh*, 10 W.A.C.A. 190.

R. v. *Ogba Azu*, 12 W.A.C.A. 486, 487.

Warri Criminal Appeal No. W/64CA/59.

Ogbe, for Appellant.

Osinibi, Crown Counsel, for Respondent.

Morgan, J.: This is an appeal against the decision of the Senior Magistrate, Warri, given at Warri on the 22nd day of December, 1958.

The charge in respect of which the appellant was convicted reads as follows:

"That you, Felix Omodion on the 2nd of May, 1956, at the Nigeria Police Station, Ughelli, in the Warri Magisterial District, made a statement to P.C. No. 3844 2 C.C. Stephen Iduoze, a person employed in the Public Service, to wit: a Police Officer, that your B.S.A. Bicycle No. H 75838 was stolen by (1) Ekibodo, (2) Orezi, (3) Ohwomuro, (4) Ojukiri and (5) Machine, a statement which you knew to be false, and in order that the said P.C. No. 3844 2 C.C. Stephen Iduoze may use his lawful Police powers to the annoyance of the said men mentioned above, and thereby committed an offence punishable under section 125A (1) (*b*) of the Criminal Code".

The facts proved in support of the case for the prosecution are these:

At about 2.15 p.m. on the 2nd May, 1956 the appellant went to the police station at Ughelli and reported to the police that a B.S.A. bicycle was stolen from his compound at about 3 p.m. on 30th April, 1956 and that he suspected five persons, whose names he gave to the police, of the theft. The five names given to the police were Ekikodo, Orezi, Ohwomuno, Ojukiri and Machine Obukata (*see* Exhibit E). The complaint was referred to the first prosecution witness, Stephen Iduoze, for investigation and the witness went with the appellant to Ozoro. They arrived there at about 11.45 p.m. and the witness was given lodging in the house of the Ovie. The appellant told the first prosecution witness that he was going out and did so. He came back at about 1 a.m. and brought back the bicycle which, according to his complaint to the police, was stolen. He told the first prosecution witness that he went to the compound of the persons against whom he lodged his complaint and told them that he had brought a policeman with him but that he would not cause them any trouble if they returned his bicycle. He said that one man named Ohwomuro demanded the sum of £1 and that on paying the money the bicycle was returned to him. On the following morning the Ovie sent for the five suspects. All of them denied the accusation made against them and Ohwomuro stated that he lent the appellant the sum of £20 with which to stand for election and that when he asked for his money back the appellant told him to go and institute proceedings against him to recover it. He said that he instituted action against the appellant and that it was because of that, that the appellant falsely accused him of stealing a bicycle.

The appellant, giving evidence at his trial, confirmed the accusation he made against the five suspects. He also confirmed (*see* page 12 of the record) that he was served on 2nd May, 1956 with a summons issued at the instance of Ohwomuro claiming from him the sum of £20. He went on "I was annoyed. I got a car and came to Ughelli to lodge a complaint about the missing bicycle". In connection with the recovery of the bicycle he said "At Ozoro the Police Constable who went with me said he was too popular at Ozoro. He requested me to proceed with the negotiation for the release of the bicycle. I gave £1 to Boy Ereghe, who gave the 20*s* to Pius and Pius in turn gave it to Ekikodo. Ekikodo gave the 20*s* to Ohwomuro".

After considering the facts the police charged the appellant with committing an offence contrary to section 125A (1) (*b*) of the Criminal Code. He was tried and the learned Senior Magistrate, after hearing the case for both sides, convicted him and sentenced him to a term of four months I.H.L.

It is against the conviction and sentence that he has appealed to this Court.

Three grounds of appeal were first filed and a fourth was added by leave of the Court. The grounds are as follows:

1. That the decision is altogether unwarranted, unreasonable and cannot be supported having regard to the weight of evidence.

2. That additional grounds will be filed when the records of the case are made available to counsel who did not appear at the trial before the learned Magistrate.

3. That the sentence is excessive.

4. (*a*) That the decision is erroneous in point of Law:

(*i*) in that the charge as laid is bad in law in that essential ingredients were omitted from the charge, namely, "with the intention" and "employed in the public service" and that the second ingredient should have been alleged after the words "Stephen Iduoze" in the last but four line.

(*ii*) That in the last but four line after the word "Powers", "such powers" should have been inserted in the charge.

(*b*) (*iii*) That there ought not to be a conviction under the section of the law without positive proof of the knowledge of the accused or the belief of it, as to the falsity of the information".

I struck out what purported to be the second ground of appeal and the learned counsel for the appellant argued the remaining three grounds.

In arguing the first ground he submitted that the appellant and his witnesses adduced evidence to the lower court showing that a bicycle was stolen. He directed attention to a statement alleged to have been made by one Ekikodo Oreze, one of the suspects, and put in evidence as Exhibit G. In the statement Ekikodo (one of the five persons whom the appellant alleged came to his compound (*see* page 14), while denying that he went to the appellant's house and stole the bicycle admitted that he got 20s from Pius and handed it to Ohwomuro, that Ohwomuro, brought out the missing bicycle, and that he handed the bicycle to the appellant after they had come out of Ohwomuro's compound.

In my view the document was inadmissible in evidence to prove the truth of the statement contained therein, it being an extra-judicial statement, its maker not having been sworn and subjected to the test of cross-examination.

In my judgment the learned trial Magistrate gave careful and detailed consideration to the facts before him and having regard to the manner in which the appellant left the first prosecution witness in the Ovie's house and came back some hours later with the bicycle alleged to have been stolen, the loss of which the first prosecution witness left Ughelli with him to go and investigate, and his admission that he went to make the complaint after he was served with the writ of summons issued at the instance of Ohwomuro, I can find no reason or cause to disagree with the learned Magistrate's finding.

As regards ground 4 (*a*) there is no doubt that an omission to allege an essential ingredient of the offence charged is usually said to be fatal to conviction.—*R.* v. *Shaibu Yakubu*, 10 W.A.C.A. 267, 268 and *R.* v. *James and another*, 12 Cox 127.

But is there such omission in this case? It is true that the expression used in section 125A (1) is "with the intention of causing such person" to use his lawful powers to the annoyance of any other person. According to Lush, J. in *R.* v. *James and Another*, (1871) 12 Cox 127, 128:

> "I must hold the words" with intent to defraud "to be a material part of the indictment, nor can I amend it under the 14 and 15 Vict. C. 100 S. 1 and as the words are not inserted, their omission is I think fatal to the prosecution, therefore this indictment must be quashed."

The case was considered by the West African Court of Appeal in *R.* v. *James Ernest Bandoh*, 10 W.A.C.A. 190. In applying the principle stated above the Court said at page 191 "We are of opinion that the particulars given in the present case fail to state what is necessary for giving reasonable information as to the nature of the charge and that consequently the information is bad". The omission in the Bandoh case was the failure to state in the particulars of a charge of perjury that the statement alleged to have been made by the appellant was false to his knowledge or that he did not believe the same to be true. In my view although it is best to employ the expression used in the Criminal Code in stating the ingredients of an offence, conviction based on a charge in which such expressions have not been specifically used will be good if they give the accused person reasonable information as to the nature of the charge. In this connection reference should be made to section 152 (3) of the Criminal Procedure Ordinance which provides that "The particulars in the charge shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms". Furthermore section 166 of the Criminal Procedure Ordinance provides as follows:

> "No error in stating the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission."

I am sure that the appellant was not misled. In my judgment the charge as laid, stating as it did that the appellant made the statement in question to a person employed in the public service, as a police officer, in order (or with the intention) that he should use his lawful police powers to the annoyance of the said men, gave the appellant reasonable information in non-technical terms as to the nature of the charge.

Under ground 4 (*b*) (*iii*) the learned counsel for the appellant has argued that there must be positive proof of the knowledge by the accused, or his belief, as to the falsity of the information he gave to the police. A case which comes near to the point in issue in respect of this ground is *R.* v. *Ogba Agu*, 12 W.A.C.A. 486, 487, where Verity, C.J., said "It is true I think, therefore, sufficiently clear that the onus lies on the prosecution to prove that the accused had knowledge of his possession of forbidden articles or at least to prove facts which would justify the inference that he had such knowledge." The case deals with an offence under section 10 of the West African Currency Notes Ordinance but I am of the opinion that the issue as to proof of the falsity of the information given to the police by the appellant is of a similar nature as proof of the knowledge by an accused person of the possession of forged currency notes. Unless an accused person confesses to such knowledge the issue as to what he knows or does not know, or what he believes or does not believe is a matter peculiarly within his own knowledge

which cannot be proved except by evidence which will justify an inference of such knowledge or belief. In the present case, having regard to the findings of the learned Magistrate as to the reason why the appellant made the complaint to the police, the inference that he knew that the information he gave was false is irresistible.

Finally as regards ground 3 the learned Senior Magistrate stated that the offence of giving false information was rampant in his district and that he viewed the offence with great concern. He also stated that the appellant was an ex-police constable. In my view the reasons given by the learned Magistrate justify the nature and *quantum* of the punishment imposed.

For the foregoing reason I am of the opinion that there is no merit in any of the grounds of appeal argued and that they all fail. I hereby dismiss both the appeal against conviction and that against sentence.

Appeal against conviction and sentence dismissed.

OLOTU AKPOLOKPOLO ... ... *Appellant*

v.

THE COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Morgan, J., 16th March, 1960.]

Criminal Law—giving false information to a public officer—admissibility of a wife's evidence against her husband—sections 160 (2) and 161 of the Evidence Ordinance, Cap. 63, applied.

The appellant was charged before a Magistrate's Court for giving false information to a person employed in the public service that is, a police officer, with the intention of causing him to use his powers as a police officer to the injury and annouance of one Akpojofor Okunuadere. At the trial, one of the witnesses for the prosecution was one Ejijovo Olotu who said on oath: "I know the accused, he is my husband". There was no evidence whether the marriage between the appellant and the witness was a monogamous marriage. She was not called to give evidence on the application of the appellant.

Held: (1) that the evidence of the witness Ejijovo Olotu was not admissible against the appellant by virtue of section 160 (2) of the Evidence Ordinance, she not having been called on the application of the appellant or with his consent;

(2) that having excluded the evidence of the witness Ajijovo Olotu the Appeal Court is unable to say that the trial Magistrate would still have convicted the appellant and therefore this appeal is bound to succeed.

Appeal allowed.

Cases cited:

Francis Keshiro and Another v. *Inspector-General of Police*, 1955-56 W.R.L.N.R. 84.

Udofa Unwa Idiong and Another v. *The King*, 13 W.A.C.A. 30.

R. v. *Momodu Laoye*, 6 W.A.C.A. 6.

R. v. *Ajiyola and Others*, 9 W.A.C.A. 22.

R. v. *Ajibodu Afenya* (un-reported) but *see* cyclostyle W.A.C.A. reports January-February 1947, page 9.

Warri Criminal Appeal No. W/41CA/1959.

Ovie-Whiskey, for appellant.

Osinibi, Crown Counsel, for respondent.

Morgan, J: This is an appeal from the decision of the Senior Magistrate, Warri, given on the 23rd day of December, 1958.

In the lower court the appellant was charged with giving false information to a person employed in the public service, a police officer, with the intention of causing him to use his powers as a police officer to the injury and annoyance of a person named Akpojotor Okunuadere, an offence punishable under section 125A (1) (*b*) of the Criminal Code.

The case for the prosecution, put briefly, was as follows:

In July 1957 the appellant procured one Akpojotor's lover to have carnal connection with his own friend, Isaac. Both of them quarrelled and on 8th July, 1957, the appellant complained to the first prosecution witness, Police Constable No. 1488 Edwin Oyewole to the effect that Akpojotor threatened his life with a gun. One of the witnesses for the prosecution was Ejijovo Olotu who said on Oath:

"I know the accused, he is my husband".

At the close of the case for the defence the learned Counsel for the appellant submitted that the evidence of the appellant's wife should be disregarded because she was not called to give evidence on the application of the appellant. He cited section 160 (2) of the Evidence Ordinance and *Francis Keshiro and Esther Keshiro* v. *Inspector-General of Police*, 1955-56 W.R.N.L.R. 84 but was over-ruled. That the learned Magistrate attached such importance to the evidence given by the woman there can be no doubt. He said (at p. 17, lines 2 to 7) "I accept the testimony of the third prosecution witness notwithstanding the suggestion of the defence that she was trying to side her brother. In this connection it is noteworthy to mention that this woman is at present in family way for the accused. She is a witness of truth".

The learned Counsel for the appellant filed and argued five grounds of appeal to wit:

1. That the decision is unwarranted, unreasonable and cannot be supported having regard to the weight of evidence.

2. That inadmissible evidence has been admitted by the Magistrate's Court and that there is no sufficient admissible evidence to sustain the decision after rejecting such inadmissible evidence.

3. That the decision of the learned Senior Magistrate is erroneous in point of law when the said learned Senior Magistrate ruled that the wife of the appellant is a compellable witness and when he presumed that the marriage between the appellant and his wife, the third prosecution witness in this case, is a polygamous marriage even though this fact was not proved by the prosecution.

4. That the sentence passed on conviction is excessive.

5. That the decision was erroneous in point of law when the learned Senior Magistrate did not presume in favour of the accused that his wife who gave evidence against him was not a competent witness without his consent and that she was not a compellable witness in the absence of proof to the contrary by the prosecution.

A sixth ground which was filed as an additional ground was abandoned.

Apart from the appeal on ground 4 the other grounds, in one way or another, rest upon the effect of the evidence of the wife of the appellant, the third prosecution witness. I shall therefore deal with the issue of her evidence.

Section 160 (2) of the Evidence Ordinance provides as follows:

"When a person is charged with an offence other than one of those mentioned in the preceding sub-section (which does not include section 125A (1) (*b*)) the husband or wife of such person respectively is a competent and compellable witness but only upon the application of the person charged".

There is no dispute that the witness was not called upon the application of the appellant. And section 161 of the Ordinance provides as follows:

"When a person charged with an offence is married to another person by a marriage other than a monogamous marriage such last named person shall be a competent and compellable witness on behalf of either the prosecution or the defence".

The application of this rule of evidence was explained by Verity, C.J., in *Udofa Unwa Idiong and another* v. *The King*, 13 W.A.C.A. 30, at page 31. He said "Apart from the fact that it appears from the record that this witness was sworn 'on gun' and that her husband is stated to be a pagan, there is nothing to show that the marriage was other than a monogamous marriage within the meaning of section 161 of the Evidence Ordinance (Cap. 63) or that the witness was not a 'wife' as defined by section 2 of the Ordinance, and therefore a competent and compellable witness only upon the application of the first appellant".

This question has been dealt with in a number of cases. In *R.* v. *Mamodu Laoye*, 6 W.A.C.A. 6, it was said that where a witness was sworn on the Koran she was "presumably a Mohamedan" but the Court added: "a point of this important should not be left to presumption". In *R.* v. *Ajiyola and others*, 9 W.A.C.A. 22, where both the witness and the person charged were sworn on the Bible the Court said "it must be taken that they are husband and wife of a 'Christian marriage' and the woman was only a competent witness if called upon the application of the person charged". In *R.* v. *Ajobodu Afenya*, W.A.C.A., Judgments January-February 1947, page 9, it was laid down that "it is necessary for the prosecution to show that the marriage is not monogamous and that this cannot be presumed..... In our view.....no presumption arises from either the fact that the witness was sworn 'on gun' or from the fact that the first appellant is stated to be a pagan."

The case of *Idiong* v. *The King*, 13 W.A.C.A. 30, and the cases cited therein are authorities in point in this case and not *Keshiro* v. *Inspector-General of Police*, 1955-56, W.R.N.L.R. 84. I am bound by those authorities and agree with them with respect.

In my judgment therefore the evidence of the third prosecution witness is not admissible in evidence, she not having been called on the application of the appellant or with his consent.

From this conclusion I proceed to deal with the weight that attaches to the remaining evidence upon the exclusion of the evidence of the third prosecution witness. As I have stated earlier the learned Magistrate attached much importance to the evidence of the third prosecution witness, apparently because she was the appellant's wife and on the presumption, which may have no foundation in fact, that because she was still his wife and carrying his unborn child she must be a truthful witness. I am unable to say that the learned Magistrate would still have convicted the appellant if the evidence of the third prosecution witness had been excluded from the evidence adduced before him. For this reason I uphold the appeal on grounds 1, 2, 3 and 5.

There is no need to consider the fourth ground. I hereby allow this appeal and set aside the conviction and sentence. I discharge the appellant.

Appeal allowed.

1. JOSEPH OYEKUNLE ARAGBA ... ...
2. SALAMI DUROJAIYE ARAGBA ... ...
3. YESUFU AJALA ARAGBA ... ... } *Plaintiffs*
(For themselves and on behalf of the children of Aragba, deceased).

v.

1. LAWANI AKANJI ... ...
2. SIYANBOLA ADIGUN ... ...
3. LADEJI AKANMU ... ... } *Defendants*
4. ADELEKE AJAO ... ...
5. ADEBAYO ALAO ... ...

[HIGH COURT OF JUSTICE: Taylor, J., 11th April, 1960.]

Administration of estate—claim for an account from administrators by children of the deceased—section 12 (1) of the Western Region High Court Law, 1954, construed.

The plaintiffs on behalf of themselves and other children of one Aragba, deceased, brought this action against the defendants who had been duly appointed as administrators of the deceased's estate by the order of an Ibadan Native Court dated 7th July, 1957, claiming from the defendants an account of all their dealings with the deceased's estate and also for payment over to the plaintiffs of any amount found due to them.

After pleadings had been filed by both parties, the defendants contended that the High Court had no original jurisdiction to try this cause because of the proviso to section 12 (1) of the Western Region High Court Law, 1954.

Held: that since on the pleadings it was apparent that the defendants were being sued as the administrators of the estate which was subject to the jurisdiction of a Native Court, the High Court had no original jurisdiction to entertain this claim because of the proviso to section 12 (1) of the Western Region High Court Law, 1954.

Case struck out.

Cases cited:

Raimi Igbodu and others v. *Momodu Amoo*, 1957 W.R.N.L.R. 22.

Oyebimpe Idowu and another v. *Salami Adisa and another*, 1957 W.R.N.L.R. 167.

Ibadan Civil Suit No. I/98/59.

Craig for plaintiff.

Agbaje (*Junior*) for defendant.

Taylor, J.: By the writ the plaintiffs, as the Attorneys of the children of the late Aragba, sue the defendants the Administrators of the estate of the said deceased for an account of all their dealings with the said estate and payment over of the amount found due to them.

Paragraph 3 of the Statement avers as follows:

"The defendants by order of the Ibadan Native Court dated the 7th day of July, 1957 were empowered to administer the estate of the said deceased".

Following upon this the defendants plead that this Court has no original jurisdiction to try this cause and Mr Agbaje Junior relies for this contention on the proviso to section 12 (1) of the Western Region High Court Law, No. 3 of 1955 which states that—

"Provided that.....(the omissions do not affect us)...the High Court shall not exercise original jurisdiction in any matter which is subject to the jurisdiction of a Native Court relating to marriage, family status, guardianship of children and inheritance or disposition of property on death".

The issue being fought out here is whether this cause relates to inheritance or disposition of property on death. My attention was directed by learned counsel for the defence to the following cases:—

1. *Raimi Igbodu and two other Administrators and Administratrix of the Estate of Raji Igbodu deceased* v. *Momodu Amoo*, 1957 W.R.N.L.R. page 22 where Stuart, J., held that the High Court by virtue of the same proviso had no original jurisdiction to try a suit in which the plaintiff as administrators and administratrix of the estate of the deceased claimed certain chattels and money allegedly detained (or retained) by the defendant. The plaintiffs made their claim for the purpose of administering the estate of the deceased. The plaintiffs had been empowered by the Native Court, Ibadan to administer the estate of the deceased.

"There is no doubt" says Stuart J. "that this is a cause relating to the administration of the deceased's estate."

With this I agree but at the same time it must be borne in mind that the proviso under consideration then and now refers not to "a cause relating to the administration of the deceased's estate" but to "a cause relating to inheritance or disposition of property on death". Whether the word "administration" is synonymous with the words "inheritance or disposition" I am not here prepared to say more than that to me the former seems a more embracing word than the latter two which would seem to refer to two specific headings of the former. I say this however in obiter for in the case before me I shall confine myself to the wording of the particular ordinance under review.

2. The second case to which my attention was drawn was that of *Oyebimpe Idowu and another* v. *Salami Adisa and another* 1957 W.R.N.L.R. page 167. In that case the High Court presided over by Ademola, C.J. (as he then was) sitting in its appellate jurisdiction held that—

"The learned Magistrate, it would appear, overlooked the fact that this is purely a matter relating to administration of an estate subject to the jurisdiction of the Native Court and that his jurisdiction to hear such matters is excluded by the proviso to section 18 of the Magistrates Courts (Western Region) Law No. 5 of 1955".

The case mentioned above was referred to and followed. The proviso to the relevant Magistrates' Courts' Law as unamended also employs the words "inheritance or disposition of property on death."

Mr Craig for the plaintiffs here contended that the defendants are not here sued as administrators of the estate and that the two cases above have no application. In this learned counsel is in error for the first paragraph of his writ and paragraphs 3, 4, 5, 6 and 7 of the Statement of Claim make it abundantly clear that such is the case.

Again learned counsel contended that in the present suit unlike the authorities already referred to the plaintiffs are not the administrators of the estate suing in a matter subject to the jurisdiction of the Native Court. I cannot see that the wording of the particular ordinance which makes provision for "any matter which is subject to", limits the interpretation or operation of the ordinance as contended by learned counsel.

It is clear from the writ that the plaintiffs as beneficiaries of the estate of Aragba deceased are suing the defendants as administrators of the said estate by virtue of an order of the Ibadan Native Court dated the 7th July, 1957, in respect of their actions as such administrators. In paragraph 4 of the Statement of Claim the plaintiffs aver that the defendants have disposed of certain properties of the estate in the course of their administration and by virtue of such disposition hold funds in their hands to which the plaintiffs feel they are entitled. As a result they claim an account of all such dealings with the estate and payment over of what is due to them. Does the action, the subject matter therefore not relate to the properties of Aragba disposed of on his death? Of course it does.

In my view original jurisdiction is not in the High Court and I strike out this action and make no order as to costs.

Case struck out.

JAMES OGIDI ... ... *Appellant*

v.

THE COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Morgan, J., 19th April, 1960.]

Criminal Law and Procedure—seditious publication contrary to section 51 (1) (c) of the Criminal Code—what amounts to seditious intent—admissibility of secondary evidence—authority to prosecute required by section 52 (2) of the Criminal Code given by the Director of Public Prosecutions—section 3 of the Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958.

The appellant was convicted at the Magistrate's Court, Warri for publishing, concerning the administration of justice in the Western Region of Nigeria, a certain seditious publication contrary to section 51 (1) (c) of the Criminal Code. The publication complained of (*quoted fully in the judgment of the Court infra*) appeared in the front page of the *Midwest Champion* of the 2nd July, 1959. On appeal before the High Court it was argued on behalf of the appellant that the publication was not seditious as the seditious intent required for the offence was not established, and also that certain exhibits, mainly copies of the original document given to the Editor for publication were wrongly admitted. It was finally argued on behalf of the appellant that the trial Magistrate had no jurisdiction to hear the case because the authority to prosecute which ought to have been given by the Attorney-General as required under section 52 (2) of the Criminal Code was given by the Director of Public Prosecutions.

Held: (1) that if while purporting to point out a grievance, a publication is at the same time calculated to whip up hostile feelings against the administration of justice, such a publication could nevertheless be seditious;

(2) that to say that Customary courts acted deliberately against political opponents of the Party in power in the Region, that they deny justice to supporters of such political opponents, that these courts do not administer British justice, that they must be regarded as Communist institutions, and that citizens are not safe as long as they exist, amounts to seditious publications;

(3) that since the Editor of the *Midwest Champion* had said in evidence that he could not find the original statement handed over to him by the appellant for publication, secondary evidence of the statement is admissible to prove that what was published in the paper was the one written by the appellant;

(4) that by virtue of the Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958 the written authority required under section 52 (2) of the Criminal Code is that of the Director of Public Prosecutions and not that of the Attorney-General (in the Western Region).

Appeal dismissed.

Cases cited:

R. v. *Burns* 16 Cox C.C. 355.

R. v. *Wallace Johnson*, 5 W.A.C.A. 56.

The African Press Ltd. v. R., 4 W.A.C.A. 57.

R. v. *Lambert and Perry*, 2 Camp 398.

R. v. *Aldred*, 74 J.P. 55.

Bromage v. *Prosser*, 4 B and C 247.

R. v. *Pearce*, 1 Peake (3rd ed.) 106.

Makin v. *The Attorney-General for New South Wales*, [1894]. A.C. 57.

Warri Criminal Appeal No. W/70.CA./59.

Egbe, for *Okorodudu*, for the Appellant.

Aguda, *Senior Crown Counsel*, for the Respondent.

Morgan, J.: This is an appeal against the decision of the Senior Magistrate, Warri, given on the 3rd day of September, 1959.

At the Magistrate's Court the appellant was charged with publishing, concerning the administration of justice in the Western Region of Nigeria, certain seditious publication and thereby committing an offence punishable under section 51 (1) (*c*) of the Criminal Code.

The case for the prosecution, put briefly, was as follows:

On the 2nd day of July, 1959, a statement was published on the front page of the *Midwest Champion*, a newspaper "owned, printed and published by the Midwest Printing and Publishing Co., 7 James Street, Warri", under the heading: "Warri NCNC sends telegram to Chief F. R. A. Williams. Says it has lost confidence in Customary Courts". The publication was put in evidence at the trial and marked Exhibit A.

The remaining portion of the statement reads thus:—

"We strongly suggest abolition customary courts Warri Division or replace judges in them. Since establishment Customary Court acted deliberately against political opponents of Action Group. Justice denied Nation Co. Supporters charged to court. Accused sentenced refused bail on appeal by undue conditions. Option fines denied. Customary Court procedure based on Action Group doctrine. British Justice not in practice in courts. Warri Customary Courts are Action Group, institutions destined (appointed or established) to punish Nation Co. supporters. British protected persons nay Warri citizens not used to this un-British Justice. Unless these courts (are) abolished we deem them Communist institutions. Citizens (are) not safe with Customary Courts still existing Warri. Aims of Customary Courts misinterpreted in Warri. Nation Co. and all citizens lost confidence and West Regional Government name and good intention dragged in the mud due primitive interpretation of justice Customary Courts Warri Division. Minister Justice called upon to take immediate action abolished or order inquiry.

(*Sgd.*) Ogidi NCNC Divisional Secretary, Warri".

The police interviewed David Ozurumba, P.W. 5, who told the trial court that although he was the editor of the *Midwest Champion*, he was not the author of the statement in question. He said that the appellant brought a copy of the telegram to him, that he published its contents, and that they were exactly as published in Exhibit A. He said furtner that in the presence of the police he searched for the copy of the telegram that the appellant showed to him but that he could not find it.

The appellant himself, when interviewed by the police, admitted to Police Constable Saibu Momoh that he was the author of the statement in question and gave to the witness his own office copy of the telegram. Two post office receipts (*see* Exhibits E, E 1, and E 2) are pasted on the telegram.

The statement published in Exhibit A is a correct reproduction of the statement contained in Exhibit E, which in itself is a correct reproduction of the statement contained in Exhibits B and C. Exhibits B was the telegram sent by the appellant to Chief F. R. A. Willimans who was, at that time, the Minister of Justice, Western Region. And Exhibit C was the telegram sent to the Nigeria Broadcasting Corporation, Lagos, the West African Pilot, Yaba, and Chief Okotie-Eboh, Lagos.

In his statement to the police, Exhibit F, the appellant said that it was he who gave Exhibits E, E 1 and E 2 to the police and that Exhibit B, of whidh Exhibit E is the office copy, was similar to the telegram that he sent to Chief Williams.

A document was tendered and marked Exhibit D and contains the written consent of the Director of Public Prosecutions in the Region authorising the prosecution of the appellant.

The appellant did not give evidence on oath but his counsel in his cross-examination of the witness for the prosecution laid the foundation of the defence which he later put forward in his address. In reply to some questions put to the editor of the *Midwest Champion* the witness stated that the contents of the telegram were of public interest. He referred to two publications, one in the *Times* of 6th July, 1959 and the other in the *Tribune* of 25th August, 1959, and tendered a copy each of both publications.

The learned Senior Magistrate stated in his judgment that he was satisfied that the prosecution had proved its case beyond reasonable doubt. He found that the publication was seditious and that it was published with a view to bring into hatred and contempt the administration of justice in the Region, and in order to excite disaffection of the people in the area against the administration of justice in the Region; particularly in the Customary Courts. He found the appellant guilty and sentenced him to a term of two years imprisonment with hard labour. It is against the conviction and sentence that the appellant has appealed to this court.

Eight grounds of appeal were filed; namely—

1. That the learned Magistrate misdirected himself in fact and in law in the following passage in his judgment and in consequence the conviction of the appellant of the offence charged is wrong in law:—

> "I find as a fact that the publication was seditious and was published with a view to bring into hatred and contempt the administration of justice in the Western Region and to excite disaffection of the people in the area against the administration of justice in the Region, particularly in the Customary Courts".

2. The learned trial Magistrate erred in law in convicting the appellant of the offence as charged when the intent required by law as an essential ingredient of the offence was not established by the prosecution.

3. That the learned trial Magistrate erred in law when in his judgment he said that the accused put up no defence to the charge, and he thereby failed to direct himself as to the defence inherent in the publication charged.

4. That the learned trial Magistrate misdirected himself in law and in fact when he held that the publication was seditious.

5. That the verdict is unreasonable and cannot be supported having regard to the evidence.

6. That the trial Court had no jurisdiction to try and convict the accused/appellant of the offence charged.

8. That inadmissible evidence, namely, Exhibits B, C, E, E 1 and E 2 were admitted by the learned trial Magistrate and the subsequent conviction is therefore wrong in law.

The learned counsel for the appellant confined his arguments to grounds 4, 8, 5 and 7, in that order, and abandoned the other grounds.

In respect of ground 4 the learned counsel submitted that it was difficult to define what sedition was and that each case must depend upon its own circumstance. Referring to the case of *R.* v. *Burn*, 16 Cox C.C. 355, at page 359 and to the definition of sedition given by Stephen, J., he submitted that if a person sets out to show that the Government has been misled or to point out measures which tend to bring about hatred between various classes of the people he cannot be said to have a seditious intent.

The section of the Criminal Code under which the appellant was charged reads thus: (section 51 (1) (*c*)).

> Any person who prints, publishes,.....distributes or reproduces any seditious publication shall be guilty of an offence.
>
> "Seditious publication" means words having a seditious intention and a seditious intention is an intention to bring into hatred or contempt or to excite disaffection..... against the administration of justice in Nigeria (*see* section 50 (1) and section 50 (2) (*a*) of the Criminal Code).

I have quoted these definitions because the learned Counsel in my view tended to identify too closely the law of sedition in England with the law of sedition in this country. That they are not the same is clear from the case of *The King* v. *Wallace Johnson*, 5 W.A.C.A. 56, 59, 61, in which the Privy Council said:

> "The foundation for these submissions was sought in the summing up by Cave, J., in *R.* v. *Burns* (16 Cox C.C. 355) (the case which the learned counsel dwelt upon at some length and which he submitted was relevant to his submission) quoted at length in Russel on Crime (9th edition), pages 89 to 96. Reference was also made to a number of cases on the law of sedition in English and Scottish Courts, which, it was said, supported the statement of the law by Cave, J. Their Lordships throw no doubt upon the authority of these decisions, and if this was a case arising in this country, they would feel it their duty to examine the decisions in order to test the submission, on behalf of the appellant. The present case, however, arose in the Gold Coast Colony and the law applicable is contained in the Criminal Code of the Colony.
>
> .....The fact remains, however, that it is in the Criminal Code of the Gold Coast Colony and not in English or Scottish cases that the law of sedition for the Colony is to be found. The Code was no doubt designed to suit the circumstances of the people of the Colony. The elaborate structure of section 330 suggests that

it was intended to contain as far as possible a full and complete statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of the case free from any glosses or interpolations derived from any expositions however authoritative of the law of England or of Scotland".

I have quoted from this judgment at length because the definition of "seditious intention" under section 330 (8) (4) of the Gold Coast Criminal Code is almost exactly the same as under section 50 (2) (*a*) of the Criminal Code.

But the learned counsel for the appellant has however argued that the statement in question is not seditious. That it tends to point out, with a view to their removal, matters which were producing or had a tendency to produce feelings of ill-will and enmity between different classes of the people of this area.

In the case of the *African Press Limited* v. *The Queen* 14 W.A.C.A. 57 at page 58, Coussey J. A., said "We are unable to accept the submission.....that the article intended only to make suggestions to remedy defects in administration. If that had been the intention of the article the specific errors and defects which were intended to be remedied would be pointed out and suggestions would be made for their correction. On the other hand, the article is clearly designed to whip up hostile feeling against Administrative Officers".

This case, in my view, gives some guidance and some indication as to when a publication may be said to have been made with seditious intention or whether it can be said to be intended to point out grievances with a view to their removal.

What was the intention of the appellant in publishing the fourteen points made in the statement in question? Did he intend that they should point out grievances with a view to their removal or were they calculated to whip up hostile feeling against the administration of justice in the Customary Courts in the area referred to in particular and in the Region as a whole?

The exception created to section 50 (2) of the Criminal Code reads "But an act, speech or publication is not seditious by reason only that it intends....."

In my view the word "only" is important in the context because it means solely, merely, exclusively, nothing more, besides with no other. (*See* the *Concise Oxford Dictionary* and *The New Elizabethan Reference Dictionary*). Therefore, if while purporting to point out a grievance, a publication is at the same time calculated to whip up hostile feelings against the administration of justice the mere fact that it also points out a grievance will not exculpate the publisher.

In my judgment, to say that Customary Courts acted deliberately against political opponents of the Party in power in the Region, that they deny justice to supporters of the Party in opposition in the Region, that they do not administer British Justice and are Action Group institutions appointed or established to punish the supporters of the NCNC, that they must be regarded as Communist institutions unless they are abolished, and that citizens of this area are not safe as long as the Courts exist, can hardly be regarded as pointing out grievances with a view to their removal.

In my view the publication, taken as a whole is designed and calculated to bring the Customary Courts in this area into hatred and contempt and to excite disaffection against them and the administration of justice in this area. It is true that the statement added that "Western Regional Government name and good intention dragged in the

mud due primitive interpretation of justice Customary Courts". This is hollow praise and the author of the statement deceives no one but himself if he expects to be taken seriously in pretending to defend the name and the good intentions of a Government formed by the Action Group Party while in most of the preceding paragraphs he stated that the Customary Courts are instruments of tyranny and injustice established (by the Action Group Government) to victimise supporters of the Party in opposition to the Government.

The defence of the appellant, implicit in the cross-examination of the prosecution witnesses, is that the statement in question is a comment on a matter of public interest.

The editor of the *Midwest Champion* tendered an issue of the *Daily Times* and an issue of the *Tribune* to show that discussions relating to Customary Courts in the Region as a whole is a matter of public interest.

This is not doubted. The appellant's telegram was sent on Wednesday, 1st July, 1959 and its contents were published in the *Midwest Champion* on Thursday, 2nd July, 1959. The Minister of Justice held a press conference two days later, on Saturday, 4th July, 1959, which was attended by the Chairman of the Local Government Service Board, and disclosed what the Government had already done. (*See* Exhibit J). The Chairman of the Local Government Board himself, speaking to about thirty members of the Customary Courts in Badagry area, warned them to abstain from party politics. In my view the effect of these publications is to show how quickly and anxiously the Government is coping with the problems arising from the creation of the Customary Courts.

A man may lawfully discuss, criticise or censure Government measures but he must do so fairly, temperately, with decency, and respect, and without imputing any corrupt or improper motive.

The statement in question is couched in very intemperate language and this is admitted by the learned counsel for the appellant himself.

The efore, for the foregoing reasons I consider that the statement published by the appellant, was published with seditious intention within the meaning of that expression as defined in section 50 (2) (*a*) of the Criminal Code. I can therefore find no reason to disturb the decision of the learned Senior Magistrate on that point.

In respect of Ground 8 the learned counsel for the appellant submitted that Exhibits B, C, E, 1 and E 2 were wrongly admitted in evidence because the publication alleged in the charge was that in the *Midwest Champion.* He submitted further that all the other statements published ought to have been charged separately. I do not agree with this submission. In the first place in order to prove a seditious intent evidence is admissible of the prisoner's having published other copies of the same libel or other libel; (*Bromage* v. *Prosser*, 4 B and C 247, 225; R. v. *Pearce*, I Peake (3rd edition) 106. Also Article 2160 Archbold, 33rd edition, page 1188). In the second place, according to Lord Herschell L.C. in *Makin* v. *The Attorney-General for New South Wales* [1894] A.C. 57 "the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury; and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Moreover the editor of *Midwest Champion* said that he could not find the copy of the statement in question which the appellant gave to him. It is therefore clear that secondary evidence is admissible to prove that what was published in the paper was written by the appellant. And what better secondary evidence can be found than the office copy of the statement, Exhibit E and the actual telegrams sent to Chief Williams and the others (Exhibits B and C). As far as Exhibits E 1 and E 2 are concerned they are mere receipts and are passed to Exhibit E. It seems that they were numbered as exhibits separately to distinguish them from the telegram. Exhibit E, itself. The fact of their admission does not in my view affect the issue which the Court had to adjudicate upon.

In arguing Ground 5 the learned counsel for the appellant submitted that it was essential that the document handed by the appellant to the editor of the *Midwest Champion* should be proved in evidence. Having regard to the evidence of the editor that he could not find the document, to the admission of the appellant himself to the police, and to the secondary evidence furnished by Exhibits B, C, and E I reject the argument of the learned counsel on this point.

I now come to the last ground of appeal argued, Ground 7. Under this ground the learned counsel for the appellant argued that the trial court had no jurisdiction to try the appellant because there was no written consent by the Attorney-General as laid down in section 52 (2) of the Criminal Code. Further, that the written consent given by the Director of Public Prosecutions has no validity, and that even if it would have had, it purported to have been made under a non-existent section of the Criminal Code.

In respect of the last point, although it is true that the section is shown at page 15 of the record as 51 (1) (2) it will be seen at page 16 that the section is correctly stated to be 51 (1) (*c*). Furthermore an examination of the exhibit itself (Exhibit D) show that there is no error whatever and that the appropriate section was correctly quoted in the order as section 51 (1) (*c*).

As regards the submission that the order was signed by the Director of Public Prosecution and not the Attorney-General it is clear that the learned counsel for the appellant has failed to consider the following provision of section 3 of the Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958, which came into operation on 1st April, 1958 to wit:—"The existing laws specified in the Schedule shall be read and construed with the adaptations and modifications specified in that Schedule."

Schedule.—Criminal Code Ordinance, Cap. 42. After sub-section 2 of section 1 which was inserted by the Adaptation of Laws (Judicial Provisions) Order, 1955, add the following sub-section:—

"(3) In the application of this Ordinance to the Western Region and the Eastern Region a reference to the Attorney-General of the Region or the Solicitor-General of the Region shall mean the Director of Public Prosecutions of the Region".

It is clear from this that the written consent required in this case was that of the Director of Public Prosecutions of the Western Region and that it was given and given in exercise of the powers conferred under the appropriate section of the Criminal Code.

All the grounds of appeal argued have failed and I reject them.

I therefore hereby affirm the conviction and dismiss the appeal against conviction.

Appeal dismissed.

J. W. DIKEY ... ... *Appellant*

v.

A. O. ODENIYI ... ... *Respondent*

[HIGH COURT OF JUSTIVE: Duffus, J., 22nd April, 1960.]

Action for Libel—qualified privilege—onus of prove of malice—headmaster of a school is a person in public authority.

The appellant instituted, in a Magistrate's Court, an action for libel against the respondent for writing a letter to the Chairman of the Education Committee of the Mushin District Council, apparently at the request of the Chairman containing allegations generally as to immoral behaviour between children and teachers at schools in Mushin and in particular against the plaintiff who was the Headmaster of Odu Abore School. The appellant himself during the trial had admitted that he was courting his present wife whilst she was a pupil at this school and also that he had had sexual intercourse with her before marriage as a result of which she was pregnant. The respondent called no evidence but rested his case on that of the appellant. The Magistrate dismissed the action and it is against that order of dismissal that this appeal was brought.

Held: (1) that as the headmaster of a school would come within the meaning of a person in public authority, it would be lawful in the public interest to lay a charge or complaint to the proper authority;

(2) that the defence of qualified privilege would succeed as the respondent was under a social and moral duty to have brought the facts stated in his letter before the Education Committee who controlled the appellant's school;

(3) that since the occasion of this publication was privileged the onus was on the appellant to prove malice and since he had failed to prove this, he was bound to fail in his action.

Appeal dismissed.

Adesina for Appellant.

Akinyemi for Respondent.

Ikeja Civil Appeal No. AB/19A/58.

Duffus, J.: This is an appeal from the Senior Magistrate, Ikeja.

This is a civil action for libel. At the end of the Plaintiff's case, the Defendant called no evidence but rested his case on the evidence called by the plaintiff.

The Learned Senior Magistrate gave a considered judgment. He dismissed the action on three grounds.

(*a*) That there was no publication.

(*b*) That the words were published on an occasion of qualified privilege and that malice had not been proved.

(*c*) That the defence of fair comment applied.

Clearly in this case there was publication of the alleged libel and in my view the defence of fair comment does not apply. Learned Counsel for the Appellant admitted

however that the publication was made on an occasion of qualified privilege but he argued that the plaintiff's case had established malice against the Defendant, who did not give any evidence to rebut this.

The alleged libel in this case was contained in a letter written to the Chairman of the Education Committee of the Mushin District Council, apparently at the request of the Chairman and contained allegations generally as to immoral behaviour between children and teachers at schools at Mushin and in particular against the Plaintiff who was the Headmaster of Odu Abore School.

The trial was summary and there were no pleadings. I am of the view that the letter in question was clearly a privileged communication as the writer was under a social and moral duty to have brought the facts stated in his letter before the Education Committee who controlled the Plaintiff's school. It would appear that the Headmaster of a school would come within the meaning of a person in public interest to lay a charge or complaint to the proper authority. I would refer to cases discussed in Gately on Slander 2nd ed., pages 244 and 245. The magistrate was also justified in finding that the letter was written as a result of a request for information from the Chairman of the Education Committee. Once it is found that the communication was made on a privileged occasion, then the onus lies on the Plaintiff to prove malice.

Counsel for the appellant submitted that the Plaintiff had proved malice, and that this had not been rebutted by the defence.

The learned trial Magistrate considered as to whether malice had been established and he found, I quote:

"I would see no malice in this case."

The Magistrate did not give any reasons for his findings but it must be presumed that he directed himself correctly on the law.

In fact a great deal, if not the substance of the libel is admitted by the Plaintiff.

He had admitted that he was courting his present wife whilst she was a pupil at his school and also that he had had sexual intercourse with her before the marriage as a result of which she was pregnant.

The question as to whether the Plaintiff had proved malice was a matter of fact for the decision of the trial Magistrate.

The defendant elected to call no evidence but rested his case on the facts of the Plaintiff's case. I am of the view that the Magistrate was justified in his conclusion that Plaintiff had not proved malice and that therefore the publication was made under circumstances which amounted to a qualified privilege.

The appeal is dismissed, and the Judgment of the Senior Magistrate affirmed.

Appeal dismissed.

IGBINEKAO IDEHEN ... ... *Appellant*

v.

THE COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Thomas, J., 22nd April, 1960.]

Criminal Law and Procedure—charge containing four counts—failure of Magistrate to record separate pleas to each count—nullity by virtue of section 304 of the Criminal Procedure Ordinance—retrial not ordered for lack of evidence—recalling an accused person after the case for defence—section 200 of the Criminal Procedure Ordinance.

The appellant was charged along with another before a Magistrate's Court on four counts of conspiracy, forgery and uttering forged documents. The trial Magistrate then made the following record in his record book: "charges read to the accused persons with the first count as amended. Each elects summary trial and pleads not guilty.....". At the close of the case for the prosecution the two accused persons were discharged on two counts of the charge and they made their defences to the other two counts. After they made their defences the trial Magistrate reserved Judgment to a later date. On this later date the appellant was recalled by the Magistrate and he gave further evidence. After that he was convicted on the two counts.

Held: (1) that the provision of section 304 of the Criminal Procedure Ordinance is mandatory and since it appeared that the trial Magistrate did not comply with it the subsequent trial was a nullity;

(2) that the court would not order a retrial since at the close of the case for the prosecution there was not a shred of evidence upon which the appellant could have been called upon to make a defence;

(3) that the recall of the appellant after the close of the case for the defence indicated that the trial Magistrate had some doubts in his mind as to the appellant's guilt the benefit of which ought to have been given to the appellant.

Appeal allowed.

Cases cited:

George Bainbridge Boyle, 38 C.A.R. 111.

R. v. *Asuquo Edem and others*, 9 W.A.C.A. 25.

Horvat v. *Police*, 20 N.L.R. 52.

R. v. *Owen* [1952] 1 All E.R. 1040.

Benin Criminal Appeal No. B/88CA/59.

Ihua-Maduenyi for Appellant.

Aguda, Senior Crown Counsel, for Respondent.

Thomas, J.: The appellant, and another, who has not appealed were arraigned in the Court below on the following counts:—

That you Rosson Obazee and (2) Igbinekao Idehen, on the 16th day of July, 1958 at Orhio Village, in the Benin Magisterial District, conspired together stealing £26 8*s* 9*d* royalty fund for Orhio Village knowing that the said Iduwe Ohenzuwa (*m*) is innocent of the alleged offence and thereby committed an offence punishable under section 125 of the Criminal Code.

Second Count: That you, Rosson Obazee and (2) Igbinekao Idehen on the 16th day of July, 1958, at Benin City, in the Benin Magisterial District forged a document dated 16th July, 1958, purporting same to be written and thumb-impressed by Ediagbonya Okunbor (*m*), Osarinwian Amayo (*m*), Igbile Orikhi (*m*), Imagbenikao Erhabor (*m*), Sunday Ogbomo (*m*), Idugboe Obayogbona (*m*), Osarumwense Obavbonyi (*m*), and Sunday O. Usiofafo and thereby committed an offence punishable under section 467 of the Criminal Code.

Third Count: That you, Rosson Obazee and (2) Igbinekao Idehen on the 16th day of July, 1958, at Benin City in the Benin Magisterial District forged right thumb impressions of Ediagbonya Okunbor (*m*), Osarinwian Amayo (*m*), Ighile Orikhi (*m*), Imagbeniko Erhabor (*m*), Sunday Ogbomo (*m*), Idugboe Obayagbona and Osarumwense Obavbonyi purporting same to be right thumb impressions of the above-mentioned persons and thereby committed an offence punishable under section 467 of the Criminal Code.

Fourth Count: That you, Rosson Obazee and (2) Igbinakao Idehen on the 17th day of July, 1958, at Benin City, in the Benin Magisterial District knowingly and fraudulently uttered a forged document to one David Ogieyan of Eyaen Village, Chairman of the Assessment Committee, offence punishable under section 468 of the Criminal Code.

The Learned Magistrate then recorded as follows:

"Commr. of Police *vs* Rosson Obazee and Igbinakao Idehen

L/Cpl. Idonije for Police.

Charges read to the accused persons with the first count as amended.

Each accused elects summary trial and pleads not guilty.

Bail: Each accused £100 and one surety in like sum".

At the close of the case for the prosecution, the Learned Magistrate discharged each accused in respect of the first and third counts and ruled that each had a case to answer in respect of the second and fourth counts.

The trial then proceeded, each accused testifying in his defence and at its conclusion, the Magistrate reserved judgment until the 16th May, 1959.

On that date the Appellant, who was the second accused was recalled and the Learned Magistrate recorded as follows:

"Second accused Igbinekao Idehen:

Sworn on iron. Exhibit B was read to my hearing and I signed it. It was against tax collection. I am not literate. Ohenzuwa was never charged to Court by the Police".

The Appellant was then convicted and sentenced to nine months imprisonment with hard labour in respect of the two counts.

Against these convictions and sentences he has now appealed on the following grounds:—

(*a*) That the pleas are recorded by the Learned trial Magistrate was defective and constituted no plea at all and that the whole trial was therefore a nullity.

(*b*) That the decision is erroneous in point of law in that at the close of the case for the prosecution there was no evidence in respect of counts 2 and 4 and therefore the appellant ought not to have been put on his defence.

2. That the recall of the Appellant by the court at the close of the case for the defence and after the case was adjourned for judgment amounted to such grave irregularity and showed some doubts in the mind of the Learned Magistrate, the benefit of which should have gone to the Appellant.

3. That the Learned trial Magistrate failed to direct himself to the evidence of the first accused which contradicted the evidence of all the prosecution witnesses as well as his statements Exhibits D and E made to the Police.

4. That the Learned trial Magistrate misdirected himself in holding that—

"There is not the slightest doubt that Exhibit "B" was got up at the instance of the first and second accused persons."

With reference to the first ground of appeal section 304 of the Criminal Procedure Ordinance, Cap. 43, after dealing with the procedure for obtaining consent to summary trial, enacts as follows:

"shall forthwith ask him the following question:—

"Do you plead guilty or not guilty".

The four counts were in respect of indictable offences and the consent to summary trial relates to one indictable offence and the question "Do you plead guilty or not guilty " must necessarily relate to a single offence.

In the present case the accused did not plead "not guilty" to each of the indictable offences as envisaged by the enactment.

Crown Counsel for the Respondent cited the case of *George Bainbridge Boyle*, 38 Cr. App. R. 111 and suggested that since no injustice had been done the conviction should be upheld as in that case.

The case referred to, *supra*, must be distinguished from the instant case, in that in the former, the Appellant entered a general plea of guilty to the four counts put to him as a whole.

But the Court however held that—

"Where an indictment contains several counts, each count should be put to the prisoner separately, and he should be asked to plead to each count as it is read to him.

Where the counts are for alternative offences, *e.g.*, larceny and receiving, the first should be put to the prisoner separately. If he pleads guilty to that, there is no need to put the second and alternative count; but if he pleads not guilty to the first, the second and alternative count should be put separately and his plea taken on it".

The provision in section 304 of Cap. 43 with reference to the question "Do you plead guilty or not guilty?" is mandatory and as it appeared that the Learned Magistrate did not comply with it, it is my view that the subsequent trial is a nullity.

I now have to decide whether to order a retrial or not.

After reading the Record, I uphold Counsel's submission that at the close of the case for the prosecution there was not a shred of evidence against the appellant in respect of either charge and that he ought to have been discharged.

His co-accused testified against him, but his testimony contradicted those of the witnesses for the prosecution and related to a different document.

The Appellant then testified, he was illiterate and was not represented by Counsel.

The learned Magistrate reserved judgment.

But before giving judgment he recalled the appellant who testified as indicated *supra*, *viz:*

"Exhibit 'B' was read to my hearing and I signed it. It was against tax collection. Am not literate. Ohenzuwa was never charged to court by the Police."

It should be noted that the Police expert P.W. 1 had testified that the Appellant's thumb print was not found on the document that was in issue.

It is quite clear that the learned Magistrate was doubtful as to the guilt of the Appellant. That was why he recalled him and after putting certain pertinent questions to him, apparently to clear the doubt in his mind he subsequently found him guilty.

Section 200 of Cap. 43 enact as follows:

"The Court at any stage of any trial, inquiry or other proceedings under this Ordinance may call any person as a witness or recall and re-examine any such person already examined and the court shall examine any such person if his evidence appears to the court to be essential to a just decision of the case."

There are several limitations to the exercise of this power.

The principles on which the Court should act were reviewed in *Rex* v. *Asuquo Edem and others*, 9 W.A.C.A. 25.

In *Horvat* v. *Police*, 20 N.L.R. 52, Ademola, J. (as he then was) applying *R.* v. *Owen* [1952] All. E.R. 1040, held—

"It was wrong on the part of the Magistrate, after the case had been closed and adjourned for judgment to recall and question the Appellant, apparently in order to clear up his doubts in the case : for that course deprived the Appellant of the benefit of the doubt and was against the spirit of the law."

The appeal succeeds on all the grounds file. Appeal allowed.

There will be no order for a retrial.

Appeal allowed.

CHIEF AMINU ARE ... ... *Appellant*

v.

THE ATTORNEY-GENERAL, WESTERN REGION *Respondent*

[FEDERAL SUPREME COURT: Abott, Brett, F.JJ., Hubbard Ag.F.J., 4th May, 1959.]

Petition of right—petition filed 29th May, 1958 whilst Public Lands Acquisition (Amendment) Law, 1958, came into operation on 19th June, 1958—whether this law could have retrospective effect so as to bar the petition.

The appellant, on 29th May, 1958, filed a petition of right in the High Court Ibadan, claiming compensation on behalf of himself and the Are family for a piece of land which had been compulsorily acquired by the Nigerian Government some twenty years before. The fiat of the Governor was endorsed on the petition on 9th October, 1958. Meanwhile the Public Lands Acquisition (Amendment) Law, 1958, came into operation on the 19th of June, 1958. The High Court held that in so far as this new law purported to set a limitation to the period during which the right conferred by section 10 of the principal law could be exercised, it affected practice and procedure and therefore operated retrospectively so as to bar the petition. The petition was accordingly dismissed and it is against this order of dismissal that the appellant brought this appeal.

Held: that since the effect of the wording of the amending law is clearly *in futuro* and as it is not possible to say that it could by necessary implication have the effect of putting a stop to proceedings which had already been validly commenced, this amending law cannot be given retrospective effect.

Appeal allowed.

(*Note.—See* the report of the High Court judgment in 1959 W.R.L.N.R., at page 171).

Okubadejo, for the Appellant.

Eboh, Senior Crown Counsel, for the Respondent.

Abbott, F.J.: This is an appeal against the judgment of Doherty, J., sitting at the High Court, Ibadan. The proceedings were commenced in the lower Court by a Petition of Right brought under the Petitions of Right Ordinance, Cap. 167 of the 1948 Edition of the Laws of Nigeria. Thereby the petitioner claimed from the Government of the Western Region a large sum of money for compensation for land acquired by the Government or its predecessor some twenty years ago. Section 10 of the Public Lands Acquisition Ordinance, Cap. 185 of the same edition, provides that disputes as to compensation shall be settled by the High Court. An amendment to this section, by adding a further sub-section to it, was effected by the Public Lands Acquisition (Amendment) Law, 1958, of the Western Region Legislature. This amending Law came into operation on the 19th June, 1958. The Petition of Right already referred to was filed in the High Court on the 29th May, 1958, and was duly endorsed with the fiat of the Governor on the 9th October, 1958. The sub-section added by the Western Region Law, No. 15 of 1958 reads as follows:

"Subject to the provisions of section 20, no claim to any estate, interest or right in or to any lands in respect of which a notice has been served and published in the Gazette in accordance with section 99, or to any compensation or rent in respect of any such

estate, interest or right, made after the expiration of twelve months from the publication of the notice, shall be entertained by any public officer whose duty it is to receive such claims or by any court."

The learned trial Judge, holding that the new sub-section "affects practice and procedure" decided that it affected the petition retrospectively and that as more than twelve months had expired between the publication of the Gazette notices provided for by section 10 and the filing of the petition, it could not be entertained.

It seems to me that the important words in this section are "shall be entertained". It is beyond doubt, in my view, that the claim in this case, represented as it is by the Petition of Right, was "entertained" by the Court on the day of its filing, namely, 29th May, 1958, some three weeks prior to the coming into operation of the amending law. The effect of the wording of the amending law is clearly *in futuro*, and it is not possible to say that it could by necessary implication have the effect of putting a stop to proceedings which had already been validly commenced. To hold otherwise would be tantamount to saying that the amending Statute secured the undoing of something already done. It is a cardinal principle that unless it affects purely procedural matters (and in my view this is not such a matter) a statute cannot apply retrospectively unless it is made to do so by clear and express terms.

Mr Eboh, who appeared for the respondent very fairly admitted that there was little he could say in opposition to this appeal.

I am clearly of the opinion that the learned trial Judge erred in regarding the amending law as one which merely affected procedure. It follows, therefore, that I would allow this appeal and remit the matter to the High Court to be heard on its merits.

Appeal allowed.

GREGORY ONUORAH ... ... *Appellant*

v.

THE COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Thomas, J., 19th May, 1960.]

Criminal Law and Procedure—resisting arrest and assault on a police officer—lawfulness of the arrest—sections 5 and 10 of the Criminal Procedure Ordinance—section 34 of the Police Ordinance—no evidence of reasonable suspicion—non-direction by the Court on this point—effect upon conviction.

The appellant was charged before a Magistrate's Court on two counts of resisting a police officer and for assaulting him in the execution of his duty. The evidence showed that the police officer found the appellant on the high road carrying a bag when he stopped him. The police officer then informed him that he suspected the appellant and enquired about the contents of the bag which the police officer seized. As a result a struggle ensued between them. The trial Magistrate found the appellant guilty on the two counts.

Held: (1) that there was no evidence that the police officer was exercising his rights of arrest under the Common Law or under section 10 of the Criminal Procedure Ordinance or under section 34 of the Police Ordinance, Cap. 172.

(2) that the police officer could not comply with section 34 of the Police Ordinance by merely telling the appellant that he suspected him; but that he must go further and explain to him that he suspected that he was conveying or had in his person property that had been stolen or unlawfully obtained and must inform him of the grounds of his suspicion;

(3) that if the police officer failed to comply with the provisions of the law as he had in this case, he could not be said to be acting in the execution of his duty and the appellant would be entitled to resist any encroachment on his liberty and to defend himself from assault by the police officer;

(4) that it was a serious misdirection for the Magistrate to have failed to consider the failure of the prosecution to adduce evidence from which it could be inferred that the police officer reasonably suspected the appellant of the possession of stolen goods or goods otherwise unlawfully obtained.

Appeal allowed.

Cases cited:

Regina v. *Chapman*, 12 Cox C.C.4.

Rex v. *Hugh Carey*, 14 Cox C.C.124.

Benin Criminal Appeal No. B/13CA/1960.

Idigbe for Appellant.

Bada, Crown Counsel, for Respondent.

Thomas, J.: The appellant was convicted on each of two counts as follows:

(1) Resisting a Police Officer while acting in the execution of his duty.

(2) Assaulting a Police Officer while acting in the execution of his duty.

The case against the appellant was that at the material date and time, the Police Officer found him on the High Road carrying a bag, when he stopped him. He then informed him that he suspected him and inquired about the contents of the bag which he seized. As a result, a struggle ensued between them, in consequence of which the appellant was charged, tried and convicted on the two counts.

The appellant in his defence testified that he was riding a bicycle on the main road and had alighted to allow a lorry to pass him. That as he was about to remount his bicycle, he was sized from behind and slapped. He beaame annoyed and saw that his assailant was the Police Officer, and he retaliated by slapping him. The Police Officer attacked him with his baton and he had to defend himself.

The learned Magistrate in his judgment stated, *inter alia*, as follows:

"There is no doubt in my mind, that the prosecution has proved the charges in counts 3 and 4, to the hilt against the accused persons. I believe the evidence of the first prosecution witness that the accused assaulted him, and the evidence also of the second, third and fourth prosecution witnesses affords cogent proof in this respect. The accused himself did not deny assaulting the first prosecution witness, but said that he did so in self-defence."

The learned Magistrate then concluded that he did not believe the appellant when he said that the Police Officer slapped him.

Section 356 (2) of the criminal code under which the appellant was charged only makes it an offence to assault or resist a Police Officer whilst such officer "is acting in the execution of his duty." and not otherwise.

Section 10 of the Criminal Procedure Ordinance, Cap. 43, provides for circumstances and procedure to be followed in respect of arrests without warrant by a police officer.

There is no evidence on record that the purported arrest of the appellant was within the ambit of any of these provisions.

Section 5 of the Criminal Procedure Ordinance enacts as follows:

"Except when the person arrested is in the actual course of the commission of a crime or escape from lawful custody, the police officer or other person making the arrest shall inform the person of the cause of the arrest."

Section 34 of the Police Ordinance, Cap. 172, enacts as follows:

"A police officer may detain and search any person whom he reasonably suspects of having in his possession or conveying in any manner anything which he has reason to believe to have been stolen or otherwise unlawfully obtained."

There is no evidence on record that the police officer was exercising his rights of arrest under the common law or under any of the statutory provisions already referred to, *supra*, when he stopped the appellant.

The police officer could not comply with section 34 of the Police Ordinance, Cap. 172, by merely informing the appellant that he suspected him. He must go further and explain to him that he suspected that he was conveying or had in his person, property that had been stolen or unlawfully obtained and must also inform him of the grounds of his suspicion.

If the officer failed to comply with the law, as indeed he has in this case, he could not be said to be acting in the execution of his duty and the appellant was entitled in law to resist any encroachment on his liberty and defend himself from assault by the police officer.

In *Regina* vs *Chapman*, 12 Cox Criminal Cases, page 4, the head note is as follows:

"In order to justify an arrest, even by an officer, under a warrant, for a mere misdemeanour, it is necessary that he should have the warrant with him at the time.

Therefore, in a case where the officer, although he had seen the warrant, had it not with him at the time and it did not appear that the party knew of it:

Held, that the arrest was not lawful. And the person against whom the Warrant was issued resisting his apprehension and killing the officer, held, that it was not murder; and the prisoner was convicted of manslaughter only."

In *Rex* vs *Hugh Carey*, 14 Cox Criminal Cases, page 124;

The prisoner was indicted for the murder of Sewell, a police sergeant at St. Helens. It had transpired that the prisoner while passing along a street with something evidently buttoned up in his coat was stopped by the officer at that time on duty and in uniform. He had seized the prisoner by his collar and demanded to know what he had in his coat. Some angry conversation and scuffling ensued, whereupon the prisoner drew a revolver from his trousers pocket and shot the officer dead.

By the St. Helen's Improvement Act, 1869, section 257, power is given to constables to stop, search and detain persons reasonably suspected of knowingly having or conveying anything stolen or unlawfully obtained.

At the close of the case for the prosecution, it was submitted by Counsel that there was no case of murder to go to the jury.

Lindley, J.: "The arrest by Sewell was illegal. Cases may be imagined where the absence of a warrant might be no defence, as where the murder was premeditated. It is abundantly clear that if the deceased, was arresting the prisoner on Pichavance's charge, he was exceeding his duty by acting without a warrant; if he was arresting him under the powers given by the local act, there is no evidence from which the jury could infer that the deceased reasonably suspected the prisoner of the possession of stolen goods, and it lay on the prosecution to give such evidence."

The prisoner was convicted of manslaughter.

It must be noted that the St. Helen's Improvement Act, 1869, section 257, is substantially identical with section 34 of the Police Ordinance, Cap. 172.

Likewise, in the present case, the prosecution led no evidence from which it could be inferred that the Police Officer reasonably suspected the appellant of the possession of stolen goods or otherwise unlawfully obtained.

The Police Officer was not acting in the execution of his duty.

Furthermore, had the learned Magistrate, considered this fact and its legal implications, in considering the case for the defence he might have come to a different conclusion.

This omission, on his part, is a serious misdirection and I will therefore annul and set aside the conviction and sentence on each count and enter a verdict of discharge and acquittal in respect of each count.

Appeal allowed.

BOLARIN BUCKNOR ... ... *Appellant*

v.

YUMSA OGUNSESAN ... ... *Respondent*

[HIGH COURT OF JUSTICE: Charles, J., 21st June, 1960.]

Jurisdiction of Magistrates' Court—validity of a Native Court judgment based upon a document wrongly admitted—whether Magistrate's Court's jurisdiction outsed by mere raising of the question of title to land in action for trespass—section 18 (1) of the Magistrates' Courts (Western Region) Law, 1954.

It would appear that the appellant had in a previous case obtained, in a Native Court, judgment that he could recover possession of a piece of land. In that suit an unregistered document had been admitted contrary to the provisons of the Land Registration Ordinance (Cap. 108). It would appear further that in the present case the appellant took action in a Magistrate's Court claiming damages for trespass against the respondent and that the respondent raised the point that the trial Magistrate had no jurisdiction to try the case (presumably because of section 18 (1) of the Magistrates' Courts (Western Region) Law, 1954) as it involved a dispute as to title to the land, now claimed by the respondent. The trial Magistrate having decided that the judgment of the Native Court was not valid by reason of the inadmissible evidence, which was admitted, went further to decide that the question of title to that land was still unsettled and that therefore he had no jusrisdiction to entertain the suit.

Held: (1) that although the unregistered document was wrongly admitted by the Native Court, the judgment of that court was not thereby rendered invalid and that since that judgment had not been reversed on appeal, it did not lie within the province of the magistrate to determine in the proceedings before him that the judgment was invalid;

(2) that a judgment for possession under the general law is a judgment *in rem* which entitles the appellant to the immediate possession of the land to which it relates at the time of the service of his writ and to have ejected from the land all persons upon it, whether or not they were parties to the action in which judgment was obtained;

(3) that in as much as the Native Courts have applied general law remedies for the infringement of customary rights, a judgment of a native court must be given the same effect as a similar judgment in the High Court.

(4) that the taking of the fruits of the land by the respondent after the judgment of the native court was an act of trespass;

(5) that for a question of title to land to oust the jurisdiction of the Magistrate's Court, it must not only be raised *bona fide* but it must be one of substance, that is, one tenable in law at least to the extent that it is necessarily open to argument.

Appeal allowed.

Cases cited:

Ntisakagro v. *Amodu and another unreported* (but *see* suit No. AB/88/56).

Balabale v. *Coker*, unreported (but *see* suit No. MK/1A/59).

Abeokuta Civil Appeal No. AB/62A/59.

Adesanya, for Appellant.

Respondent absent, not represented.

Charles, J.: An oral judgment was delivered in this case. It was, as indicated at the time, a summary of the reasons which I would record more fully later. Those reasons appear below.

2. While I agree with the learned trial Magistrate that the document Exhibit "A" was inadmissible because it had not been registered under the Land Registration Ordinance (Cap. 108), I am unable to agree that the judgment of the Native Court in suit 647/54 was, on that account, invalid. That was a judgment that the plaintiff was entitled to recover possession of the land for subsequent trespass upon which he has sued the defendant in these proceedings, and it was one in proceedings upon which the Native Court had jurisdiction to give a judgment. Consequently whether the judgment was right or wrong is a matter which can only be decided by an appellate court in the exercise of its appellate jurisdiction, and so long as such a court has not reversed it, it stands and must be accepted in all subsequent proceedings as valid. It, therefore, did not lie within the province of the Magistrate to determine in the proceedings before him that the judgment was invalid.

3. The effect of a judgment for possession under the general law was discussed by me in *Ntisakagro* v. *Amodu and another* (AB/88/56). For present purposes it is sufficient to say that such a judgment establishes *in rem* the right of the plaintiff to the immediate possession of the land to which it relates at the time of the service of his writ and to have ejected from the land all persons upon it, whether or not they were parties to the action in which the judgment was obtained. If a person who, being on the land, was not a party to the action, disputes the plaintiff's right, his proper course is to apply to the trial court to have the judgment set aside and to be made a defendant to the action which should be heard *de novo*.

4. In as much as the Native Courts have applied general law remedies for the infringement of customary law rights, a judgment of a Native Court must be given the same effect as a similar judgment in this Court. To do otherwise would be to increase the torrential spate of litigation by rendering the judgments of native courts inconclusive.

5. Consequently, the judgment of the Native Court for possession conferred upon the plaintiff the right to enter into the immediate possession of the land in dispute against all persons in possession or otherwise using the land, whether parties to the action in which it was given or not. The evidence is conflicting as to when the plaintiff entered upon the land but it is common ground that he did do so at least in 1959 when he started to clear it. As there is no evidence, and it was not suggested, that the right to immediate possession which was adjudged to belong to him in 1955 had ceased to exist in 1959, his entry then must be regarded as being an entry into possession of that land and to have made the defendant a trespasser, by reason of the doctrine of relation back, from the time of the service of the process initiating the proceedings in the Native Court in which the judgment for possession was made.

6. As a result, the taking of the fruits from the land by the defendant after that judgment were acts of trespass. As the defendant's evidence was that he had taken in each season crops to the value of £40, the plaintiff, in my opinion, is entitled to judgment for the total amount claimed, that is, £400.

7. As the defendant did not seek to confess and avoid the plaintiff's right to possession under the judgment of the Native Court by attempting to set up a subsequent loss of that right, but attempted to do what he was not allowed to do, namely, to challenge the validity of the judgment and to rely upon his earlier possession and his ownership from his mother, a *bona fide* question of title did not arise in this case so as to oust the jurisdiction of the Magistrate's Court. For a question of title to have that effect it must not only be raised in good faith but be one of substance, that is, one tenable in law at least to the extent that it is necessarily open to argument. (*Balabale* v. *Coker and another* (MK/1A/59). The defence which was raised in this case, that the judgment of the Native Court was invalid, was not tenable.

Appeal allowed.

OKUNZUWA AND ANOTHER ... ... *Appellants*

v.

THE COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Thomas, J., 28th June, 1960.]

Criminal Law and Procedure—assault contrary to section 355 of the Criminal Code—charge amended after election and plea—second election unnecessary—section 164 (1), (2) and (3) of the Criminal Procedure Ordinance construed.

The appellants and another were charged before a Magistrate's Court with assault contrary to section 355 of the Criminal Code. After each appellant had elected summary trial and pleaded not guilty, the charge was amended. Thereafter the trial Magistrate caused the charge as amended to be read to the appellants. The appellants were not put to their election again but they both pleaded not guilty to the charge. They were subsequently convicted. In an appeal before the High Court it was contended on behalf of the appellants that the trial Magistrate had no jurisdiction to have tried the case because the appellants were not put to their election on the altered charge.

Held: that there was nothing in section 164 (1), (2) and (3) of the Criminal Procedure Ordinance which makes it obligatory on the Magistrate to put the appellants to their election a seond time.

Appeal dismissed.

Momoh, for Appellants.

Aguda, Senior Crown Counsel, for Respondent.

Benin Criminal Appeal No. B/3CA/60.

Thomas, J.: (*After giving a short history of the case and enumerating the original grounds of appeal* continued): The following additional grounds, on application, were filed.

(*a*) The learned trial Magistrate was without jurisdiction in trying the case, the accused person/appellant not having been put to his election on the altered charge.

(*b*) The altered charge was not read to the accused person/appellant.

The additional grounds were argued together by Counsel for the appellant.

It is recorded that each appellant elected to be tried summarily and pleaded not guilty to the charge. Thereafter the charge was amended by the insertion of the date "28th August, 1958".

It is on record that this amended charge was read to the appellants as provided by section 164 (1) of the Criminal Procedure Ordinance, Cap. 43. The plea of each appellant was one of "not guilty". Section 164 (1) *inter alia* enacts—

"The court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such a charge".

This provision was inserted to allow for the provisions of section 164 (2) and 164 (3) of Cap. 43.

The amendment, by inclusion of the date, did not affect the substance of the charge which by section 285 must be stated to the accused for his plea to be taken.

The learned Magistrate did comply with the provision of the law and he was not obliged to ask the appellants, a second time, whether they elected summary trial.

I have now ascertained that there has been no judgment by the Federal Supreme Court touching this point as alleged.

The provisions of sections 164 (2) and 164 (3) of Cap. 43 were to enable the court to consider granting an adjournment or ordering a new trial to avoid any injustice against the accused in case it was to proceed forthwith with the trial, following an amendment.

Appeal dismissed

SIMI JOHNSON ... ... *Appellant*

v.

THE COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Duffus, J., 5th July, 1960.]

Charge for traffic offence contrary to section 7 (1) of the Road Traffic Ordinance—driving without licence by a person who had passed driving test but had not obtained a licence —onus of proof in cases provided for in proviso to section 7 (1) of the Ordinance—sections 140, 141 and 142 of Evidence Ordinance, Cap. 63—regulation 19 (11) (iii) of the Road Traffic Regulations, 1948.

The appellant who held a learner's permit, and had passed her driving test but had not obtained her driving licence, was found driving a vehicle and was charged before a Magistrate's Court and convicted for an offence contrary to section 7 (1) of the Road Traffic Ordinance, 1947. Her licence was ordered to be suspended. Against the conviction and order of suspension she has brought this appeal.

Held: that the onus of proof that the appellant came within the proviso to section 7 (1) of the Road Traffic Ordinance, 1947, was on the appellant; and that since the appellant did not establish that she was driving for the purpose of instruction, her appeal was bound to fail

Obiter: that in any event the learner's permit would no longer be in force as in fact the appellant had passed her driving test and was therefore no longer a learner.

Appeal dismissed; order of suspension of appellant's driving licence quashed.

Criminal Appeal: No. HK/8CA/60.

Coker, for Appellant.
Peters, for Respondent.

Duffus, J.: The appellant in this case was convicted under section 7 (1) of the Road Traffic Ordinance, 1947, for driving a motor vehicle without a driving licence. The facts are short. The appellant drove a moter vehicle and at the time had no Driver's Licence. The appellant held a learner's permit, and had already passed her driving test, but had not yet obtained her driving licence.

The appellant had no driving licence and the issue depends on whether she comes within the proviso to section 7 (1). This proviso reads, *inter alia*, as follows:

"7 (1) Provided that holder of a learner's permit issued under the regulations made under this Ordinance may, when accompanied for the purpose of instruction by a licensed driver sitting beside him, drive for such period as may be prescribed and on such highways as may be specified in such permit....."

The question as to whether the appellant comes within the protection attached by this proviso, depends on facts which are peculiarly within the knowledge of the appellant, and the burden of proof is in this respect on the defence. I would refer to sections 140, 141 and 142 of the Evidence Ordinance, Cap. 63.

The defence have to establish the following facts:—

(1) That the appellant had a learner's permit.

(2) That she was driving for the purpose of instruction.

(3) That she was accompaned by a licensed driver.

(4) That she was driving within a period and on a highway specified by the permit.

The defence established (1) and (3) above, that is that she had a permit and was accompanied by licensed driver.

The defence did not, however, establish that she was driving for the purpose of instruction. No evidence was led as to this. In fact, the evidence that she had already passed her driver's test would suggest that she was not driving for the purpose of instruction. The permit was not produced and no evidence was led to show that the appellant was driving within a specified period and on a specified highway.

I am therefore of the view that the Magistrate was justified in his finding that the appellant was not protected by the proviso to section 7 (1) and in finding the appellant guilty.

I am also of the view, although this is not necessary for a decision in this case, that in any event the learner's permit would no longer be in force as in fact the appellant had passed her driving test and was therefore no longer a learner. I would refer to the regulation under which a learner's permit is issued: Part V of the Road Traffic Regulations 1948, regulation 19 (11) (*iii*). Under this Regulation a learner's permit is issued for the purpose of obtaining instructions in order to take the driving test. Once the appellant has passed the driving test then she is no longer a learner, and there is no necessity for further instructions in order to take a test which she had already passed. His duty then is to apply for and obtain the driving licence required by section 7.

This was however a serious breach. The appellant's act was already a matter of not paying her licence fee. She had taken the necessary preliminary steps and was qualified to obtain her licence, and in these circumstances in my view, her licence should not have been suspended.

The appeal on the conviction is dismissed but I will quash the order for suspension of the licence.

Appeal dismissed; order of suspension of appellant's driving licence quashed.

CHIEF OYINLADE ODOPETU ... ... *Plaintiff*

v.

CHIEF O. AUSI ... ... *Defendant*

[HIGH COURT OF JUSTICE: Doherty, J., 5th July, 1960.]

Motion under section 71 of Sheriffs and Civil Process Ordinance, Cap. 205—whether one who disobeys an interlocutory order of Court is a judgment debtor—section 2 of Cap. 205 applied.

On the hearing of a motion brought by the plaintiff for the committal of the defendant to prison for disobeying an interlocutory order of this court made on 15th April, 1960, it was contended on behalf of the defendant that the application was not properly before the court because section 71 (as well as sections 65 to 80) of the Sheriffs and Civil Process Ordinance under which the motion was brought, relates only to judgment debtors. It was further contended that since no judgment had yet been delivered in the case, the defendant could not be regarded as a judgment debtor against whom an order could be made under the section.

Held: that someone who has disobeyed an interlocutory order of the court is a "judgment debtor" against whom an order of committal to prison can be made under section 71 of the Sheriffs and Civil Process Ordinance, Cap. 205.

Preliminary objection overruled.

Akure Civil Suit No. AK/124/58.

Adeyefa, for the Plaintiff.

Ojomo, for the Defendant.

Doherty, J.: On the hearing of this motion on Tuesday, 28th June, 1960, filed on behalf of the plaintiff and calling upon the defendant/respondent to show cause why he should not be committed to prison for contempt of the order of this court made on the 13th of April, 1960, it was objected on behalf of the respondent that the application was not properly before the court because section 71 of the Sheriffs and Civil Process Ordinance, Cap. 205, under which it is purported to be brought relates to a judgment debtor, as in fact do all (so it was contended) of sections 65 to 80 of the Ordinance which come under the general heading of Misconduct of Judgment Debtor. It was further contended that no judgment has been delivered yet in this case, and that section 71 does not apply to interlocutory matters. On the 13th day of April, 1960, on the application of the plaintiff this court granted an injunction restraining the defendant, his servants or agents from entering upon the area marked brown in the plan, *i.e.*, A, B, D, E, F, for any purpose whatsoever, pending the determination of this suit. It was for a breach of this Order that the present application is filed. Whatever merit appears on the surface of the preliminary objection is exploded, in my view, by a glance at section 2 of the Ordinance which deals with definitions. "Judgment" is therein defined as including order; a "judgment debtor" means a person liable under a judgment; and an "Order" includes an injunction. It must follow therefore from these definitions that the respondent is a judgment debtor within the meaning of the Ordinance because he is a person who is liable under the judgment (*i.e.*, the order or injunction) of this court of the 13th of April, 1960. He is therefore a person to whom sections 65 to 80 of the Ordinance will properly apply. As the definitions do not contemplate a difference between interlocutory and final orders, the respondent's contention on that score must fall to the ground.

The preliminary objection therefore fails and it is accordingly overruled.

Preliminary objection overruled.

S. O. LASEBIKAN ... ... *Petitioner*

v.

1. G. K. DADA ... ...
2. ELECTORAL OFFICER, EKITI NORTH-WEST CONSTITUENCY. } *Respondents*

[HIGH COURT OF JUSTICE: Thomas, J., 21st July, 1960.]

Election petition—validity of nomination of a candidate challenged after issue of Form 5—votes in excess of registered voters cast in three polling stations—excess does not affect the result of the election—regulation 48 of the Elections (House of Representatives) Regulations, 1958.

In this petition, the petitioner sought the nullification of the election of the first respondent under the Elections (House of Representatives) Regulations, 1958, on the grounds:

(1) That nomination of the first respondent, was invalid in that the name, Wilson Emmanuel Akanwo, one of the nominators of the first respondent, did not appear on the register of voters;

(2) That in three polling stations there were cast 2, 3 and 8 votes respectively in excess of registered voters;

(3) That the election was tainted with irregularities, fraud and personation in that an agent of the first respondent canvassed at some polling station and that votes were cast on behalf on six registered voters who had died before the elections.

Held: (1) that the Electoral Officer having received the nomination form of the first respondent and having communicated to him on the prescribed form (Form 5) the validity of his nomination, the validity of such nomination was concluded by law;

(2) that the fact that at three polling stations there were 2, 3 and 8 votes respectively cast in excess of registered voters is not, *per se*, sufficient to avoid the election in the absence of proof of fraud or corrupt practices during the election or on the part of the officers who conducted the election or counted the votes cast.

(3) that these excesses would not avoid the election since they did not affect the success of one candidate over the other;

(4) that there was no proof that five of the alleged dead registered voters had in fact died that in the case of the one proved dead, there was no evidence to show that it was the first respondent who procured someone to impersonate the deceased;

(5) that there was no evidence that the alleged agent canvassed on behalf of the first respondent or at his request.

Petition dismissed.

Petitioner and second respondent, unrepresented.

Omisade (*Obisesan with him*) for first respondent.

Thomas, J.: The petitioner, Samuel Odetola Lasebikan and the first respondent, Gabriel Kayode Dada, were candidates at the Federal Election for the Ekiti North-West Constituency on the 12th December, 1959.

The second Respondent, Frederick Michael Barrett, was the Electoral Officer.

The first respondent scored 29,263 votes as against 7,704 scored by the petitioner and was duly elected by the secnd respondent.

The petitioner then filed a petition setting out fifteen grounds on which he alleged the election ought to be avoided.

On the application of Counsel for the first and second respondents, twelve of the grounds filed were struck out as inapplicable to the petitioner's prayer leaving the following grounds:—

(1) That the Election was vitiated by fraud and irregularities in that more votes were cast at Polling Stations G 22, C 27 than the number of voters registered.

(2) That the Election was vitiated by non-compliance with the Election (House of Representatives) Regulations.

(3) That the Election was tainted with irregularites, fraud and personation, in that more votes were cast at Polling Stations G 63 and G 64 than the number of living registered voters in that several voters had died within the period elapsing following the publication of the final list of registered voters and the Polling Day, 12th December, 1959.

By the Order of the Court the petitioner filed the following particulars:—

First ground.—That the Electoral Officer failed and refused to exercise his powers under regulation 48 of the Electoral (House of Representatives) Regulations, 1958 as amended.

(*a*) Where an objection coming under regulation 48 (2) had been lodged by the petitioner against the first respondent;

(*b*) Where the nomination papers of the first respondent were not completed as required by law contrary to regulation 46 of the regulations as the persons nominating the said first respondent were not persons whose names appeared in the Register of Electors.

Second ground.—That contrary to regulation 114 one Mr Anjorin, an agent of the first respondent canvassed for votes in the polling day within a distance of 200 yards of Polling Stations G 16, G 17, G 18 and G 19 and there distributed registration cards to various persons (in breach or regulation 117 of the 1958 Regulation), for the purpose of impersonation to persons who did impersonate.

Third ground.—That contrary to regulation 117 one Shittu Olaitan and Chief Aseasanyin, canvassers and agents of the first respondent did carry fifteen and eigthteen registration cards irregularly on polling day.

The petitioner supplied the names of six persons (deceased) in support of the third remaining ground of his Petition.

Counsel for the first respondent then raised an objection to the first of the remaining grounds of the Petition and the petitioner withdrew it.

Petitioner's case.—The petitioner testified that nominations closed at 12 noon on the 21st November, 1959, when the second respondent published a list of the candidates together with their respective nominators. That he then noticed that the names of the voters list for that Constitutency and that he protested and that the second respondent did not give a decision on the point as requred by law. He further

testified that one Anjorin, one of the nominators of the first respondent had on the 12th December, 1959 the date of the Election distributed Registration Cards and had canvassed for votes at Polling Stations G 16 to G 19.

That Anjorin had stated that he was acting on behalf of the first respondent.

That, at Polling Station G 22, six persons in excess of those registered there had voted.

That, at Polling Station G 24, three persons had voted in excess of those on the Register.

That, at Polling Station G 27, eight persons in excess of those registered had voted.

That, at Polling Station G 63, where 350 persons were registered 350 cast their votes.

That six persons had died at various dates during the period that elapsed between Registration and the date of the Elections.

The petitioner called witnesses including P.W.5, a Police Constable, who tendered a Station Diary showing that on the 14th December, 1959, at 7.45 p.m. it was reported that one Pele Aina had been in possession of a Registration card bearing the name of Owoyeju Akano at 4.00 p.m. on the 12th December, the date of the election. This witness was unable, however to testify as to what transpired after the report.

First Respondent's Case.—The first respondent testified that he scored 29,263 votes whilst the petitioner scored 7,704. That he had two nominators; that one was Wilson Emmanuel Akanwo, a registered voter. He testified further that he know on Anjorin a fellow Councillor at Ijero but denied that he was his agent for any purpose whatsoever on the 12th December, 1959. That he did not know that Anjorin canvassed on the polling day or that he distributed cards to any one.

Wilson Emmanuel Akanwo testified that he is a Teacher and that he had signed the Nomination Form, exhibit 3 and that he is a registered voter F.A. Ward, Section N.1 as shown in exhibit 4 and that he is the one and the same person registered as Akanwo Wilson and described therein as a Teacher.

The second respondent, the Electoral Officer, D.W.3 who is an expatriate testified that he was the Electoral Officer for the constituency at the last Federal election. That the petitioner and respondent submitted nomination forms and that in consequence the eof he had issued Form 5, exhibit 2, *i.e.*, Electoral Officers ruling as to the validity of the nominations of the first respondent and that a similar form was issued to the petitioner.

He testified further that he had examined the Register of Electors, exhibit 4 and had been satisfied that Wilson Akanwo, whose name is shown therein is the one and the same individual as Wilson Emmanuel Akanwo on the Nomination Form, exhibit 3.

Conclusion.—The petitioner's contention is that the Register of Electors, exhibit 4 lists the name Wilson Akanwo whilst exhibit 3, the nomination form has on it the name Wilson Emmanuel Akanwo, and that the names must therefore be taken to refer to two entirely different individuals.

Wilson Akanwo, D.W. 2 the teacher and one of the registered nominators of the first respondent was actually identified in court by the petitioner whilst the latter was being cross-examined. Further Wilson Akanwo thereafter testified that he had signed the nomination forms as Wilson Emmanuel Akanwo.

D.W.3 the Electoral Officer has testified to the same effect.

I accept the testimony of the first respondent and his witnesses and that of the Electoral Officer on this point and say that there is no substance in petitioner's contention on this point. Furthermore, the Electoral Officer, having issued to him Form 5, *i.e.*, exhibit 2, the validity of first respondent's nomination was concluded by law.

REGULATION 48 (1):

"When any nomination paper is delivered and a deposit is made in accordance with these Regulations the candidate shall be deemed to stand nominated unless and until the Electoral Officer decides that the nomination paper is invalid or proof is given to the satisfaction of the Electoral Officer of the candidate's death.

(2) The Electoral Officer shall be entitled to hold the nomination paper invalid only on one or more of the following grounds:—

(*a*) that the particulars of the candidate or his nominators are not as required by law, or

(*b*) that the paper is not signed as required by law, or

(*bb*) that the candidate has been nominated in more than one constituency, or

(*c*) that the nominators of the candidate or one or any of them are not persons whose names appear on the register of electors in respect of the appropriate constituency.

(3) The Electoral Officer's decision that the candidate has been validly nominated shall be final and shall not be questioned in any legal proceedings.

(4) Whenever the Electoral Officer decides that a candidate has not been validly nominated he shall endorse and sign on the nomination paper the fact and reasons for his decision and such decision shall only be subject to review on an election petition as provided for in these Regulations.

(5) The Electoral Officer shall within twenty-four hours of the receipt of a nomination paper communicate to the candidate or to one of the persons nominating the candidate in the prescribed form in writing his decision as to the validity or otherwise of such nomination".

I find as fact that at each of the polling stations G22, G24 and G27, there were 2, 3 and 8 votes in excess of registered voters in each case.

The fact of these excess of votes cast in each of these polling stations is not, *per se*, sufficient to avoid the election in the absence of proof of fraud or corrupt practices during the election or on part of the Officers who conducted the Election and counted the votes that were cast. Moreover these excesses will not avoid the election as they did not affect the result of the election, *i.e.*, the success of one candidate over the other.

The petitioner has sought to prove that six persons at Epe and whose names are on the voters register had died during the period between the registration and the holding of the elections.

I am not satisfied in the absence of authoritative vital statistics in the area and after assessing the evidence tendered by the petitioner that five names of individuals, listed in petitioner's particulars are names of deceased persons as their demise has not been satifactorily established.

I do however accept the evidence of the petitioner and his witness Samuel Aina Agbede that Michael Ojo, a registered voter did die before the date of elections. I have noted the conflict in the testimony of the witnesses as to the actual time of the demise of this individual, but this conflict has in no way affected my belief that he is dead.

The most material question is assuming this individual is dead, is there any evidence before the court that the first respondent procured anyone to impersonate the deceased during the elections? I have no hesitation in saying that there is no evidence whatsoever.

The evidence before me has disclosed that at the polling stations G63 and G64, nearly 100 per cent of the registered voters cast their votes. The Ballot Paper Account and Record of Votes were signed in each case by the Election Officers and in the absence of any evidence to the contrary, I accept them as true and correct.

The petitioner has not on the evidence before me established that Anjorin canvassed on behalf of the first respondent or at his request.

In fact his witnesses did not even support his testimony on the point.

I have also considered the question of "General Corruption" in this particular election and I am satisfied that the petitioner, on the evidence before me has failed to establish it.

The petition is therefore dismissed.

Petition dismissed.

M. O. D. OYELEDUN ... ... *Appellant*

v.

LAWAL SHOMOYE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Duffus, J., 22nd July, 1960.]

Claim for recovery of premises, mesne profits and arrears of rent—owner of equitable interest cannot give notice to quit—failure to prove service of notice to quit—sections 19 and 28 of the Recovery of Premises Ordinance, Cap. 193—mesne profits payable only by a person holding land illegally—attornment of a lease—section 165 (1) of the Property and Conveyancing Law, 1959.

The respondent rented a room from one Animashawun on premises which were subsequently sold to the appellant, according to him in May 1958, under powers contained in a mortgage, the sale being covered by a conveyance dated 29th July, 1959. The appellant took action in the Magistrate's Court in April 1959 claiming the recovery of the premises, *mesne* profits and also arrears of rent from July 1958 to March 1959. The appellant alleged that he had served on the respondent the notices as required by the Recovery of Premises Ordinance, Cap. 193, on 30th December, 1958 and 7th February, 1959. On the question of the arrears of rent, the respondent's case was that he paid his rent up to March 1959 to his former landlord, Animashawun. The evidence accepted by the Magistrate was that the respondent was never notified of the sale before he got the summons in this action. On these facts, the Magistrate's Court dismissed the appellant's claim and it is against this order of dismissal that he has brought this appeal.

Held: (1) that between the date of the alleged sale in May 1958 and the execution of the conveyance in July 1959 the appellant had only an equitable interest and not a legal estate in the land and therefore could not give any notice to quit;

(2) that the appellant had not, at any event, proved that the respondent's tenancy was legally terminated under the provisions of the Recovery of Premises Ordinance, Cap. 193, as he had failed to prove proper service of the notice to quit under section 28 of the Ordinance.

(3) that the respondent would be protected in any payments that he had made to his former landlord without notice of the conveyance even after that conveyance had been executed.

(4) that the appellant's claim for *mesne* profit must fail because the respondent did not improperly hold the land but held it under a valid tenancy.

Appeal dismissed.

Cases cited:

Graham v. *Ilwaine* [1918] 2 I.R. 353.

Thompson v. *McCullough* [1947] K.B. 447; [1947] 1 All E.R. 265.

Civil Appeal No. HK/2A/60.

Desalu for Appellant.

Respondent in person.

Duffus, J.: This is an appeal against the decision of the Magistrate, Ikeja in a civil action in which the plaintiff/appellant sought to recover possession of premises under the Recovery of Premises Ordinance, Cap. 193. He also sought to recover arrears of rent and *mesne* profits. The action was dismissed by the Magistrate.

The short facts are that the defendant/respondent rented a room from Raji Ishola Animashawun on premises which were subsequently sold to the appellant under powers contained in a Mortgage. The premises were conveyed to the appellant by the Conveyance tendered in evidence as Exhibit "C".

According to the appellant the sale of the premises took place at an Auction Sale held in May 1958, but the conveyance is dated the 29th July, 1959. This action was brought in April 1959, prior to the execution of the conveyance. The notices were alleged to have been served on the 30th December, 1958 and 7th February, 1959, both also prior to the execution of the conveyance. The arrears of rent claimed are from July 1958 to March 1959.

The appellant's title is based on his conveyance, Exhibit "C". This conveyance is dated the 29th July, 1959, some months after he had brought the present action. Before this conveyance was executed the appellant had at the best only an equitable interest and not the legal estate. He could not therefore at that stage legally give a notice to quit. I would refer to the following passage from Woodfall's *Landlord and Tenant*, 25th Edd. at page 1035:

> "Any person for the time being legally entitled to the immediate reversion of and in the demised premises, *e.g.*, an assignee, devisee executes an administration of the landlord may give notice to quit.....But an assignee of a lease with only an equitable title cannot exercise the right to determine the tenancy. Nor can a person who has entered into a contract to purchase land subject to a tenancy before he has completed the purchase.

I would also refer to the case of *Graham* v. *Mr Ilwaine* (1918) 2 I.R. 353, and to the following note of his case in Volume 31 of the *E. and E. Digest* (Replacement Volume) at page 501:

> "A purchaser who between payment of the purchase money and the execution of the conveyance serves in his own name a notice to quit on a tenant of the land purchased cannot by such notice validly determine the tenancy".

I would also refer to the case of *Thompson* v. *McCullough* [1947] K.B. 447; [1947] 1 A.E.R. 265. In this case it is not clear from the evidence what was the position before this conveyance, Exhibit "C" was executed. There is no evidence as to when the purchase money was paid, or when the appellant obtained possession, or when the contract was completed. Apart from this I am also of the view that the plaintiff has not proved the proper service of the notice to quit. This was not apparently made an issue at the trial but was not admitted by the defendant and under section 19 of the Recovery of Premises Ordinance, Cap. 193, the plaintiff has to prove *inter alia* the expiration and determination of the tenancy. In this case the tenancy was purported to have been terminated by notice. The plaintiff/appellant however, failed to prove when the notice was served, or that it was served in accordance with the provisions of section 28 of the Ordinance. Service in this case was done by pasting on the door but there was no proof that defendant could not be found.

I am therefore of the view that the appellant has not proved that the respondent's tenancy was legally terminated and for this reason he could not have succeeded in this claim for recovery of possession.

On the question of the arrears of rent, the defendant's case is that he paid his rent up to March 1959 to his former landlord, Animashawun. In his evidence the defendant states in cross-examination "since last year March, I received the notice that plaintiff had now bought the house."

This case was tried in 1959, so on the face of it, this statement means that he received notice of the plaintiff/appellant's purchase of these premises in March 1958. This is clearly an error according to plaintiff he only purchased the place in May 1958 and he only served a notice on the defendant/respondent in November 1958. This must have been intended for March 1959 and this would be in accordance with all the defendant's evidence. The Magistrate does not specifically deal with this passage but he does say that the defendant/respondent first knew of the plaintiff/appellant's title to the land when his action was started. The defendant's statement must therefore be that he received notice of plaintiff's purchase in March 1959.

In this case there is no evidence that the respondent attorned to the appellant, indeed the evidence which the Magistrate accepted is that the respondent had not ever been notified of the sale before he got the summons in this action.

I agree that attornment is no longer necessary under section 165 of the Property and Conveyancing Law, 1959 (Western Region, 21/1959). The relevant portion of this section reads—

"165 (1) Where land is subject to a lease the conveyance of a reversion in the land expectant on the determination of the lease shall be valid without any attornment of the lease."

Nothing in this sub-section (1) affects the validity of any payment of rent by the lessee to the person making the conveyance a grant before notice of the conveyance or grant is given to him by the person entitled thereunder.

This law only came into effect on the 23rd April, 1959 but this in effect re-enacted the provisions of the English Act, 4 and 5 Anne, Cap. 16, which would have been in force here as an act of general application.

The tenant would be protected in any payments that he made to his Landlord without notice of the conveyance even after that conveyance is executed.

In this case the Magistrate has found that the respondent had no notice of the sale. In fact as the Magistrate points out the letters Exhibit "D" and "F" did not state that the appellant had purchased the reversion.

I am of the view therefore that the payment of rent made by the respondent to Animashawun were a valid discharge of his rent, and that the appellant cannot now collect this rent from the respondent. He may be able to recover these from Animashawun. The respondent's evidence as to these payments remain uncontradicted and the appellant has not proved that this rent was due.

The appellant's claim therefore for arrears of rent up to March 1959 also fails.

The appellant also claims *mesne* profits from April 1959. The defendant admits he has not paid his rents from April 1959 onwards. The plaintiff's claim is however for *mesne* profits. *Mesne* profits are profits derived from land improperly held.

This is not the case here as the respondent's tenancy has continued to exist all along. The appellant's claim for *mesne* profits fails. The respondent apparently owes the appellant rent from April 1959, and he would be well advised to take early steps to settle this, but the appellant does not seek to recover these rents in this action.

For reasons that are not altogether the same as the learned Magistrate's, I agree that on the evidence this action was properly dismissed and accordingly this appeal will be dismissed, and the judgment of the Magistrate affirmed.

The appellant will pay the respondent costs which I will now tax.

Appeal dismissed.

THE QUEEN
v.
THOMAS IJOMA

[HIGH COURT OF JUSTICE: Duffus, J.: 28th July, 1960.]

Criminal Law and Procedure—apparent defect on records of committal—section 149 (1) of Evidence Ordinance—what facts would sustain charges under section 98 (1) and 99 of the Criminal Code.

The accused was charged with Official Corruption and Extortion contrary to sections 98 (1) and 99 respectively of the Criminal Code. After plea, Counsel for the Crown applied to quash the information because it would appear from the record of the committal that the Magistrate in committing the accused had done so without giving him the opportunity of being heard in his defence. The evidence in this case established that the accused, an Acting Assistant Superintendaet of Police, in the Nigeria Police Force, demanded and received the sum of £5 5*s* from the complainant before he released to him (the complainant) the police extract report of an accident in which the complainant's motor vehicle was involved. It was established that it was the duty of the accused as a Superior Police Officer to approve of the supply of such a report.

Held: (1) that after the committal by the Magistrate of an accused person the Court will by virtue of section 149 (1) of the Evidence Ordinance, Cap. 63, presume that the Magistrate had complied with the formal requisites for the committal;

(2) that since the accused received the money for the purpose of carrying out his duty and not for the purpose of any corrupt or improper act in the actual discharge of his duty, he could only be guilty of an offence of extortion under section 99 of the Criminal Code but not of an offence under section 98 of the Code.

Accused found not guilty of count 1 but guilty on count 2.

Cases cited:

Biobaku v. *Police*, 20 N.L.R. 30.

Ajaegbur v. *Inspector-General of Police*, 1956 N.R.N.L.R. 104.

Criminal trial: Charge No. Ikeja HK/7c/60.

Akinloye (*Craig and Chukurah with him*) for the accused.

Johnson, Senior Crown Counsel, for the Crown.

Duffus, J.: The information in this case charges the accused on the first count with Official Corruption contrary to section 98 (1) of the Criminal Code and on the second count for Extortion contrary to section 99 of the Criminal Code.

At the start of the trial, but after plea had been taken, learned Crown Counsel applied to quash the information as it appeared that the Magistrate in committing the accused had done so without giving him the opportunity of being heard in his defence as under section 314 of the Criminal Procedure Ordinance. Counsel for the accused stated that the defence waived any objection to the information being bad and Crown Counsel then applied to withdraw his application to quash the information.

I refused the application to quash the information as in my view the provisions of section 149 (1) of the Evidence Ordinance applied and it must be presumed that the Magistrate had complied with the formal requisites for the committal. In this case the committal is written at the end of the manuscript of evidence. The statutory caution and enquiry as to whether the accused desired to give evidence and had any witnesses are on printed forms and these were bound after the committal but this is probably due only to this being separate printed forms and it must be presumed that the Magistrate duely read these to the accused before he committed. This case is quite different to several other cases which I recently had where the committal was clearly invalid. I therefore refused the application to quash the information and the trial proceeded.

The facts on which the Crown rely are that the complainant Sampson Oshibodu had his Motor Van destroyed by fire whilst travelling along the road on the 5th October, 1959. The police enquired into the incident. The car was insured and the Insurance Company required a Police report before dealing with the claim. The complainant applied to the police for the report. The Prosecutor alleged that it was the duty of the accused as a Superior Police Officer to approve of the supply of such a report to the complainant, and that the accused demanded £5 5*s* from the complainant before he would release the report. The accused was then acting as Assistant Superintendent of Police at Ikeja. The complainant made a report of this demand to the Senior Superintendent of Police and was referred to the C.I.D. in Lagos. As a result a trap was set and the complainant given £5 5*s* in marked Currency Notes. The complainant then went to Ikeja and saw the accused and gave him the marked money and received the report. The Police then sprang the trap and went into the accused's office, where the money was found in a drawer where it is alleged the accused placed it, locked the drawer and kept the key. The accused in his defence denies demanding or receiving any money.

The prosecution called in all eight witnesses. The first and eighth witnesses Assistant Superintendent Onwuemelie who was in charge of the investigation and Assistant Superintendent Nwoko who is now an Assistant Superintendent of Police, Ikeja, both gave evidence that the accused at the time of this offence was acting as an Assistant Superintendent of Police, Ikeja, and as such was a Superior Police Officer whose duty it was to approve of the supply of this report.

The third prosecution witness the complainant, Oshibodu gave a detailed account of his dealings with the accused. The Crown depend a great deal on the evidence of this witness although his evidence is corroborated as to the accused receiving the marked £5 5*s* from him by the witness Kuyoro and also to some extent by A.S.P. Onwuemelie (first prosecution witness) and Inspector Borokini (seventh prosecution witness). I was impressed by the demeanour of this witness and I believed that he was speaking the truth. His evidence stands alone on the question of the demand made by the accused, and according to him the second prosecution witness Constable Sunday Akinjagunla was present on the occasion when the accused made the demand on him, and not only was he present then, but according to this witness in his statement Exhibit 9 he said that it was the second prosecution witness who came out of the office and advised him to give some money to the accused or he would never get the report. Constable Akinjagunla gave evidence for the Crown. This witness, if the Crown's case is accepted, clearly was an accomplice with the accused in this demand of money. This evidence supports the defence in many respects. Thus he denies entirely ever making any suggestion of a payment to the complinant Oshibodu or of ever hearing

any conversation at all between the complainant and the accused as to a demand or payment of any money. He was also in the office when the money was alleged to have been paid. He also stated that after he had typed and the accused signed the letter (Exhibit 4) with the attached report, the accused handed this to him and told him to put this into an envelope and post to the complainant and but for the fact that he closed his office very late that day after 2 o'clock p.m. the report would have been posted but was instead kept by him in his drawer. This evidence is most important and if true strongly supports the defence as if the accused had intended to receive money before the report was handed over to the complainant, then he would hardly have told his typist to post the letter before any money was paid. He also supported the defence in that he agrees that it was the practice of the accused to have the key in the key hole of his drawer where eventually the marked money was found. This witness did not, however, impress me as being truthful. He was evasive and appeared all the time to be endeavouring to protect himself. It was suggested to this witness that he was the person who demanded and received this £5 5*s* from Oshibodu and that he put this into the drawer of accused table. This of course, if true could account for his demeanour in Court.

The complainant's evidence as to dates was not clear and there are discrepancies between his statement to the police and his evidence in Court. According to the complainant he saw the accused on several occasions, but both in his statement and in his evidence the complainant stated that it was the day before this offence that the accused and himself finally agreed that the complainant would bring the money and get his report on the 24th November, 1959.

The Crown's case as to what occurred on the 24th November, is related by several witnesses.

The first prosecution witness A.S.P. Onwuemelie and Inspector Borokini (Seventh prosecution witness) both gave full accounts as to what occurred. There can be no doubt that this £5 5*s* in currency notes was marked and handed to the complainant, and this same money was found in the locked drawer of the accused table. The first prosecution witness said that when he entered and told the accused he wanted to search the accused and his office that accused quickly got up and dipped his hands into his pocket and held his two hands up and said search me and that at this time he had a bunch of keys in his right hand. Subsequently when the complainant said that the accused had placed the money in the drawer and locked it up, the accused then said his keys were missing. After this Inspector Borokini told the accused who had sat down to get up and the keys were found on the seat of his chair. Inspector Borokini said that he was instructed not to take part in the search but his role was to carefully note all that happened. He also says he saw the accused with a bunch of three keys tied with green tag in his right hand and that when the accused sat down, the accused then put his right hand under him and when he brought up his hand again nothing was visible. When the key could not be found he told the accused to get up and the key was found on the chair on which he was sitting.

The fifth prosecution witness, Sub-Inspector Alale was called in by A.S.P. Onwuemelie to witness the search. He also gave evidence that he saw accused put his hand in his pocket and took out something but he did not see the keys until Borokini told the accused to stand up. The keys were found on the chair and when the accused refused to use the key to open the drawer this witness at the request of Onwuemelie opened the drawer and the marked £5 5*s* was found inside.

I would refer here to the evidence of the witness Kuyoro. He appears to be a close friend of the complainant. He was present when his car was burnt and gave a statement to the Police, to be found in the police file Exhibit 8. His role in the trap set for the accused was to stay outside the accused office and on receiving a signal from the complainant. He relayed the signal to watching C.I.D. officers. This he did but he goes further and says he actually saw the complainant gave the money to the accused. There can be no doubt that this witness did receive and pass on the signal and I believe he saw what happened in the room.

The Crown also called Lance Corporal Jongbo who investigated the burning of the complainant's car, and referred to the Police files on the accident Exhibit 7 and Exhibit 8. He gave evidence of the procedure as to the enquiry and of the several visits by the complainant to bring and get his report.

The accused gave evidence in his defence but did not call any witnesses. The accused has a good record of service. He joined the police force as a Constable in 1942, and worked his way up until he was just appointed to act as an Assistant Superintendent of Police and was stationed at Ikeja on the 1st October, 1959.

In June before he took up duties in Ikeja the accused was an Inspector at Ibadan prosecuting in the Chief Magistrate's Court and as a result he had to go to Ibadan to prosecute every week on Thursdays and Fridays. The accused completely denies the charge. The complainant had seen him about this report and a cause of delay appears to have been caused by the Vehicle Inspection Officer's report received only on the 17th November. He saw the complainant in his office on the 23rd November, 1959 and it was on this day that the complainant gave him the letter of application on page 3 of Exhibit 7 and also paid the Government fee of 10*s*. The letter bears the date stamp of his office on the 23rd November, 1959 and this bears out the accused's evidence as to the date of receipt. The complainant's evidence is that he handed this in on the date of signature the 6th November, 1959. On his instructions the second prosecution witness who was his typist then typed out the letter and report (Exhibit 4) and he told second prosectution witness to either post or give this to the complainant.

On the day of the incident he said he saw the complainant in his office sitting down, when he came in from delivering a lecture to some recruits. When he saw the complainant in his room he told the second prosecution witness to hand over the report if he had not yet posted it. The second prosecution witness then opened his drawer and took out the report in the envelope Exhibit 4, and handed it to accused who then handed this to the complainant. After this, the C.I.D. men came. The first prosecution witness told him of the allegation against him, and he said he then told the first prosecution witness that he had found the complainant in his office when he came in. He said he had his spectacle case on one hand and spectacle on the other and denies having had the keys. He said where the complainant said that the accused had locked the money in his drawer he suggested that the complainant might have put the money in the drawer. He said he always kept the key in the drawer, and when the drawer was found locked the key would not be found and he was surprised to find this on his chair. The accused denied all knowledge of this money and denies completely the allegations of the Crown as to his demanding and receiving this £5 5*s*.

In the address by learned Counsel for the accused, he put forward the proposition that this money might have been deliberately planted in the drawer by the complainant and placed there by the second prosecution witness, the typist.

I have carefully considered the defence of the accused, and also the fact that his case is largely supported by the evidence of the second prosecution witness Constable Akinjagunla. I have borne in mind that the onus of proof lies on and remains with the prosecution and that the prosecution must prove the guilt of the accused with that degree of certainty required in a criminal case. There have been discrepancies in the evidence given by the witnesses for the prosecution and in particular between the evidence of the complainant and his statement to the police. The case for the prosecution depends to a great extent on the evidence of the complainant. I believe that the complainant has been a truthful witness and his evidence is corroborated by the fact that the marked money was found in the possession of the accused. I have no hesitation in accepting the evidence of A.S.P. Onwuemelie and Inspector Borokini. Both these witnesses have in my view been truthful. They are both trained observers and I am satisfied that the accused had the key for his locked drawer in his possession and that he endeavoured to hide this when the C.I.D. men came in.

I do not accept the defence. On the facts I am satisfied and found the accused did demand and receive this £5 5*s* from the complainant before he released him the report. I also believe that the second prosecution witness, as described by the complainant, assisted the accused in his demand for money. On the law learned Counsel for accused submitted that the evidence did not support the first count and he relied on the judgment of Bairamian, J., in *Biobaku* vs *The Police*, 20 N.L.R. 30.

Learned Crown Counsel referred me to the case of *Ajaegbur* vs *Inspector-General of Police*, 1956 N.R.N.L.R. 104. In delivering the judgment of the Court in the latter case *Brown*, C.J. said at page 106:

"The second charge is laid under section 98 (1) of the Criminal Code. The essence of an offence under that section is that the money is corruptly obtained by the accused in the performance of his duty as was said by Bairamian, J. in *Biobaku* vs *Police* (20 N.L.R. 30)".

"the mischief aimed at in section 98 is the receiving or the offering of some benefit as a reward or inducement to sway or deflect the officer from the honest and impartial discharge of his duties—in other words as a bribe for corruption or its price.

That is the essence of an offence under section 98 (1) that the accused corruptly accepts a bribe which deflects him from the honest and impartial exercise of his duties."

With respect I agree with this interpretation of the meaning of section 98.

The evidence in this case shows that the accused received this money for the purpose of carrying out his duty, and not for the purpose of any corrupt or improper act in the actual discharge of his duty. The facts of this case show clearly an offence of extortion under section 99 of the Criminal Code but not of an offence under section 98.

The accused is therefore acquitted and discharged on the first count.

On the second count learned Counsel submitted that the evidence showed that the accused was under the duty of issuing a police report and not under the duty of approving the supply of as he is charged on the second count. With respect I cannot agree with this submission. In the evidence of the first prosecution witness said:

"It was the duty of the accused at that time to approve and supply the report to an applicant".

This duty was laid down in Standing Orders and a copy of this was put in by the eighth prosecution witness A.S.P. Nwoko. Order 841 reads *inter alia* as follows:—

"An extract of a police report or record may, on written application to and with the approval of a Superior Police Officer be supplied to any of the following persons.....".

In this case the evidence shows clearly that the accused accepted this money for the purpose of approving of the supply of this report. It does not matter whether he delivered it himself or not, he received this money for the purpose of having the report issued.

On the facts it is very clear that the accused has committed an offence under section 99. He is in the public service and he accepted this money for the performance of his duty as an Assistant Superintendent of Police beyond his proper pay as an emoluments.

I find the accused guilty as charged on the second count.

Accused found not guilty on count 1, but guilty on count 2.

WURAOLA KUKU ... ... *Plaintiff*

v.

FATUMO OLUSHOGA ... ... *Defendant*

[HIGH COURT OF JUSTICE: Irwin, J., 22nd August, 1960.]

Claim for damages for false imprisonment and slander—alleged false imprisonment resulting from the issue of search warrant by a Magistrate—defendant not liable.

This action was instituted by the plaintiff to recover damages from the defendant for slander and false imprisonment. The defendant who saw the plaintiff wearing a gold chain on the Ileya Festival of 23rd August, 1953, which she recognised as the same or similar to her own which had earlier been stolen, went and made a report to the Nigeria Police, Ijebu-Ode, on the same day. The house of the plaintiff was later searched on a warrant issued by the Magistrate following the swearing of an information. Neither the warrant nor the information was produced in evidence and it was not suggested that the information had been sworn by the defendant. It was during the search that the defendant was alleged to have spoken the words which were alleged to constitute slander of the plaintiff and there were at least three versions of the words as given by the plaintiff and his witnesses.

Held: (1) that the temporary restriction of the plaintiff's liberty following the issue of a search warrant by the Magistrate amounted to imprisonment for which the defendant was not liable as the issue of a search warrant which is a judicial act, is within the discretion of the Magistrate;

(2) that on the evidence, the alleged slander and the innuendo pleaded had not been established.

Case dismissed.

Cases cited:

Hope v. *Evered*, (1886) 17 Q.B.D. 338.

Austin v. *Dowling*, [1870] L.R. 5 C.P. 534.

Sewell v. *National Telephone Co.*, [1907] 1 K.B. 557.

Ibadan Civil Suit No. I/105/1953.

Obe for *Adekunle* for Plaintiff.

Peter-Thomas, for Defendant.

Irwin, J.: This is an action for damages for false imprisonment and for slander.

It was established on behalf of the defendant that eight months after the death of her husband in the year 1950, some of her property, including a gold cord chain, which was kept in a room in his family house at Ijebu-Ode was found to be missing.

The plaintiff, who is a substantial trader, is a member of the Olushoga family to which the deceased husband of the defendant belonged.

It is not disputed that at the Ileya Festival on the 23rd August, 1953, the plaintiff wore a gold cord chain. It appears that this is not a very common ornament and that it is worn by women only upon special occasions. The defendant, who also attended the Festival, saw the plaintiff wearing the chain which, she says, she recognised as being the same or similar to her own which she believed to have been stolen from the Olushoga family house. On the same day the defendant made a report to the Nigeria Notice at Ijebu-Ode. A warrant to search the house of the plaintiff was issued by the Magistrate following the swearing of an information. Neither the warrant nor the information was produced in evidence and it was not suggested that the information had been sworn by the defendant.

At the invitation of the police, the defendant was present when the plaintiff's house was searched. A gold cord chain and a portion of a similar chain was found in the plaintiff's room. The plaintiff was then brought to the Police Station and was regarded as being under arrest; she was, however, released some few hours later on bail granted by the police.

After an investigation which appears to have been inconclusive, the case file was closed, and the cord chain and portion taken from the plaintiff's room was returned to her on the instructions of the Assistant Superintendent. Mr Chude who was then the Assistant Superintendent at Ijebu-Ode was not called as a witness.

When the police and the defendant first went to the plaintiff's house with the search warrant, the plaintiff was in her shop which was some distance away.

It is at this stage that the defendant is alleged to have uttered the words complained of. The witnesses called in support of this allegation were Sub-Inspector Oni, plaintiff's second witness, Adebayo Gamu, plaintiff's fifth witness, and the plaintiff's mother, her seventh witness. Adebayo Gamu said that it was he who went to call the plaintiff from her shop so that she should be present at the search. Paragraph 19 of the statement of claim makes it plain that of the words said to have been spoken those principally relied on as constituting a slander are: "a policemen should follow the person who is going to call Wura in order that Wura may not be able to remove the necklace from her neck and hide it in case she has it on when she hears she is wanted in her house by the police".

The plaintiff's second witness, who was called on the first day of the hearing, stated: "Defendant said that plaintiff might take off the chain if she was wearing it, and therefore I should send a constable with the messenger to the plaintiff's shop". The plaintiff's fifth and seventh witnesses, who gave their evidence some months later, each said that the words used were that a policeman should go with the messenger lest the plaintiff should dispose of the gold chain if she had it with her. Neither said anyting about the actual wearing of the chain.

It is admitted that the plaintiff and four other women wore gold cord chains and cloths of the same pattern at the Afin and at a funeral ceremony held two days previously. A gold cord chain appears to have been accompaniment of the formal dress worn on such occasions. I consider it most improbable that the defendant would have expected the plaintiff to wear the chain on a working day when in her shop. I am inclined to think that a subsequent realisation of this improbability explains the different version given by the plaintiff's fifth and seventh witnesses. I do not accept the evidence called by the plaintiff that the substance of these words or of the other words alleged was spoken by the defendant.

The words as set out in paragraph 18 of the statement of claim are, it seems, alleged to have been addressed to the police and to have been overheard by the plaintiff's fifth and seventh witnesses; if they were addressed to the police, there was a pointless reiteration of the complaint of which they were already fully cognisant. The first four sentences appear to me to represent what the plaintiff supposed the defendant to have told the police and to have been deduced from the circumstances. I hold that the alleged slander and the innuendo pleaded have not been established.

The temporary restriction of the plaintiff's liberty which, I think, amounted to an imprisonment, followed the issue of a search warrant by the Magistrate. The issue of a search warrant was within the Magistrate's discretion and was a judicial act for which the defendant was not therefore responsible: *Hope* v. *Evered*, (1886) 17 Q.B.D. 338.

While no charge can, in my view, be said to have been formulated by the defendant, the present case appears to me to be governed by the law as stated by Willes, J. in *Austin* v. *Dowling*, [1870] L.R. 5 C.O. 534, which was followed in *Sewell* v. *National Telephone Co.*, [1907] 1 K.B. 557. Here also "the opinion and judgment of a judicial officer" were interposed between the defendant's report to the police and the subsequent imprisonment.

There being no evidence that the defendant directly caused the imprisonment, I conclude that an action for false imprisonment does not lie against her. Accordingly there will be judgment for the defendant.

Case dismissed.

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AMORIGHOYE AKPEIYI AND OTHERS ... *Applicants*

v.

U. E. ONUWAJE AND OTHERS ... ... *Respondents*

[HIGH COURT OF JUSTICE: Adeyinka Morgan, J., 17th March, 1960.]

Civil Procedure—civil suit commenced by one judge—whether formal transfer necessary if it is to be continued by another judge of the same judicial division—sections 38 (1) and 42 of the High Court Law, 1954 applied.

This suit was commenced before a judge of the High Court, Warri Judicial Division, but was subsequently put on the cause list of another judge in the same Judicial Division for determination. The point was then taken whether a formal order of transfer was necessary.

Held: that upon a proper interpretation of sections 38 (1) and 42 of the High Court Law, 1954 (No. 3 of 1955) a formal order of transfer from the court of the first judge was essential if the matter was not to be commenced *de novo*.

Application granted.

Warri Suit No. M/7/1960.

Idigbe (*Egbe* and *Ogbobine* with him) for the applicants.

Eboh, Senior Crown Counsel, for first respondent.

Rewane, for the second and third respondents.

Adeyinka Morgan, J.: In my view although this court can continue with this matter a formal transfer from the court of Kester, J., to this court is essential if the matter is not to commence *de novo*. I say this after considering the provisions of sections 38 (1) and 42 of the Western Region High Court Law, 1954 (No. 3 of 1955) which are as follows:

Section 38 (1):

"A Judge may at any time or at any stage of the proceedings before final judgment, and either with or without application from any of the parties thereto, transfer any cause or matter before him.....to a judge in the same or any other Judicial Division".

Section 42:

"Every proceeding in the High Court and all business arising thereout shall, so far as is practicable and convenient and subject to the provisions of any Law or Ordinance be heard and disposed of by a single judge, and all proceedings in an action subsequent to the hearing or trial down to and including the final judgment or order shall so far as is practicable and convenient, be taken before the judge before whom the trial or hearing took place."

Although my brother Kester and I have jurisdiction in respect of all matters in this Division it is my view that once the court of either of us becomes seized of any matter and any step has been taken in court before either of us an order of transfer from the one to the other, subject to the proviso to section 38 (1) of the law, is necessary before the other to whom it is transferred can become seized of it and before the effect of section 42 of the law as regards what to do can be considered. I therefore rule that a formal order of transfer is necessary.

Application granted.

HARRISON CHIEF JAFIA ... ... *Appellant*

v.

JONATHAN ARCHBOLD COLE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Adeyinka Morgan, J., 28th March, 1960.]

Evidence—admissibility of a promissory note which also affected interest in land—whether the note is registrable—sections 2, 15, 26 and 28 of the Land Registration Ordinance, Cap. 108, considered—regulation 5 of the Regulations made under sections 26 and 28 of the Ordinance applied.

At the trial of this civil suit before a Warri Magistrate's Court, there was tendered to the court a document which recited that the plaintiff/appellant had lent defendant/respondent the sum of £105 12*s* and that the defendant/respondent acknowledged receipt of the money and covenanted to repay the loan within five months and that the plaintiff/appellant should collect the monthly rent of a house belonging to the defendant/respondent which the defendant/respondent was to convey to the plaintiff/appellant if he made default in paying the balance of the debt on the due date. The document was not registered under the Land Registration Ordinance, Cap. 108. The trial Magistrate held that by virtue of section 15 of the Ordinance the document was inadmissible as it was not merely a promissory note but was also a memorandum affecting land and one which was made registrable by virtue of section 2 of the Ordinance. The plaintiff/appellant was non-suited. He then appealed.

Held: (1) that the document was an agreement for sale of land and by regulation 5 of the Regulations made under sections 26 and 28 of the Land Registration Ordinance it was exempted from registration and that therefore the document was not a registrable instrument within the meaning of section 2 of the Land Registration Ordinance, Cap. 108.

(2) that even if it were a registrable instrument, it would nevertheless be admissible in evidence as an acknowledgment of the loan but not as an instrument affecting an interest in land.

Appeal allowed.

Cases cited:

Inua-Na-Mallam Yaya v. *Alhaji Ibrahim Nagogo*, 12 W.A.C.A. 132.

Coker v. *Ogunye*, 15 N.L.R. 57.

Elegbede v. *Savage and others*, 20 N.L.R. 9.

Warri Civil Appeal No. W/45A./59.

Irikefe, for appellant.

Adeyinka Morgan, J.: This is an appeal from the decision of the Senior Magistrate, Warri, given on the 17th day of March, 1959 in an undefended claim for £105 12*s* made by the appellant against the respondent.

At the trial the appellant tendered in proof of his claim a document executed in his favour which the lower court admitted in evidence and marked Exhibit A.

The learned Senior Magistrate, although he had already admitted the document in evidence, proceeded in his judgment to say "I accordingly declare it inadmissible and ignore it". He gave as his reason for doing this that the document was not merely a

promissory note but also a memorandum affecting land and one which is made registrable by virtue of the provisions of section 2 of the Land Registration Ordinance, Cap. 108 of the Laws of Nigeria. He decided that it was not admissible in evidence because of the provision of section 15 of the Ordinance and non-suited the appellant.

The document in question is an indenture prepared by a solicitor, Mr R. A. Ogbobine. It recites that the appellant lent the respondent the sum of £105 12*s* 0*d* and that the respondent acknowledged receipt of the money and covenanted to repay the loan within five months from the 1st August, 1957. It further provides that the appellant should collect the monthly rent of £5 2*s* accruing from a house belonging to the respondent and which was valued at £195 and that the respondent covenanted with the appellant to convey the said house to the appellant if the respondent defaulted in paying the balance of the debt at due date.

Two points arise. Is the document a registrable instrument and if so is it admissible in evidence for any purpose?

In my judgment there can be no doubt that the transaction evidenced by the document conferred an equitable interest in the house in question upon the appellant. But, by the provision of section 2 of the Land Registration Ordinance, an instrument means "a document affecting land in Nigeria wherein one party confers, transfers..... in favour of another party.....any right, title or interest in land in Nigeria". According to the decision of the West African Court of Appeal in *Inua-Na-Mallam Yaya* v. *Alhaji Ibrahim Nogogo*, 12 W.A.C.A. 132, 134 where a document is merely evidence that there was an agreement for sale and of the payment of the purchase price it is exempted from the need for registration.

The receipt in question is an agreement for sale and, by Regulation 5 made under sections 26 and 28 of the Land Registration Ordinance, is exempted from registration. I therefore hold that the document in question is not a registrable "instrument" within the meaning of that word in section 2 of the Land Registration Ordinance.

But even if it were a registrable instrument I am of the view that it would be admissible in evidence as an acknowledgment of the loan but not as an instrument affecting an interest in land. (*See Coker* v. *Ogunye*, 15 N.L.R. 57). In the case of *Elegbede* v. *Savage and others*, 20 N.L.R. 9, 10, de Comarmond, S.P.J., said: "My view of these cases is that they establish that a document which is an integral part of a transaction and is in itself an operative instrument (and not merely evidential) must be registered. I therefore admitted Exhibit C for the sole purpose of establishing payment of a sum of money in respect of land." I agree with respect with the step taken by the learned Judge and hold that even if Exhibit A were registrable it was still admissible in evidence to prove the loan although, not having been registered, it would be inadmissible in evidence as affecting an interest in land.

For the foregoing reasons I allow this appeal and set aside the judgment of the lower court. I enter judgment for the appellant for £105 12*s* 0*d*.

Appeal allowed.

JAMES ISONI ... ... *Appellant*

v.

JOHNSON I. EZEWU ... ... *Respondent*

[HIGH COURT OF JUSTICE: Adeyinka Morgan, J., 11th April, 1960.]

Agreement for sale of a house—voluntary payment of rent by vendor following an order of court—whether specific performance could be decreed—jurisdiction of Grade "C" Customary Court—res judicata—*section 53 (a) of the Customary Courts Law, 1957, applied.*

On 23rd September, 1958 the respondent entered into an agreement with the appellant purporting to sell his house to the latter for £60. The respondent failed to give up possession of the house to the appellant who thereupon brought an action in the Uvbie Grade "C" Customary Court seeking an order of the court for the respondent to quit the house. Although the respondent admitted that he had sold the house to the appellant he said that he had changed his mind and offered to return £25 out of the £60 immediately and pay the balance later. The court ordered the respondent to pay rent to the appellant as from the date of the agreement until the whole sum of £60 was paid. The court also stated that it would not give judgment in the matter of the refund of the sum of £60 as it had no jurisdiction. Neither party appealed against this judgment.

On 12th January, 1959 the appellant again instituted another suit before the same Court seeking recovery of the premises from the respondent *qua* landlord from a tenant. The respondent pleaded *res judicata*. The court rejected this plea and ordered the respondent to quit the house within thirty days. The respondent appealed to the Grade "B" Customary Court which allowed the appeal and held that the matter should remain as decided in the first case. This is an appeal from that decision.

Held: (1) that the order of Uvbie Grade "C" Customary Court that the respondent should pay rent until the purchase money was refunded was *ultra vires* that court;

(2) that the Uvbie Grade "C" Customary Court was right in rejecting the plea of *res judicata* and considering the claim before it;

(3) that the voluntary payment of rent by the respondent for a continuous period of nine months would have been such an act of part performance as to create an equity against the respondent but for the fact that the rent was paid in pursuance of an order of a court and not on the initiative of the respondent;

(4) that therefore specific performance of the agreement for sale would not be ordered.

Appeal and claim for possession dismissed.

Case cited:

Chaprioneres v. *Lambert*, [1917] 2 Ch. 356.

Warri Civil Appeal No. W/3A/60.

Irikefe, for appellant.

Ovie-Whiskey, for respondent.

Adeyinka Morgan, J: This is an appeal from the decision of the Western Urhobo Grade "B" Customary Court given in its appellate jurisdiction on the 26th day of November, 1959 in respect of an appeal from a decision of the Uvbie Grade "C" Customary Court.

By an agreement made on the 23rd day of September, 1958 which, though it was stamped, had no plan and was not registered, the respondent purported to have sold his dwelling house to the appellant for the sum of £60.

The respondent failed to deliver up possession of the house to the appellant and in case No. 1/1959 the appellant made the following claim against the respondent in the Uvbie Customary Court:—

"The plaintiff seeks an order of the court requesting the defendant to quit the house which he purchased from the defendant *vide* agreement dated 23rd August, 1958".

The respondent opposed the claim but told the court: "I did sell the house with the land to the plaintiff for £60. I changed my mind again never to sell it." He offered to return £25 immediately and to pay the balance later but the appellant refused to get the money back.

Without taking any evidence the court said "We are not prepared to waste time..... because defendant had agreed that he sold the house with the land to the plaintiff."

The respondent informed the court that he did not bring the appellant's money with him and the court ordered as follows:

"The defendant would have to pay rent to the plaintiff for the period which he had been staying in the house as from the time the agreement was made. He would continue paying the rent till he pays the money". But it did not stop there. It ended "We never gave any decision about the term of refunding the £60 because it was not the action before us for the fact that £60 claim is above our jurisdiction."

The respondent gave notice of appeal against the decision but in the end neither side appealed against it.

In case No. 128/1959 the appellant instituted a second action. This time it was not an action seeking for the specific performance of the agreement of sale but an action for recovery of possession *qua* landlord from a tenant. The respondent opposed the claim and pleaded the judgment in case No. 1/1959 of 12th January, 1959. He indicated that he was prepared to refund the purchase money but the court overruled his plea of *res judicata* and took evidence.

The appellant testified that following the sale the respondent paid rents for nine months and added that because he wanted to carry out major repairs in the house he gave the respondent a month's notice to quit and a further notice of seven days. Under cross-examination the appellant admitted that the respondent started to pay the rent after the judgment was given in the first action and that the respondent ceased to pay rent after he wrote to the appellant and asked him to come for a refund of the purchase money.

The respondent again admitted the sale of the house and also that he changed his mind and decided not to sell the house again. He relied upon the decision in the former case and asked that the claim should be dismissed.

The court rejected the plea of *res judicata* and ordered the respondent to quit the house within thirty days.

The respondent appealed to the Grade "B" Customary Court which held that the appellant ought to have appealed against the former decision and that the Grade "C" Customary Court had no jurisdiction to revise (*sic*) or reverse the former decision.

It held that the matter should remain as decided in the former judgment, allowed the appeal and set aside the judgment of the Uvbie Grade "C" Cutomary Court.

The learned counsel for the appellant argued that the Grade "B" Customary Court erred in law:

1. Because it regarded the first decision as dealing with the question whether the sum of £60 should be refunded or not.

2. Because, while holding that both cases deal with the same issue, it held that the second was defective because it did not allege the agreement of sale; and

3. Because it gave judgment on appeal based upon the former case which was not before it.

As regards the third ground of appeal I do not agree that it purported to give judgment as if there was an appeal before it in respect of the former case. Obviously the effect of setting aside the second decision is to restore the parties to the position in which they stood after the first judgment.

I think that the proper thing to do is to deal first with the decision in the first case; case No. 1/1959.

The action was an action for the specific performance of an agreement for the sale of property in question. The value of the property according to the agreement of sale was £60.

A Grade "C" Customary Court has jurisdiction only in land matters in which the value of the subject matter does not exceed £50. (*See* Part III of the Second Schedule to the Customary Courts Law, 1957). The Uvbie Grade "C" Customary Court recognised its limitation and acted rightly in the first action when it said "We never gave any decision about the term of refunding the £60 because it was not the action before us for the fact that £60 claim is above our jurisdiction."

Although the court expressly stated that it had no jurisdiction to try the very claim before it yet it ordered that the respondent should pay rent until the purchase money was refunded.

In my view the order for payment of rent was *ultra vires* the court and the claim was not before it, and had the respondent appealed against it the appeal ought to have succeeded. In any event having regard to the admission of the Court of its want of jurisdiction in respect of the real claim before it, the further order of the court cannot operate as an estoppel *per rem judicatam* in respect of the sale. Therefore, in my view, even if the second claim before the Uvbie Court were for specific performance of the same agreement the real objection to the hearing of such a claim would have been on the question of a want of jurisdiction in the court to entertain the claim.

However, the second claim is for recovery of possession *qua* landlord from a tenant and was preceded by the formality of the giving of a month's notice to quit and, as if the Recovery of Possession Ordinance applied, of a further seven days notice. There certainly appears to be some doubt as to the genuineness of the basis for the claim because no evidence was given of the nature of the major repairs the appellant intended to carry out in respect of a house into the possession of which he had not yet entered. But this point was not taken and the Uvbie Grade "C" Customary Court accepted the claim on its face value and ruled that it was not barred by the former judgment.

In my judgment the Grade "C" Court was right in rejecting the plea of *res judicata* and considering the claim before it. In coming to a decision on that issue however it was bound to decide whether the relationship of landlord and tenant existed between the two parties. It accepted the plaintiff's evidence of the purchase of the property and, on the admission of the defendant that he sold the property but that he later changed his mind, held that there was no dispute as to the sale of the house. It did not consider the issue that the failure to deliver up possession was a failure to complete the agreement for sale which would involve the further issue whether the case was one in which a court exercising its equitable jurisdiction would order the specific performance of the agreement for sale.

In my judgment this is an important issue which ought to have been considered and which the Court, because of its want of jurisdiction, could not have entertained. This court, by virtue of the provision of section 53 (*a*) of the Customary Courts Law, 1957 may after rehearing the whole case or not reverse, vary or confirm the decision of the Court from which the appeal is brought and make such order as the court of first instance could have made in such cause or matter or as the appeal court shall consider that the justice of the case requires.

In this case the respondent after receiving full payment for the house repudiated the sale and refused to deliver up possession of the property. Action was instituted against him for possession and the court ordered him to pay rent until he has refunded the purchase money which the court admitted it had no jurisdiction to order him to pay. He complied with the order to pay rent and did so for nine months.

There is no doubt that the payment of money is an equivocal act unlike an entry into possession of property. If however, there is proof of part performance, a court would order specific performance in a suit founded on such part performance. But the basis of such order would be that the relative position of the parties has been irremediably altered, with the result that the party who has acted acquires an equity against the other. (*See Chaproniere* v. *Lambert* [1917] 2 Ch. 356). I am of the view that the voluntary payment of rent for a continuous period of nine months would have been such act of part performance as to create an equity against the respondent. However I am of the view that the payment of rent by him in this case was not such act of part performance as would create an equity against him because the rent was paid in pursuance of an order of a court and was not paid on the initiative of the respondent, on the demand of the appellant, so as to be deemed a voluntary act of the respondent.

What does the justice of this case demand? In my view the respondent having repudiated the agreement of sale, and failed to complete the sale, and having consistently refused to do so, it is my view that this is not a case in which specific performance of the agreement should be ordered.

It is a case in which it cannot be said that the relationship of landlord and tenant existed which would justify the order of possession made by the court of first instance. In my judgment, the agreement for sale having been so categorically repudiated, the appellant is not entitled to possession *qua* landlord. His remedy is an action for damages for a breach of the agreement of sale. I therefore dismiss this appeal and also the claim for possession.

Appeal and claim for possession dismissed.

THE QUEEN ... ...
v.
THE PRESIDENT AND MEMBERS OF AKUGBENE GRADE "C" CUSTOMARY COURT ... ... } *Applicant*
In re CHIEF TALBOT EDON CARTER ... ...

[HIGH COURT OF JUSTICE: Adeyinka Morgan, J., 25th April, 1960.]

Certiorari—party to a civil suit before a Customary Court citing sections of the law—whether this amounts to contempt of court, contrary to section 133 (9) of the Criminal Code—denial of right of appeal where it exists—sections 28 (2), 46 and 47 of the Customary Courts Law, 1957, considered.

The applicant who was not a legal practitioner was charged before the Akugbene Grade "C" Customary Court for contempt of court, contrary to section 133 (9) of the Criminal Code. The evidence adduced against him was to the effect that during the trial of a civil suit in which he was a party before the same court he quoted sections of the Customary Courts Law, 1957, in support of his application for transfer of the civil suit to another court. The Customary Court found him guilty and sentenced him to a term of three months imprisonment and it appeared on the record of the proceedings that the appellant was denied a right of appeal against the conviction and sentence.

The applicant then applied to the High Court for and obtained an order *nisi* of *certiorari* to remove to the High Court for purposes of being quashed the whole proceedings and judgments in the contempt of court case. The present application is for the court to make absolute the order *nisi*.

Held: (1) that the citing of sections of the Law before the Customary Court by a party to a suit who was not a legal practitioner could not amount to contempt of court;

(2) that the denial of a right of appeal to the applicant alone entitled him to the order sought.

[*Per curiam:* that it is very important that courts of trial should specify in their records what acts or words done or uttered by persons accused of or charged with contempt of court they consider to be in contempt of them].

Order nisi of Certiorari made absolute.

Case cited:

R. v. *Christian* (1842) 12 L.J.M.C. 26.

Warri Suit No. M/33/59.

Iseru, for applicant.

No appearance for the respondents.

Adeyinka Morgan, J.: In this matter the applicant is praying that this court should make absolute its order, made *ex parte* on the 23rd day of December, 1959, for an order of *certiorari* to quash an order made by the respondents on the 18th day of November, 1959.

The proceeding in question is quite short and I shall reproduce it here.

"*Finding.*—The accused was prosecuted by the prosecutor on a charge of contempt of court punishable under section 133 (9) of the Criminal Code. The prosecutor adduced his evidence that the accused on the 26th October, 1959 while called to answer a civil suit No. 77/59 sought for transfer of his case and vacated Chief P. K. Apodor and Otikpa Assessor and quoted section in the Customary Courts Law, 1957 while he is not legally qualified to quote section in the court and also disrespected the court with words of intimidation. The court after hearing the evidence of the prosecutor asked to know whether it was the usual procedure for litigants in the court who are not legally qualified to quote section, the answer was in the negative. The evidence of the accused was that it was the then Court Clerk who quoted the section in his evidence on that day is a pure false allegation. The charge presented by the prosecutor is judicious for the fact that the accused really disrespected the court and quoted section in his evidence while he is not authorised by law. Therefore accused is found guilty.

Judgment:—Accused found guilty and sentenced to three months imprisonment with hard labour. Accused to serve sentence consecutively.

Appeal is not allowed.

Mr Awaligie—*President*

P. K. Apodor—*Member*

M. T. Ogu—*Member*

18th November, 1959".

At the time the order *nisi* was made the applicant had served just over one month of the three months sentence.

The applicant was charged with an offence punishable under section 133 (9) of the Criminal Code and it has not been suggested that the respondents have no jurisdiction to try persons charged with the offence. Therefore, as the court had jurisdiction to try the case, this court would not grant an order of *certiorari*, on the ground that the Grade "C" Court had misconceived a point of law, if the proceedings before the court appear on the face of the record to be regular. (*R.* v. *Christian* (1842) 12 L.J.M.C. 26).

It will be found that the court gave two reasons for its decision. Firstly, that the applicant cited law before it and was not legally qualified to do so. Secondly that he "disrespected the court with words of intimidation". The Court also informed the applicant that he was not allowed to appeal.

In respect of the first point, as the court is a Grade "C" court, no legal practitioner may appear to act for or assist any party before it. (*See* section 28 (2) Customary Courts Law, 1957). But even if legal practitioners could appear before it what is there to prevent the applicant from citing law before it. It is, in my view, unthinkable that any persons considered fit for appointment as members of a Customary Court should be so ignorant as to think that it is disrespectful to their court for reference to be made to the law in the court.

The respondents have filed a counter-affidavit in which the following points were made:—

Paragraph 6.—"That at the resumed hearing the applicant requested that his case be transferred to another court because he said he learnt from a source that we are of a different political camp from himself and therefore would not receive a fair trial at the Court.

Paragraph 8.—That we assured him of a fair trial and.....referred him to the..... court manual.....which said that a Customary Court cannot transfer a civil case to another Customary Court of the same grade.

Paragraph 9.—That at this stage, the applicant got annoyed and was showing off and started to insult members and went so far as to spit on the floor of the court to show his contempt for them".

If these allegations are true, then, of course, even if this Court upheld the contention that the Grade "C" Court abused its jurisdiction when it held that the applicant was not qualified to cite law in the court, it will not quash the order made by the Grade "C" Court. It is very important that courts of trial should specify in their records what acts or words, done or uttered by persons accused of or charged with contempt, they consider to be in contempt of them. No details are given in the record of the proceeding in the present case except that the applicant is said to have "also disrespected the court with words of intimidation". Paragraph 9 of the respondent's counter-affidavit does not support the express words contained in the finding of the court, for there is obviously a difference between an act of intimidation and an act of showing off, as well as between an act of intimidation and an insulting act. In my judgment the allegation contained in paragraph 9 of the counter-affidavit is an after-thought because it appears from the proceeding, taken as a whole, that the ground upon which the conviction of the appellant rested was that he cited law before the court.

I now come to the third point: that the applicant was not allowed to appeal. Sections 46 and 47 of the Customary Courts Law, 1957 give any party aggrieved by the decision of a Grade B, C, or D Customary Court a right of appeal against the decision either to a customary court of appeal or to a Magistrate's Court according to the circumstances of the case. The denial, even of this right alone, apart from other considerations, entitles the applicant to the order absolute.

I therefore hereby order that the proceeding and order of the Grade "C" Customary Court, Akugbene, under the hand of the President and members of the court and hearing date the 18th day of November, 1959 whereby the applicant was convicted and sentenced to three months imprisonment with hard labour be removed to the High Court of Justice, Warri Division, and that the clerk to the said Grade "C" Customary Court, Akugbene, do send forthwith the said record of conviction to the Registrar of this Court.

And it is further ordered that thereupon the said proceeding and conviction be quashed.

Order nisi of Certiorari made absolute.

OSSAI OKALUDO ... ... *Appellant*

v.

JOHN OMAMA ... ... *Respondent*

[HIGH COURT OF JUSTICE: Adeyinka Morgan, J., 13th May, 1960.]

Customary law—divorce in a Customary Court—whether expenses for clothing of wife is refundable—whether "dowry" payable on marriage under customary law is refundable in full—section 53 (a) of the Customary Courts Law, 1957 applied.

The appellant brought a suit in a Customary Court against the respondent claiming (*a*) the refund of £22 being dowry paid on a woman who was his wife but had divorced him and married the respondent; (*b*) the return of £22 being money he had spent buying clothing for the woman and (*c*) £16, evidence in support of which was very vague. The Customary Court ordered the respondent to refund £10 out of the dowry to the appellant but dismissed the other claims.

On appeal it was **held:**

(1) that expenses for clothing do not form part of the dowry and are not refundable;

(2) that dowry refundable diminishes according to the duration of the marriage and that the £10 ordered to be paid to the respondent is not unreasonable.

Appeal dismissed.

Warri Civil Appeal No. W/37A/59.

Okandeji, for *Idigbe*, for the appellant.

Egbe, for the respondent.

Adeyinka Morgan, J.: The claim before the trial court was for refund of dowry and other expenses incurred by the appellant in connection with his marriage to the respondent's wife, which marriage has been dissolved.

The claim is for £60 and the evidence adduced to the trial court by the appellant's father shows that £22 was paid for dowry and £22 spent for buying clothes for the appellant's wife over a period of five years. An extra sum of £16 was claimed but the evidence in support of the claim is most vague.

In my view, acting under the provision of section 53 (*a*) of the Customary Courts Law, this claim for £16 should not have been allowed.

Further, I am of the view that expenses for clothing do not form part of the dowry and are not refundable. I accept the view of the customary court of appeal on this point.

As regards the actual dowry paid the customary court of appeal decided—and there is no need for proof of this in the customary court—that dowry refundable diminishes according to the duration of the marriage. The court ordered that £10 should be refunded and this, in my view, is not unreasonable.

There is no doubt that the appellant and the respondent made statements to the customary court of appeal in answer to questions put to them by the court. There is equally no doubt that the statements were not made on oath.

In my view however the statements do not materially add to the evidence adduced to the trial court and in my judgment do not warrant the reversal of the decision of the customary court of appeal. Finally the order of the court that the respondent should refund £10 to the appellant is, far from being vague, quite clear.

For these reasons I dismiss this appeal.

Appeal dismissed.

SANUSI IMAM ... ...
(For himself and as representing The Odo Ogun Sand Selling Company) ... ... } *Plaintiff*

v.

SANNI DAWODU AND OTHERS ... ... *Defendants*

[HIGH COURT OF JUSTICE: Duffus, J., 14th September, 1960.]

Land law—action for trespass—right to dig and carry sand as profit a prendre*—non-execution of deed of grant of by grantee need not invalidate grant—right to* profit a prendre *not prima facie exclusive—possession and use openly carried out as notice to purchaser of legal estate—matters to be considered in awarding costs.*

This was a claim by the plaintiff against the defendants for trespass to a piece of land along Ogun River by digging and carrying away sand therefrom and for an order of injunction against the defendants to restrain them from committing further acts of trespass. The plaintiff had been digging and carrying away sand from the land since 1948 under a licence granted by the Onikoro family, the admitted owners of the land. The defendants also started to dig and carry away sand from the same land as from 1956 on a licence granted by the same family. In 1957 the plaintiff got a deed of grant of a lease from the same family under which the plaintiff could continue to dig and carry away sand from the land but there was nothing in the deed, or in the previous 1948 agreement, to indicate that the plaintiff had exclusive right to all the sand on the land. One of the purported lessors and all the grantees did not execute the deed and subsequent to the execution of the deed, its contents were wrongly altered in that a plan was attached and the context of the lease altered to include the plan.

Held: (1) that the plaintiff's right to dig and carry away sand was a *profit a prendre* and this being of a possessory nature an action lay in trespass for an infringement of it;

(2) that although the grant of a *profit a prendre* had to be by deed, the fact that the grantees did not execute the deed would not invalidate the grant;

(3) that the alterations to the deed by the addition of a plan to it was not such a material alteration as to vitiate the deed which had already fully described and set out the land that was being leased;

(4) that since the plaintiff failed to prove that he had exclusive right to dig and carry away sand on the land since 1948, the grantors were entitled to grant a tenancy or licence to other persons to dig and carry away sand therefrom;

(5) that since the defendants' possession and use of their right to dig and carry away sand from the land had been openly carried on before the plaintiff was granted their lease in 1957, the defendant's possession and use constituted notice to the plaintiff as purchaser of the legal estate;

(6) that in assessing costs the court would take into consideration the amendments to their pleading asked for by the defendants which necessitated an adjournment and the calling of evidence in rebuttal.

Claim dismissed.

Cases cited:

Duke of Sutherland v. *Heathcote*, [1892] 1 C.R. 475; 61 L.J. Ch. 2481.

Newby v. *Harrison*, 1 J. & H. 391, 70 E.R. 799.

Clethan v. *Williamson*, [1804], East 469; 102 E.R. 910.

Daniel v. *Davidson*, [1809] 16 Ves. 247, 33 E.R. 978.

Ikeja Civil Suit No. H.K./9/59.

D. O. Coker, for plaintiff.

Mrs Adebiyi, for first, third and fourth defendants.

Kotun, for fifth defendant.

Duffus, J.: The plaintiff brings this action for himself and on behalf of the Odo Ogun Sand Selling Company. This Company is an association of persons the name of which has been duly registered under the Registration of Business Names Ordinance, Cap. 195.

The claim is against five defendants for £5,000 damages for trespass on a piece or parcel of sand and also seeks an injunction to prevent further trespasses. A joint defence was filed for all defendants, but it turned out that the second defendant was not served and did not appear at the trial. The plaintiff therefore proceeded with the action against the other four defendants. The first, third and fourth defendants were jointly represented at the trial but the fifth defendant had separate representation. The hearing unfortunately was prolonged and lasted much longer than the original estimate of three days. There were six witnesses for the plaintiff and eight for the defence.

The pleadings were amended several times in the cause of the trial. The plaintiff's claim is that they have the exclusive right to dig and remove the sand lying in the Ogun river bed starting from Isheri and going to the Lagos Lagoon. The plaintiff claims by right of a grant from the Onikoro family first made in 1948, but now covered by a Deed of Lease made on the 19th December, 1957 (Exhibit 2). The Onikoro family consists of several branches but Chief Onikoro is admittedly Head of the family. From the pleadings and from the witnesses called it is clear that both parties agree that the land in dispute over which Ogun river flows belongs to the Onikoro family, and both plaintiff and defendants claim their rights from grants made by this family.

It is also clear that as so often happens the whole of this dispute is caused by the Onikoro family, the owners, and it appears probable that whatever happens this family or members of the family will be liable to the unsuccessful party in this action.

The defence pleaded—

(1) That they were not trespassers as the owners of the sand, Chief Onikoro and the other Chiefs, had rented the sand to them from 1956 prior to the grant of the lease under which the plaintiffs now claim of the 19th December, 1957.

(2) That this Court had no jurisdiction to try this case.

(3) That the lease of the 19th December, 1957, was not valid for the reasons that—

(*i*) Yekini Onigbindin one of the lessors, and a party to the lease did not in fact execute the same,

(*ii*) That the lessees never executed the lease,

(*iii*) That there was no plan attached to the lease at the time of execution.

(*iv*) That the lease was subsequently materially altered and signed by V. A. Solanke and also by the addition of a plan.

The defence raised by Counsel for the fifth defendant under the Crown Lands Ordinance, Cap. 45 was not pleaded and in any event, in my opinion does not apply to this case.

I agree with learned Counsel for the plaintiffs that the plaintiffs' right to dig and remove the sand is a *profit a prendre*. Their right is of a possessory nature, and an action lies in trespass for an infringement of this right. From the evidence I find that the following facts have been established:—

(1) On the question of jurisdiction I accept the plaintiffs case and find that all the land the subject of this action, that is the Ogun River and Agboyi Creek as shown coloured red in the plan, Exhibit 1, lies in the Western Region, and within the jurisdiction of this Court.

(2) That the lands on which this right to dig sand exists belongs to the Onikoro families. There is no dispute as to ownership. In using the term Onikoro families, I include all the families of which Chief Onikoro is the head, including the Onikosi, Oshorun, Onigbindin and Abogu families. Both plaintiff and the defendants claim from the same source.

(3) I accept the defendants case that the first and fourth defendants along with other persons were granted the right to dig sand by Chief Onikoro and his family in 1956 prior to the execution of the plaintiff's lease, Exhibit 2, and that they were exercising their right from 1956. I also accept the evidence that the second defence witness Ajala had also been granted the right to dig sand in 1956 and had been digging sand and that the second and fifth defendants dug sand under his grant.

(4) That the plaintiff Company had been digging sand in this river since 1948. I shall deal further with the question as to whether this was an exclusive grant.

(5) On the question of the lease, there can be no doubt that the various defects to his documents put forward by the defence do exist. That is—

(*a*) That Yekini Onigbindin one of the purported Lessors did not in fact execute this deed.

(*b*) That the Lessees never executed the lease.

(*c*) That subsequent to the execution the contents of this Deed were wrongly altered in that a plan was attached and the context of the lease altered to include this plan.

(6) On the other hand I am satisfied that in fact this deed was executed by leading members of Onikoro family for the family, and that Yekini Onigbindin expressly ratified the lease when he along with other representative of the family accepted £100 for rent for the year 1959, and signed the receipt Exhibit 7.

I am also of the view that the alterations to the lease were not material alterations and were not such as would vitiate the lease. The alteration really was the addition of the plan, and this plan only showed the land already fully described and set out in the lease. A grant of a *profit a prendre*, has to be by deed, and in this deed, Exhibit 2 the Onikoro family made the grant to the plaintiff Company. In my view the fact that the lessees did not execute the deed would not invalidate this grant.

The defence as to jurisdiction and as to the validity of the lease cannot therefore be sustained.

I will now deal with the main ground of defence, and that is that the defendants were not trespassers as they were the tenants of the Onikoro families and had been put in possession of the sand and also of the land that they occupy by the owners.

There is no dispute here as to the right of the defendants to occupy any portion of the Onikoro land. The dispute is as to the right to dig and remove sand from the river bed. This right is a *profit a prendre*, and the crux of this case is whether the plaintiffs had the exclusive right to all the sand in the river when in 1956 the Onikoro families made a further grant to the second and fourth defendants and others. On this point the law is clearly stated in the following short passage on page 626 of volume 12, 3rd Edition, Halsbury's Laws of England.

> "A grant of a *profit a prendre* does not *prima facie* confer on the recipient an exclusive right to the whole substance, the taking of which constitutes the right to the exclusion of the owner of the servient tenement. That exclusive right may, however, be granted if the words of the grant are sufficient."

I would refer also to cases of *Duke of Sutherland* v. *Heathcote*, [1892] 1 C.R. 475; *Newby* v. *Harrison*, 1 J. & H. 391, 70 E.R. 799; *Cletham* v. *Williamson*, 102 E.R. 910. The lease, Exhibit (2) on which the plaintiff bases his claim was only executed in December, 1957. The plaintiff did not plead that they had the exclusive right to dig the sand in 1956, nor has this been satisfactorily established by the evidence. By consent various old agreements were put in evidence, including the agreement dated the 25th October, 1951, Exhibit 6 which according to its term would have been in force until the 31st December, 1961. This agreement was not pleaded nor has it been submitted that it was in effective force in 1956. No evidence was therefore led as to its validity or otherwise. The fact that the parties entered into a new agreement would appear to suggest that the agreement, Exhibit 6 was no longer effective and this is borne out by the Secretary of the plaintiff's Society when he said in his evidence—

> "When we found someone digging sand we reported to the families there was no proper agreement then, so they asked us to prepare an agreement".

I would also refer to the fact that the receipt, Exhibit 4 dated the 27th June, 1956, is for £60 and not £30 as fixed by the agreement, Exhibit 6 and does not refer to the agreement; while the receipt dated the 8th September, 1953 refers to another agreement dated 22nd September, 1952.

There are also two other points to note about the agreement, Exhibit 6. First it is not a grant by deed, so at the best the plaintiff Company would only have, as have the defendants, an equitable interest, and secondly the terms of the agreement as to the right being exclusive are by no means clear and explicit.

The plaintiff has not therefore proved that his company, had the exclusive right to dig sand in the Ogun river in 1956, and the Onikoro families were therefore in my view entitled in 1956 to grant a tenancy or licence to other persons to dig sands. On this question although not directly relevant to the issue the evidence shows that the Onikoro families own the land by the Ogun river for several miles and it does appear that the defendants need not interfere with the actual enjoyment by the plaintiffs of their right to dig sand.

I therefore find that the defendants were lawfully on the river in 1956 and 1957 and in possession of and exercising their right to dig sand, and that this was the position when the Onikoro families executed the deed, Exhibit 2.

The lease, Exhibit 2 does in my view grant the plaintiff Company an exclusive right to dig sand in this river. This grants the plaintiff a legal estate but it must be subject to any existing tenancy or equitable rights of which they had notice. I am satisfied that the plaintiff had actual notice of the defendants occupation. Evidence of this was given by the present Chief Onikoro. I do not place much reliance on his evidence, but in this respect, there is also the evidence which I have already referred to of the fifth plaintiff witness, James Aiyedun, the Secretary to the Company, to the effect that they had found someone digging sand before the proper agreement was prepared. Apart from this the defendants' possession and use of their right to dig sand has been openly carried out, and possession of a tenant is notice to a purchaser of the actual interest he may have. In this respect I would refer to the case of *Daniel* v. *Davidson* [1809], Ves. 249, 33 E.R. 978.

The second and fourth defendants, and also the second witness called for the defendant, Ajala, through whom the first and fifth defendants claim, were as from 1956 annual tenants of this *profit a prendre* and have continued as tenants up to the present time. The plaintiff's interest under their lease was subject to these existing tenancies.

I therefore find that these four defendants were not trespassers but were in fact exercising their rights as lawful tenants in the case of first and fourth defendants and in the case of the third and fifth defendants lawfully acting under a tenant of the Onikoro families.

The plaintiff's claim is dismissed with costs. In assessing these costs I take into account the several amendments made but especially the amendment made at the instance of the first, third and fourth defendants on the 24th June, 1960 which necessitated an adjournment and the calling of evidence in rebuttal. In so far as costs for the fifth defendant are concerned I take into account that his Counsel was absent on several occasions and did not appear at the hearing, nor was his brief held by other Counsel.

I fix the cost of the first, third and fourth defendants at forty guineas and the costs of the fifth defendant at fifteen guineas.

Claim dismissed.

O. N. REWANE ... ... *Petitioner/Appellant*

v.

F. S. OKOTIE-EBOH ... ... *Respondent*

[FEDERAL SUPREME COURT: Ademola, F.C.J., Abbott and Brett, F.JJ., 4th October, 1960.]

Election petition—considerations for awarding costs—rules 12 (3) and (4) of the Federal Supreme Court Rules, sections 15 and 19 (1) of the Corrupt Practices (Municipal Elections) Act, 1872, and regulation 55 (1) of the Federal Legislative Houses (Disputed Seats) Regulations, 1959 considered.

This election petition which came before the Warri High Court was dismissed with 2,000 guineas costs awarded against the petitioner. The respondent had briefed a Queen's Counsel from the United Kingdom and had thus run into expenses of nearly £3,500. In awarding the 2,000 guineas costs the trial judge had given two reasons namely—that the respondent had the right to defend himself by engaging the best Counsel available to him and that he had been put into heavy expenses in defending himself. This appeal was argued entirely on the question of the costs awarded by the trial judge.

Held: (1) that the court would not award unreasonable costs and thus cripple a party who lost in an election petition or in an ordinary suit merely because his opponent from consideration of his own position, or any special desire on his part to ensure success, chose to employ very expensive Counsel or employ an unusual number of Counsel;

(2) that although the appeal court would not lightly interfere with the discretion of the trial judge as to the amount of costs awarded, in the present case the order as to costs could not be allowed to stand because the amount awarded was so out of proportion to the costs properly recoverable in this type of case as to show that the learned judge had proceeded on a wholly erroneous estimate.

Appeal as to costs allowed; costs in the court below reduced to 600 guineas.

Cases cited:

Lovering v. *Dawson*, [1874 and 1875] L.R. 10 C.P. 726.

Donald Campbell and Co. Ltd. v. *Pollock*, [1927] A.C. 732.

Hill and another v. *Peel and another*, (1869) 22 L.T.R. (N.S.) 98.

Harold v. *Smith*, 5 H. and N. 379; 157 E.R. 1229.

Federal Supreme Court No. 202/1960.

Williams, Q.C., (*Agbaje-Williams* and *Efueye* with him), for the appellant.

Okorodudu (*Akinjide* and *J. A. Cole* with him,) for the respondent.

Ademola, F.C.J.: The respondent in this appeal was declared the duly elected candidate for Warri constitutency at the election to the House of Representatives held on 12th December, 1959.

The appellant, who was also a candidate for the constituency, petitioned against the return of the respondent by the Returning Officer for the constituency. It is hardly necessary to enumerate the grounds of his objection; suffice it to say that the petition was heard in the High Court of Warri Judicial Division in the Western Region and dismissed with 2,000 guineas costs by Thomas, J.

The petitioner appealed to this Court from that judgment and order.

Six grounds of appeal were filed. The first two grounds were against the venue where the petition was heard; the third and fourth grounds were appeals on questions of fact and misdirection; the fifth and sixth grounds were against the order as to costs, which grounds I will set out later in this judgment. Shortly before the hearing of the appeal, however, the appellant's Counsel filed a notice in this court, and served a copy on the respondent and/or his Counsel, that he was abandoning grounds 1 to 4 of the grounds of appeal and that grounds 5 and 6 only would be argued.

It will be reasonable to infer that as a result of this precautionary measure, Mr MacKenna, Q.C., Counsel for the respondent in the Court below, who had also intimated this Court that he would be appearing to argue for the respondent in support of the judgment and order of the Court below, did not come out from England to argue the appeal.

At the hearing of the appeal, Chief Rotimi Williams, Q.C., reiterated his intention to abandon the first four grounds of appeal, and to argue the following two grounds:—

"(5) The order as to costs is unreasonable and the learned trial Judge took irrelevant matters into consideration in the award of costs.

'(6) Having regard to the maximum amount allowed for an order for security of costs the order as to costs was erroneous and unreasonable".

Chief Okorodudu, for the respondent, raised a preliminary objection to these two grounds and urged the Court to strike them out on the ground that there are two matters included in each of the grounds, namely "unreasonable" and "irrelevant matters", each of which should have formed the subject matter of a separate ground. Also, he argued, the two grounds of appeal were vague. For this contention, Chief Okorodudu relied on rules 12 (3) and (4), Federal Supreme Court Rules.

As it did not appear to us that there was any due weight in the points raised, we decided to hear the appeal on the two grounds.

Chief Rotimi Williams, arguing the appeal, directed our attention to the record of appeal which indicated that apart from out of pocket expenses, costs were due for six days hearing; on two of the six days the Court sat in the afternoons as well for about two hours. Added to this, costs were due in two of the motions preliminary to the hearing. In these two instances, orders for costs to be costs in the cause were made; in two other motions preliminary to the hearing of the case, costs have already been awarded.

We were referred to the learned Judge's assessment of costs and the grounds given by him for the award for costs. He gave two reasons:

(1) Right of the respondent to defend himself by engaging the best Counsel available to him, and

(2) The fact that the respondent has been put to heavy expenses in defending himself.

With regard to (2), seven items of expenditure were referred to before the learned trial judge to which Chief Rotimi Williams called out attention. They are—

	£ s d
(*a*) Brief fee of Mr MacKenna, Q.C., from United Kingdom ...	1,000 guineas
(*b*) Queen's Counsel's fees for studying pleadings...	35 15 0
(*c*) Queen's Counsel's Clerk fees	25 0 0
(*d*) Refresher fees for 10 days at £161 5*s* 0*d* per day	1,612 10 0
(*e*) Investigation of charges	105 0 0
(*f*) Subpoenas	50 0 0
(*g*) Air Transport:	
(1) Counsel to consult Queen's Counsel in London	284 8 0
(2) Return fare for Queen's Counsel	284 8 0

Finally, Chief Rotimi Williams submitted that the case was one in which the employment of the services of a Queen's Counsel was hardly necessary and if one was needed, the services of a local Queen's Counsel would have sufficed. On the contrary, the respondent in his memorandum of appearance stated he was not only employing a local Queen's Counsel (Chief H. O. Davies) as well as ten junior Counsel, but also he was employing Mr MacKenna, Q.C. from London as the leader.

Chief Okorodudu, for the respondent, argued (1) that this Court is not competent to review costs awarded in the Court below, and (2) that if the Court is so competent, there are no circumstances adduced upon which the Court can exercise its powers to review. For the first proposition, Counsel relied on page 317, paragraph 579 of 14 Halsbury's Laws of England, 3rd edition, which deals with discretion of Court as to costs in Election Petitions. It states:

"The discretion of the election Court in dealing with costs is absolute and cannot be reviewed by the High Court".

The case Maidenhead Election Petition—*Lovering* v. *Dawson*, [1874 and 1875], L.R. 10 C.P. 726 was referred to. This case was a decision on the meaning of the Corrupt Practices (Municipal Election) Act, 1872, under which petition in Municipal election was tried by a special election Court. There was no ordinary right of appeal from the election Court, but section 15 of the Act provided that certain matters might be referred to the superior Court, that is, the Court of Common Pleas, for its determination. These matters do not include orders as to costs, and it was held by the Court of Common Pleas that the effect of section 19 (1) of the Act, of which the substance is reproduced in regulation 55 (1) of the Federal Legislative Houses (Disputed Seats) Regulations, 1959, was to make the decision of the election Courts as to costs, final. The learned author of Halsbury points out in footnote (*r*) to page 317 of Volume 14, 3rd Edition cited, that it does not follow that the decision would necessarily apply to a decision of the High Court in England as to the costs of an election petition, and since in Nigeria there is a general right of appeal to this Court from the decision of a High Court on an election petition, I am not prepared to hold that regulation 55 (1) precludes this Court from entertaining an appeal as to costs.

Chief Okorodudu also referred us to the case *Donald Campbell and Co. Ltd.* v. *Pollock* [1927] A.C. 732, as laying down the guiding principles with respect to the matter of discretion of the trial Court on costs and the competency of the Appeal Courts to review such decisions. With respect, much as this case is illuminating on the matter of the exercise of a Judge's discretion upon materials before him in the award of costs, and the power of the Appeal Court to overrule that exercise of discretion, this case was

primarily dealing with a Judge exercising his discretion to deprive a successful plaintiff of his costs in the exercise of his discretion. This case, therefore, has no application to the present appeal, which is concerned with the question of costs.

It is generally accepted that costs follow the event; it is usual for a successful party to litigation to be awarded costs; he is entitled to costs as between party and party. A respondent in an election petition is entitled to engage the best Counsel available in Nigeria for his defence. The Court is not in the least concerned with the number of Counsel he may choose to engage, and it is the nature of the case that will decide whether one, two or three Counsel was a necessity for the purpose of the case, or whether a Queen's Counsel was necessary. If it is clear to the respondent that the petitioner is engaging the services of a local Queen's Counsel he is, if he so desires, entitled for his own defence to engage a local Queen's Counsel. The respondent in the present appeal, in his memorandum of appearance to defend the petition filed against him, entered, among Counsel who would be appearing for him, the name of Chief H. O. Davies, a local Queen's Counsel. On the same list appears the name of Mr MacKenna, Q.C., as leader (as he puts it). He cannot now, on the face of this document, be heard to say, as his Counsel did say, that he had not the intention of employing two Queen's Counsels or that he had not the intention of engaging the services of a Queen's Counsel from England until it was clear to him that Chief H. O. Davies had been briefed by the Attorney-General to appear in the same matter for the Returning Officer who was also petitioned against. Chief Okorodudu agreed, when it was put to him, that at the time the respondent filed his memorandum of appearance, he had then not consulted the lawyers he mentioned in that list. It was possible that if he had consulted Chief H. O. Davies at the time, the latter would not have accepted a brief from the Attorney-General. It is clear that the employment of a Queen's Counsel from England, in the person of Mr MacKenna, was uppermost in the mind of the respondent right from the start.

I think the time has now come for this Court to lay down general principles upon which Courts are to allow costs in respect of Counsel engaged from overseas to argue a case in Nigeria. It must be made clear that the Court is not against engaging the services of Counsel from overseas to conduct cases in Nigeria. Any person is entitled to engage the best and the most prominent Counsel who is qualified to practise in Nigeria from any part of the globe, to conduct the most trifling matter or cause if he thinks his rank, position and wealth demand it, provided he does not expect his opponent to pay the expenses in costs of bringing the Counsel to Nigeria. If it is a case, which by the nature of it, requires the services or the ingenuity of a Queen's Counsel, or if one side has engaged a Queen's Counsel, and Queen's Counsels are available in Nigeria to the other side, it should not be expected that the expenses of bringing a Queen's Counsel from abroad will be recovered in costs. It is otherwise if there are no other Queen's Counsel available to him in Nigeria whose services he may employ. If the nature of the case is a specialised one or if the case involves a branch of the law where an expert is needed and there is no Counsel with sufficient skill in that branch of the law in Nigeria, the expenses of bringing such an expert from abroad, in my view, are justifiable and should be recoverable in costs. If it were otherwise, there would be nothing to stop a litigant from employing Counsel from afar off as Australia to appear for him in the most trifling case and expect to recover his expenses in costs. The same applies to a litigant who would indulge in employing unusual numbers of Counsel and expects to be reimbursed in costs.

In this connection, the headnote in the case *Hill and another* v. *Peel and another, etc.* (1870) reported in (1860) 22 L.T.R. (N.S.) 98 is worthy of attention. It reads:

"Where, on the trial of an election petition an order is made by the presiding Judge for the payment of costs of the successful party by the unsuccessful party, the successful party is entitled, on taxation of costs, to an indemnity for all costs that were reasonably incurred by him in the ordinary course of a matter of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over-caution or over-anxiety as to any particular case, or from considerations of any special importance arising from the rank, position, wealth or character of either of the parties, or any special desire on his part to ensure success".

I can put it in no clearer terms than this, that the Court will not award unreasonable costs, and thus cripple a party who lost in an election petition or in an ordinary suit, merely because his opponent in the election petition, or in the suit, from considerations of his own position, or any special desire on his part to insure success, chooses to employ very expensive Counsel or employ an unusual number of Counsel, or because he chooses to send an advocate from Nigeria to instruct Counsel in England. Costs are no more than an indemnity to the successful party to the extent that he is justly damnified. Baron Bramwell in *Harold* v. *Smith*, 5 H. & N. 379; 157 E.R. 1229 at page 1231, puts it thus—

"Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is ascertained. Of course, I do not say there are not exceptional cases in which certain arbitrary rules of taxation have been laid down; but as a general rule costs are an indemnity, and the principle is this—find out the damnification and then you find out the costs which should be allowed".

There can be no doubt that Bramwell, B., does not include in his damnification what I may term "fanciful expenditure".

This Court will not lightly interfere with the discretion of the trial judge as to the amount of costs, but, in my view, it is clear in the present appeal that the order made as to costs by the learned trial judge cannot be allowed to stand. The amount awarded is so out of proportion to the costs properly recoverable in this type of case as to show that the learned judge has proceeded on a wholly erroneous estimate. As the costs have not been taxed and it has not been shown what was allowed in respect of each item, it is not possible for this Court to go into the matter item by item. Costs will, therefore, be awarded on the ordinary principles of genuine and reasonable out-of-pocket expenses and normal Counsel's costs usually awarded for a leader and one or two juniors.

In the circumstances, I would dismiss the appeal against the declaration made in the election petition by the learned judge. The appeal as to costs will be allowed. I would set aside the order made by the learned judge as to costs and would substitute an order for 600 guineas.

The appellant is entitled to the costs of this appeal which are assessed at 75 guineas.

Appeal as to costs allowed; costs in the court below reduced to 600 guineas.

O. AKINFOSILE ... ... *First Respondent/Appellant*
T. E. ADUBA ... ... *Second Respondent*

v.

J. A. IJOSE ... ... *Petitioner/Respondent*

[FEDERAL SUPREME COURT: Ademola, F.C.J., Abbott and Taylor, F.JJ., 4th October, 1960.]

Election Petition—allegation of non-compliance with the Election (House of Representatives) Regulations, 1958—onus of proof—regulations 92 (2) and 139 (2) of the 1958 Regulations and regulations 6 (1) (b) and 7 (1) of the Federal Legislative Houses (Disputed Seats) Regulations, 1959 considered.

This election petition was brought before the Akure High Court on the grounds that there were irregularities and non-compliance with some provisions of the Election (House of Representatives) Regulations, 1958. The Court allowed the petition. On appeal it was argued that the trial judge erred in law in holding that the onus was on the respondent/appellant to show that the result of the election was not affected by non-compliance with the regulations.

Held: that a petitioner who alleges in his petition a particular non-compliance with the Regulations and avers in his prayer that the non-compliance was substantial must so satisfy the court; and that as the petitioner in this case had failed to do this his petition was bound to fail.

Appeal allowed; petition dismissed.

[*Note.*—The High Court judgment in this case which has now been reversed is reported at page 44 *supra*].

Cases cited:

Hackney Case, 31 L.T. 69.

Cheltenham Case, 19 L.T. 816.

Woodward v. *Sarsons*, [1874] L.R. 10 C.P. 733.

Abengowe v. *Wachuku*, 21 N.L.R. 56.

Stoke Newington case, [1948] 2 A.E.R. 503.

Islington Case, 17 T.L.R. 210.

Kensington North Case, [1960] 1 A.E.R. 150; [1960] 3 W.L.R. 762.

Fallon v. *Calvert*, [1960] 1 A.E.R. 281.

R. v. *Teschemaker*, 1 J.R. 78 (New Zealand).

Federal Supreme Court No. 262/1960.

Fani-Kayode, Queen's Counsel (*Sowemimo* and *Olowu* with him), for the appellant.

Williams, Queen's Counsel (*Akin-Olugbade* with him), for the respondent.

Abbott, F.J.: This is an appeal by Mr Olu Akinfosile, the respondent to an election petition brought in the High Court, Akure, by Mr J. A. Ijose. The order of the Court below was, in brief, that the election must be declared null and void for non-compliance with the Elections (House of Representatives) Regulations, 1958, as provided for by regulation 6 (1) (*b*) of the Federal Legislative Houses (Disputed Seats) Regulations, 1959. The former Regulations will be referred to in this judgment as the 1958 Regulations and the latter as the 1959 Regulations.

The petition was brought against Mr Akinfosile as first respondent, and Mr T. E. Aduba, the Returning Officer for Okitipupa North Constituency as second respondent.

The petition made, in all, three allegations of irregularity or non-compliance with the 1958 Regulations, but it is only the third and the prayer of the petition with which this Court is now concerned. The third allegation appears in paragraph 6 of the petition, which reads as follows:

"Wherefore your petitioner prays that it may be determined that the said Olu Akinfosile was not duly elected and that the election has been invalidated by substantial non-compliance with the Nigeria (Electoral Provisions) Order in Council, 1958".

It may be mentioned in passing, at this point, that the reference to the Nigeria (Electoral Provisions) Order in Council, 1958, is mistaken. The reference should be to the 1958 Regulations which were made under the power conferred by that Order in Council.

The first respondent in his reply to the petition, dealt with paragraph 6 in these words:

"With regard to paragraph 6 of the petition the first respondent states that it was at the insistence of the petitioner that ballot papers not bearing the official secret mark were counted".

The second respondent dealt with this paragraph in paragraphs 5 and 6 of his reply, and these paragraphs read as follows:

"5. This respondent admits that some ballot papers which did not bear the official seal or mark were counted with the knowledge and consent of the petitioner, but says that such ballot papers bore such other distinguishing official marks by which the prevention of fraud could be assured.

6. This respondent avers that the election was conducted substantially in accordance with the Election (House of Representatives) Regulations, 1958, and if there was any non-compliance with the said Regulations (which is denied) such non-compliance did not affect the result of the election".

It is important to remember here that Chief Rotimi Williams, Queen's Counsel, who appeared for the petitioner at the Court below, said at the end of his opening address:

"A subpoena was issued on the Electoral Officer. I understand that he has not been served, but I understand from Mr Ogundere, counsel for the second respondent, that the ballot papers are here and that his client will put in the ballot papers".

However, the evidence for the petitioner consisted of only one witness, the petitioner himself, and the material part of his evidence reads—

"I was present at the counting of votes. There were ballot papers which did not bear official marks. They were counted. I do not know how many were there. I am unable to say who would have won the election if these ballot papers had not been included with those counted".

At the close of the petitioner's evidence, and as I have above indicated, the close of the petitioner's case, Mr R. A. Fani-Kayode, Queen's Counsel, who appeared for for the first respondent, announced that he was calling no evidence on his client's behalf.

The case for the second respondent then began with the evidence of the second respondent himself, and in the course of his evidence in chief he produced and tendered sealed packets of ballot papers for the Constituency, the election to which was in question, and they were admitted without objection and marked Exhibit 3. The witness went on to say—

"Some of these ballot papers do not bear the official stamp. I do not know how many they are. I noticed these unstamped ballot papers during the counting".

When invited to cross-examine this witness, Mr Kayode stated that he was taking no further part in the proceedings, although it appears from the record that he did, as he was entitled in my view to do, address the Court when all the evidence had been concluded. It is unnecessary in this judgment to refer to the evidence of the other witnesses for the second respondent.

The learned trial Judge in his judgment, quite correctly, as a result of the evidence before him, disposed of the irregularities alleged in paragraphs 4 and 5 of the petition, and then went on to deal with paragraph 6 above set out. He first pointed out, again correctly, that the first respondent (*a*) admitted that ballot papers were counted which did not bear the official secret mark and (*b*) averred that the petitioner insisted on these papers being counted. The learned Judge then pointed to a similar admission made by the second respondent, and went on to set out the last half of paragraph 5 of the second respondent's reply to the petition.

Next the learned Judge draws attention to the fact that when the petitioner was giving evidence neither respondent suggested to him in cross-examination that he had consented or insisted, as had been alleged, to the unmarked ballot papers being included in the count, and again perfectly correctly, stated that the parties, even if there were any such consent, could not circumvent the regulations in this manner. The regulation concerned is 92 (2) of the 1958 Regulations which provides:

"Any ballot paper which does not bear the official mark shall not be counted."

and the learned Judge adds—

"There can be no doubt that the inclusion of these unmarked ballot papers was manifestly illegal".

Then goes on to state in these words where, in his opinion, the onus must lie:

"The first respondent having admitted in his reply that unmarked ballot papers had been included in the count, the onus was thereupon on him to prove the quantity of such unmarked ballot papers and that their inclusion did not affect the final result of the election."

Next in the judgment comes the reference to the submission of Counsel for the second respondent that "all the ballot papers having been tendered during the trial, the Court could sort them out for itself and establish the facts". The learned Judge dealt with this submission by expressing the view that he could not accept it and as was suggested, "sort out the facts" for himself, and gave five reasons for coming to this conclusion:

(1) That no evidence had been tendered before him as to what was the official mark.

(2) The unmarked ballot papers were not separately tendered.

(3) There was no evidence in support of the second respondent's averment that the ballot papers not bearing the official mark bore other distinguishing marks by which the prevention of fraud could be assured.

(4) There was no evidence as to the source from which the unmarked ballot papers had come.

(5) There was no evidence as to how they go into the ballot boxes or how they were distributed amongst the ninety-six polling stations in the constituency because the second respondent had not, up till the date when the learned Judge was giving judgment, signed all the ballot paper accounts.

At the point the learned Judge obviously was in doubt as to whether or not the election was conducted substantially in accordance with the 1958 Regulations, because later he says that the irregularities to which he draws attention reinforce his doubts, and he goes on to say—

"It would therefore serve no useful purpose if I were to proceed to scrutinise the thousands of ballot papers which have been tendered en bloc in the absence of evidence to assist me in the task of deciding which of the ballot papers were genuine or otherwise."

After quoting regulation 7 of the 1959 Regulations the learned Judge goes on to say—

"I am not in a position to say that owing to the relatively insignificant number of those ballot papers, the quantity could be excluded and that the final result of the election would not be affected. I cannot on the other hand say, from the evidence before me, that they were so many that the final result of the election was thereby affected. It is in my view open to reasonable doubt in view of the pleadings and the evidence tendered, whether the counting of these unmarked ballot papers may not have affected the result",

and the final paragraph of the judgment of the Court below, important for the purpose of this appeal, reads as follows:

"In the final result and after a review of the whole of the evidence, the cumulative effect of the evidence has left me with the settled impression that the election was not conducted substantially in accordance with the Nigeria (Electoral Provisions) Order in Council, 1958 and I am unable to say that the non-compliance did not affect the result of the election".

The second respondent has not appealed against this judgment and the first respondent filed four grounds of appeal, but the argument before this Court was really concentrated on the last of these, which reads as follows:

"The learned trial Judge erred in law in holding that the onus is on the respondent to show that the result of the election was not affected by non-compliance with the Regulations."

The arguments on both sides before this Court were of considerable length and in my view Chief Rotimi Williams, who appeared for the petitioner, who was the respondent to this appeal, said everything that could possibly be said on his client's behalf.

It is material here to set out the provisions of regulations 6 (1) (*b*) and 7 (1):

"6 (1) An election may be questioned on the following grounds:—

(*b*) that the election was invalidated by corrupt practices or (subject to the provisions of regulation 7) non-compliance with the Elections (House of Representatives) Regulations, 1958;

(1) An election shall not be invalidated by reason of non-compliance with the Elections (House of Representatives) Regulations, 1958, if it appears to the court having cognisance of the question that the election was conducted substantially in accordance with those Regulations, and that the non-compliance did not affect the result of the election."

It is necessary now to refer to paragraph 6 of the petition and the prayer thereof, which I have set out above. In the first place I find that paragraph 6 is extremely vague and this vagueness could have been avoided or cured after the filing of the petition, had the petitioner obtained from the Court an order under regulation 139 (2) of the 1958 Regulations and application could then have been made to amend the petition by adding the necessary details. Not only was this not done, but no attempt was made, during the conduct of the petitioner's case in the Court below, to say how many ballot papers were comprised in the "large" number said to have been counted although not bearing the official secret mark. It seems to me that that evidence ought to have been adduced by the petitioner if he was to have any chance of success in his petition. The person who makes allegations in a pleading is, by the ordinary rules of pleading, bound to produce evidence to substantiate them as part of his case, and it is not sufficient for him to rely upon the emergence of evidence from the opposite party for the purpose of proving allegations in his own pleading. Moreover, in this case such evidence as there was of the counting of ballot papers not bearing the official mark, was hopelessly vague. There were no details of how many unmarked ballot papers were counted and the Court below was not in a position to say whether there was one of such ballot papers or any other number. Chief Rotimi Williams, as stated above, apparently relied upon Counsel for the second respondent telling him that the second respondent would put in the ballot papers as evidence. With respect, I consider Chief Rotimi Williams erred here, and also in not cross-examining the second respondent on this point.

In view of the absence of any evidence, at the close of the case for the petitioner, of the number of ballot papers counted which did not bear the official mark, Mr Kayode in my view was fully justified in calling no evidence on behalf of his client.

It was submitted by Chief Rotimi Williams that once non-compliance with the Regulations is shown then that is all that a petitioner has to do, and thereafter the onus shifts to the respondent or respondents to the petition to show that the non-compliance did not affect the result of the election; counsel endeavoured to divide the latter part of regulation 7 (1) of the 1959 Regulations into two parts—(1) If it appears to the Court having cognisance of the question that the election was conducted substantially in accordance with the 1958 Regulations, and (2) if it appears to the Court having cognisance of the question that the non-compliance did not affect the result of the election. In view of the wording of the prayer of the petition it is my view that that regulation 7 (1) cannot be bifurcated in this manner for the purpose of this case. The prayer alleges that the election has been invalidated by "substantial non-compliance" with the 1958 Regulations. In other words, in my view, these words in the prayer amount to a conglomeration of the two portions into which it was submitted regulation 7 (1) should be divided. Having thus effected this union between those two parts, I am of opinion that the petitioner cannot now be heard to submit that the union, which he himself created, should be dissolved.

The following authorities were cited to this Court in the course of the argument:—

Harkney case 31 L.T. 69.

Cheltenham case 19 L.T. 816.

Woodward v. *Sarsens* [1874] L.R. 10 C.P. 733.

Abengowe v. *Wachuku* 21 N.L.R. 56.

Stroke Newington case [1948] 2 A.E.R. 503.

Islington case 17 T.L.R. 210.

Kensington North case [1960] 2 A.E.R. 150; (1960) 3 W.L.R. 762.

Fallon v. *Calvert* [1960] 1 A.E.R. 281.

R. v. *Teschemaker*, 1 J.R. 78 (New Zealand).

I do not find it necessary to say more about these cases than that in my view none of those cited by counsel for the petitioner supports the proposition contended for by him, namely, that once any non-compliance with the Regulations has been shown by the petitioner, the onus shifts to the respondent to satisfy the Court trying an election petition that the non-compliance did not affect the result of the election.

I am firmly of the view as above indicated, that a petitioner who alleges in his petition a particular non-compliance and avers in his prayer that the non-compliance was substantial, must so satisfy the Court. This the petitioner failed to do.

It follows therefore, that I would allow this appeal, set aside the judgment of the Court below with the order for costs so far as the first respondent is concerned, and order that the petition should be dismissed.

Appeal allowed; *petition dismissed.*

ALHAJI FASASI A. ONASANYA ... ... *Plaintiff*

v.

J. O. SHIWONIKU ... ... *Defendant*

[HIGH COURT OF JUSTICE: Duffus, J., 6th October, 1960.]

Land law—deed of partition of family land held under customary tenure not executed by all joint owners—partition void, not merely voidable—section 1 (2) of Property and Conveyancing Law, 1959 considered.

The claim in this suit was for a declaration of title to a piece of land. The plaintiff's claim was based on purchase from one Sabitiyu Kayaoja who alleged that this land was vested in her as a result of a partition alleged to have been made in 1949 by the children of one Salu Kayaoja who was the undisputed owner of the land before his demise. The evidence established that only four of the six children of the late Salu Kayaoja executed the deed of partition in 1949. Subsequently when the plaintiff had reasons to believe that that partition might be void or voidable he got another deed of partition executed in 1950 by some children and grandchildren of the late Salu Kayaoja. But it was established on the evidence that of the children of Salu Kayaoja, one Rufai was not party to either of these two deeds of partition nor was any of his children, he having died between the date of the execution of the 1949 deed and that of 1950.

Held: (1) that all the joint owners of family property held under customary law must join in the voluntary partition of the property;

(2) that any deed creating such a partition if not executed by all joint owners is not voidable but void; and that therefore the partition deeds of 1949 and 1950 were both void.

Cases cited:

Alhaji Fasasi Adeshoye v. *J. O. Shiwoniku*, 14 W.A.C.A. 86.

Alade v. *Aborishade* (yet unreported but *see* F.S.C. 3/1960).

Johnson v. *Onisiwo*, 9 W.A.C.A. 187.

Ikeja Civil Suit No. I/273/55.

Moore. for plaintiff.

Davis, for defendant.

Duffus, J.: This very old case was filed in the Lagos Judicial Division in June 1952, but when the Courts were regionalised, as the land the subject matter of this action was in this Region, the case was sent here and then became suit No. I/273/1955.

The plaintiff is seeking a declaration of title.

Both plaintiff and defendant claim from the same root of title. It is agreed that the land in dispute belonged to Salu Kayaoja who died intestate about 1924 leaving six children surviving him and children of a son who predeceased him.

The plaintiff's claim is based on partition alleged to have been made by all the children and grandchildren of Salu Kayaoja who were then entitled to this land. He claims the land in dispute by virtue of a Conveyance from Sabitiyu Kayaoja who had this land vested in her as a result of the partition.

The defendant on the other hand claims by virtue of a sale made by Jimo Odogbo to his Vendor, Oke Ayinke. Odogbo sold as the agent for and on the instructions of three of the children of Salu Kayaoja.

There was previous litigation between these parties in Suit No. 24 of 1950. This case was pleaded by the defence as creating an estoppel and the record was put in evidence. The defence did not at the trial continue with the plea of *res judicata* although this had been pleaded in amendment to their defence. In that case the present defendant was the plaintiff, and the plaintiff the defendant. Judgment was given in that suit for the plaintiff that is J. O. Shiwoniku (defendant here) for £5 damages for trespass. The Court in effect found that Shiwoniku (defendant) was already in possession of the land when Onasanya (plaintiff) purchased and also found that the titles of both the plaintiff and defendant were defective. This case went on appeal to the West African Court of Appeal and the judgment of the lower Court was upheld. This judgment has been reported in 14 W.A.C.A. 86. (*Alhaji Fasasi Adeshoye* v. *J. O. Shiwoniku*).

After the decision in the Court of the first instance but before the appeal was heard steps were taken to remedy the defect in the partition and a further deed of partition was prepared and executed by apparently all those persons who should have executed the first deed of partition but did not do so. Both the partition deeds are in evidence as Exhibits 1 and 2. After this last partition deed was executed the plaintiff's Vendor, Seliatu Aduke Kayaoja executed a conveyance of the land in dispute to the plaintiff. The conveyance is in evidence as Exhibit 3.

The plaintiff called his Vendor, Sabitiyu Aduke Kayaoja and she gave evidence as to the descendants of Salu Kayaoja. In cross-examination it now appears that there are still members of the family who are entitled to a share in the estate of Salu Kayaoja who have not joined in the partition. According to her evidence one of the six surviving children, Sinatu Awele had two issues, Animotu Ajiwun and Rufai. Sinatu Awele died before the first partition deed (Exhibit 1) was executed, her son Rufai had predeceased her but left ten children of whom eight are still alive. These children of Rufai were not parties to any of the partition deeds, and are indeed not mentioned.

The plaintiff has not made it clear either in his writ or in his Statement of Claim what precisely is the nature of the title he claims. In the Statement of Claim, however, the plaintiff claims his title by virtue of the conveyance (Exhibit 3) from Sabitiyu Akanke Kayaoja dated the 22nd March, 1951 by which the land was conveyed to him in fee simple. It is therefore clear that the plaintiff is seeking a declaration that he is the owner of the legal estate in the land in fee simple absolute in possession, and I will deal with his claim on his basis. I might say that no objection was made by the defence on the form of the writ or Statement of Claim.

There is some doubt as to the existing law on this question both as to the nature of the title sought in a declaration of title and as to the meaning to be placed on the term "fee simple". This matter recently came up in the Federal Supreme Court and in this respect I would refer to the judgment of Abbot, F.J., and Ademola, F.C.J., in the case of *Alade* v. *Aborisade* (F.S.C. 3/1960, judgment dated 2nd September, 1960). I am of the view however, that the present position as to the ownership of land in the Western Region has been clarified by the Property and Conveyancing Law, 1959. This law only came into force on the 23rd April, 1959, but by section 1 (2) it applies to land within the Region which is not held under customary law. This law would not, however, in my opinion affect the particular transaction in this case except in so far as it

would determine the nature of the title that the plaintiff seeks. Land in this Region would at present be held either under customary law or else under the provisions of the Property and Conveyancing Law, No. 21 of 1959.

The defendant does not admit the plaintiff's title and the onus is on the plaintiff to prove his title.

Learned Counsel for the defendant in dealing with the plaintiff's case raised what were in my opinion, two points of substance. He submitted—

(*a*) That the plaintiff's title was still defective as all the persons entitled to the land had not executed the deed of partition. He referred to the fact that the children of Rufai, the deceased son of Sinatu Awele had not been parties to the partition, and

(*b*) That the first partition deed (of 1949, Exhibit 1) was defective and could not therefore be cured by those who were not parties to the defective deed now requiring a supplementary conveyance.

I will deal with the second submission first. There can be no doubt that all the joint owners of land must join in the parties to a voluntary partition, and the same principle applies to the voluntary partition of family property held under customary law. Learned Counsel for the plaintiff rightly submitted though that in cases where a child is alive, as in this case, Sinatu Awele, then there is, of course, no necessity for her children to be parties to the partition.

A great deal depends on whether the first partition deed in 1949 (Exhibit 1) was void or only voidable. In this respect Counsel for the plaintiff relied on the authority of *Johnson* v. *Onisiwo*, 9 W.A.C.A. 187 in his submission that a partition in which some only of the entitled persons join in is not void but only voidable. When these same parties came before the Court in 1950 (Suit 24 of 1950, Exhibit 7), the learned trial Judge found that the partition deed of 1949, was voidable, but he then went on to find that the defendant's (plaintiff here) conveyance based on that partition deed conveyed no legal estate. With great respect I am of the view that the learned Judge should have found that the partition deed was void. When the case went on appeal the West African Court of Appeal made no direct finding as to whether the deed was void or only voidable, but in my view the judgment of the Court amounted to a finding that the partition deed was invalid and void. In that case learned Counsel for the appellant had submitted that this partition deed was only voidable and accordingly until it was set aside the legal estate in the land vested in the appellant, the plaintiff here, who was entitled therefore to the possession of the land. This would appear to have been in fact the position if the deed was only voidable. In delivering the judgment of the Court, Foster Sutton, P., said *inter alia:*

"The appellant sought to defeat the respondent's claim by setting up the conveyance dated 14th January, 1950, under which he claimed to be the owner in fee simple of the land in dispute. The validity of that conveyance was put in issue by the respondent, and in my opinion, the learned trial Judge was bound to determine the issue so raised. Once it became clear that the grantees had purported, as they did, to convey a title which they did not possess, the respondent being in possession of the land could successfully maintain an action for trespass against the appellant".

My view then is that the Court of Appeal found that the partition deed of 1949 (Exhibit 1) was void and not voidable, and indeed this would be only carrying out the general principle that a person cannot sell or dispose of something that is not his, *nemo dat quod non habet*.

I therefore hold that the partition deed (Exhibit 1) of 1949 was invalid and void and passed no further interest in the land in dispute to the plaintiff's vendor, Sabitiyu Aduke Kayaoja, and accordingly the further partition deed (Exhibit 2) of 1950, which was not executed by any of the grantors in the first partition deed Exhibit 1, was also of no effect and did not vest any further interest or estate in the plaintiff vendor to the plaintiff. A new agreement should have been arrived at between all the persons entitled to the land and another partition deed executed by all the parties.

I therefore agree with the submission of defence counsel that the plaintiff's title to this land is still defective, and he has not proved his right to be declared the owner in fee simple absolute in possession.

I would also here shortly deal with the second submission, that is that the children of Rufai did not join in this partition. This fact was established by the evidence of the vendor to the plaintiff and witness Sabitiyu Aduke Kayaoja. Rufai died before his mother Sinatu Awele. I agree with plaintiff's Counsel that if this partition took place during the lifetime of Sinatu Awele then her children or grandchildren would have no say in the matter and would be bound by her decision. Sabitiyu in her evidence, although very vague on the whole matter, did say that she was alive when the partition was agreed on, and the recitals to the 1949 partition deed, bear this out, but the recitals also make it clear that as found at the first trial (Exhibit 7, suit 24, 1950), that other members of the family entitled to the land had not joined in. This partition deed was therefore as I have found, defective and a new agreement or partition should have been arrived at. Sinatu was then dead, she died before the first partition deed in 1949 was executed, and accordingly the children of Rufai were then entitled to Rufai's interest, and should have been parties to the partition. It is clear that these children were not parties to the partition especially when reference is made to the Statement of Claim which sets out in detail, the various persons entitled to the land and taking part in the partition, and also in both partition deeds. Sabitiyu did give evidence that these children of Rufai did have their own share, but her evidence was on the whole rather vague, and I do not accept this statement as a fact, when this is not borne out either by the pleadings or by the deeds. I am therefore of the view that the partition of Salu Kayaoja's land was for this reason also defective. I might also point out that in any event when Sinatu Awele died intestate the children of Rufai should, in my view, have also joined in the further partition deed and not only her surviving children Alimotu Ajiwun and Abudulai Agunbiade.

I am therefore of the view that for the reasons that I have given the plaintiff's title is defective and that he has not proved that he is entitled to any declaration of title over the land in dispute.

The claim is dismissed.

Claim dismissed.

THE QUEEN

v.

ISRAEL DAVID
RAMONU DORUNMU
JOEL LADIPO

[HIGH COURT OF JUSTICE: Charles, J., 12th October, 1960.]

Criminal Law and Procedure—charge of conspiracy, slave-dealing and attempt to commit the offence of slave-dealing contrary to sections 516, 369 (2) and 509 of the Criminal Code respectively—use of agents provocateur by police—need for Court to warn itself against accepting evidence of such agents unless corroborated—variance between charge and evidence led in support—sections 168 (e) and 180 of the Criminal Procedure Ordinance applied—section 15 of the Criminal Code and section 177 of Evidence Ordinance considered.

In this case the three accused persons lived in Agada Village in Egbado Division, and a boy, Fabi, lived there with the first accused who is his relative. Later third accused left the village. One day in March 1960, the first and second accused persons left Agada Village with the boy in the small hours of the morning to a native doctor Akinwowo living at Oja-Odan Village. But three days earlier the third accused who was then apparently living in Oja-Odan had approached Akinwowo and had confided in him that he had two friends who had a boy to sell and Akinwowo had told him that he could help to arrange the sale. Meanwhile Akinwowo had gone to make a report to the police and two officers were detailed to make investigation. Two days later the two officers had arrived at Oja-Odan and Akinwowo had taken them to the third accused and had introduced them, one of them the Corporal, as the prospective buyer and the other as his (Akinwowo's) cousin. The two officers had passed the night in the third accused's house. The following morning when the first and second accused persons arrived with the boy at Akinwowo's house, he took them to third accused's house. When they got there, they left the boy outside the house. After introductions, the Corporal went out and saw the boy. Back in the house there followed negotiations for the sale of the boy, the price suggested by the accused persons being £500 whilst the Corporal offered £300. One of the accused persons suggested that £300 was only sufficient as price for the head but the Corporal insisted on having the whole boy, head and trunk for £300. This was agreed. The Corporal thereafter went out to arrange for neighbours to come into the house and on entering the house he disclosed his identity and arrested the accused persons. On these facts the accused were charged before the Abeokuta High Court for (1) conspiring to sell the boy Fabi; (2) actually selling the boy to the police Corporal; and (3) attempting to sell the boy to the police Corporal.

Held: (1) that if the accused persons intended to deal with the child as if he were a chattel or so that he could be treated as a chattel capable of being the subject of ownership, the ultimate use or abuse to which he might or was to be put as a chattel was immaterial in determining whether the crime of slave-dealing had been committed as the manifest object of section 369 of the Criminal Code was to prevent one human being becoming subject, either absolutely or conditionally, to the dominion of another as if he were a thing.

(2) that the evidence of agents provocateur, though admissible, was suspect, and the court was under a duty to warn itself that it was unsafe to convict upon it unless it was corroborated in some material particular tending to show that the alleged crime was committed and the accused persons participated in it;

(3) that in this case there was such corroborative evidence against the accused persons, and they were therefore guilty of the offence of slave-dealing;

(4) that although there was a variance between the particulars of the third count and the evidence led in support of it, the court would have regard to section 168 (*e*) of the Criminal Procedure Ordinance and would not stay judgment on that ground;

(5) that in as much as the first offence was embodied in the second offence the court would exercise the powers conferred on it by section 180 (1) of the Criminal Procedure Ordinance and return a verdict of guilt on the third count and stay trial on the first count.

Accused not guilty on second count; guilty on third count; trial stayed on the first count.

Cases cited:

Thomson v. *Knights*, [1947], K.B. 336.

Brannon v. *Peek*, [1947] 63 T.L.R. 592.

Davies v. *Director of Public Proscutions* [1954] 2 W.L.R. 343, [1954] A.C. 378.

R. v. *Prater*, [1960] 2. W L.R. 343.

Abeokuta Criminal Charge No. AB/20c/60.

Apara, Crown Counsel, for the Crown.

Charles, J.: The three accused are before the court on the following charges:—

(1) Conspiring to commit felony, contrary to section 516 of the Criminal Code, in that at Agada Village between January and March 1960, they conspired together and other persons unknown to commit a felony, namely, to sell one Ogunbayi Obanla Fabi so that the said Ogunbayi Obanla Fabi should be held or treated as a slave.

(2) Slave-dealing, contrary to section 369 (2) of the Criminal Code, in that at Agada Village, between January and March 1960, they transferred one Ogunbayi Obanla Fabi to Corporal Anthony Jegede in order that the said Ogunbayi Obanla Fabi should be held or treated as a slave.

(3) Attempt to commit a felony (slave-dealing) contrary to section 509 of the Criminal Code in that between the months of January and March 1960, at Agada Village, they did attempt to sell one Ogunbayi Obanla Fabi to Corporal Anthony Jegede so that the said Ogunbayi Obanla Fabi should be held or treated as a slave.

The following facts were common ground between the Crown and the accused:— For some time prior to March 1960, the third accused had been working as a brick-maker at Agada Village and had lived there, while so engaged, with the second accused who was a friend of the first accused, a fellow villager. The first accused is the relative of a youth named Ogunbayi Obanla Fabi, who also lived at Agada Village. Some time before last March, and after the third accused had left Agada Village, the first accused took the youth to the third accused at Ilaro, where they remained for two or three days. On one morning in March, as a result of a message from the third accused the first accused called the youth away from a funeral ceremony and, after meeting the second accused, the two accused and the youth went on two bicycles to the village of Oja-Odan, travelling in the small hours of the morning and reaching the village before day-break. On their arrival, the party went to the house of a native doctor named Akinwowo who directed them to the house of the third accused. While the three accused and the youth were at the third accused's house, the three accused were arrested for slave-dealing by a corporal of the Nigeria Police and a constable of the Local Government Police, both of whom were dressed in plain clothes.

The evidence adduced by the Crown was in substance as follows: According to Akinwowo, the native doctor, he had been approached by the third accused three days before the arrest for the purpose of consulting an oracle; the third accused had then confided in him that he had two friends who wished to sell a boy; he had told the third accused that he could arrange the sale and it was agreed that the third accused and his two friends, with the boy, should meet in three days' time; and he then reported the matter to the police at Ilaro. The story from there, as given by Akinwowo and the two police officers, with some divergence as to details between Akinwowo and the police officers, was that the two police officers, dressed in plain clothes arrived at Akinwowo's house in Oja-Odan on the evening before the arrests; that Akinwowo then went for the third accused to a neighbouring village where the latter was working: that the third accused came back to Oja-Odan and was introduced to the police officers, the corporal being represented to him as the prospective buyer of the boy and the constable as a cousin of Akinwowo: that the third accused said that his friend with the boy would arrive that night or next day and that he hoped to be compensated for his time and trouble over the boy: that the corporal enquired what would be the price of the boy and was told that £500 would be asked but £300 would be accepted: that after drinking together with the third accused, the two police officers retired to bed in the third accused's house: that next morning the first and second accused, with the youth mentioned, arrived at Akinwowo's house and were taken by Akinwowo to the third accused's house; that the first and second accused with Akinwowo entered that house, leaving the youth outside: that the corporal left the house to look at the youth and returned: that after introductions had been effected, the corporal, who had been introduced as the prospective buyer, was told that the youth had been induced to come by the representation that he was to be apprenticed to a doctor from Lagos: that the youth was brought in at the corporal's request and was told by the corporal that he was a doctor to whom he (the youth) would be apprenticed, and the youth expressed his agreement: that the youth then left the room and the corporal and the three accused then discussed the price for the boy, £500 being first asked and the price dropping until £300 was mentioned: that, with reference to the mention of £300, one of the accused told the corporal that £300 would cover the head to which the corporal replied that he wanted the boy whole in order to sell in part: that the capacity of the corporal to pay was questioned and he then disclosed a bundle of what appeared to be currency notes but were, in fact, only two £1 currency notes with pieces of paper between them: that the corporal then, by electric torch light, wrote some particulars on a piece of paper and then went outside, arranged for some villagers to come, returned to the room and, to their consternation, revealed his identity to the accused, delivered to them a homily and arrested them.

According to the native doctor and one of the police officers, the accused and the corporal had agreed, before the latter went outside, to the price for the youth intact being £300 but the evidence of the other police officer is not definite as to whether such a concluded agreement was reached. The youth himself gave evidence as to his being summoned from the funeral rites by the first accused and going with that and the second accused to the village of Oja-Odan, being left outside the third accused's house and seeing the corporal there and later being brought inside the house on two occasions. He denied that he had ever worked for the third accused at Agada and that his guardian had given him permission to be apprenticed to the third accused. The guardian of the youth gave evidence that the youth had been sent to one aged relative to look after him but that he used frequently to visit the guardian, that he had not given anyone permission to apprentice the youth to anyone, and that he first became aware of the youth's departure as a result of a report from the aged relative and subsequent enquiries.

The three accused deposed to the following:—The youth had worked with the third accused as a labourer while the latter was at Agada, and had expressed a wish to become apprenticed to him in order to learn brick-making and laying. The third accused had mentioned this request to the second accused who had then introduced the third accused to the first accused who, in turn, had introduced the third accused to the youth's guardian with whom it was agreed that when the third accused had obtained another job he would consider taking the youth as an apprentice. The visit of the first accused and the youth to the third accused at Ilaro had been, it seems suggested, in order to let the third accused's wife see the youth and express an opinion as to his suitability as an apprentice having regard to him being inflicted with yaws. In March, the third accused had obtained work in a neighbouring village to Oja-Odan, where he was also working, through the aid of the native doctor, Akinwowo, with whom he had become friendly after something in the nature of a quarrel between them. The third accused, on obtaining the additional work, had sent for the youth for the purpose of arranging an apprenticeship for him. The result was that the first and second accused had brought the youth to the third accused's house at Oja-Odan, and after obtaining the permission of the youth's guardian. It was while the three accused, in the presence of the youth, were discussing the apprenticeship that the native doctor had arrived with the two police officers and the three accused had been arrested, the stage of the discussions reached at the time of the arrests being whether the youth, as an apprentice, should be paid.

On the evidence which I have summarised, the accused are not guilty of the second charge as laid since the youth had not been purportedly transferred by them to the corporal. It is, of course, open to convict, on that charge, of an attempt to commit the offence of slave-dealing by attempting to transfer the child, but I am not prepared to exercise that power in this case. Section 369 of the Criminal Code does not create, in my judgment, a number of offences relating to slave-dealing but a single offence of slave-dealing which covers divers circumstances and particulars (cf. *Thomson* v. *Knights*, [1947] K.B. 336). As the information has specifically alleged, in the third count, an attempt to commit that offence, although with different particulars, it is undesirable at least, in my opinion, to exercise the power to return on the second count an alternative verdict of an attempt. I shall therefore acquit the three accused on that count.

An accused is guilty on the first count if it appears beyond reasonable doubt from the admissible evidence relating to him that he and one or both of the other accused persons formed an intention to join together in selling the youth Ogunbayi Obanla Fabi as if he were a chattel and he and the other accused person or persons manifested their mutual intention to each other by some overt, act indicative of either an express or implied agreement to carry out that intention. That is subject to the qualification that an accused cannot be convicted on the count, notwithstanding that those matters are proved against him, unless those matters are also proved beyond reasonable doubt against at least one of the other accused by the admissible evidence relating to the latter. Although the first count alleges that the three accused conspired together and with persons unknown, there is no evidence that anyone but the three accused were a party to the alleged conspiracy, and, consequently, if the evidence does not establish the guilt of two accused, the third is entitled to an acquittal regardless of what the evidence against him may establish in the abstract.

An accused is guilty on the third count if it appears beyond reasonable doubt from the admissible evidence relating to him that he either attempted to sell the youth as if he were a chattel or aided and abetted or counselled or procured one or both of his co-accused in such an attempt.

It is clear that if the evidence of the two police officers and the native doctor as to the former's discussion with the three accused is true, the essentials of the offences charged in the first and third count will have been proved against each accused and each accused will have been guilty of those offences. The substantial question in respect of each accused in respect of each count is whether I am satisfied beyond reasonable doubt that the police had the discussions and effected the arrests in the circumstances alleged by them. If I am so satisfied in respect of an accused he is guilty upon each count, subject to the qualification in respect of the first count, that I must also be so satisfied in respect of at least one other accused.

Before considering that question, reference should be made to the possibility which is suggested by the evidence for the Crown, that the object of the alleged conspiracy and attempted sale of the youth was not for the purpose of the youth being kept in servitude but for the purpose of killing him and using parts of his body in some revolting way. The ultimate use to which a person sold into slavery may be put does not, in my judgment, have any bearing on the question whether the crime of slave-dealing has been committed. As I held in an as yet unreported case last year in Ikeja, the essence of the crime of slave-dealing is whether the parties to any alleged transaction which constitutes that crime have dealt with another human being as if he were a chattel. If they intend to deal with him as if he were a chattel, or so that he can be treated as if he were a chattel, which is capable of being the subject of ownership, the ultimate use or abuse to which he may or is to be put as a chattel is immaterial in determining whether the crime has been committed. One of the primary ordinary meanings of the word "slave" is a "human chattel" (Concise Oxford Dictionary) and it is with that meaning that the word appears to me to be used in section 369 of the Criminal Code, having regard to the manifest object of the section being to prevent one human being becoming subject, either absolutely or conditionally, to the dominion of another as if he were a thing.

The substantial question to which I have referred has to be considered with regard to the consequences which result from the methods which the police have used in this case. According to their own evidence, the police officers and the native doctor, the latter acting under police instructions, assumed the role of agents provocateur and incited the accused to further their alleged conspiracy by attempting to carry it to completion. The use of agents provocateur in the detection of crime has received the strong condemnation of Lord Goddard, C.J., and Mr Justice Humphreys in *Brannon* v. *Peek* (1947), 63 T.L.R. 592 (D.C)—condemnations which deserve the attention of all police authorities. It cannot be emphasised too strongly that the use is one which is fraught with danger to the innocent and to the Rule of Law. A court, however, is not justified in dismissing out of hand a prosecution based on the evidence of agents provocateur, as such evidence is not inadmissible. Such evidence is, however, suspect and it is, in my judgment, the duty of a court before which it is admitted to warn itself that it is unsafe to convict upon it unless it is corroborated in some material particular by independent evidence tending to show both that the alleged crime was committed and that the accused participated in it.

The requirement clearly arises, in my opinion, in respect of the third count, by reason of section 177 (proviso) of the Evidence Ordinance. By section 15 of the Criminal Code members of the police are subject to that Code, with the result that if a constable, although acting from a sense of public duty, incites or procures a person to attempt to commit a crime, he himself is guilty of an offence under section 513 of the Code and, having regard to the definition of "accomplice" in *Davies* v. *Director of Public Prosecutions*, [1954], 2 W.L.R. 343, 1954 A.C. 378 (H.L.) is an accomplice in

the attempt. It is relevant to note that in *Brannon* v. *Peek* (supra) both Goddard, C.J., and Humphreys, J., were of the opinion that an agent provocateur who had incited a person to commit an offence was himself guilty of an offence. That opinion was criticised, at least as regards statutoty offences, by a learned writer in the *Law Quarterly Review* (1948, Vol. 64, p. 190) on the ground that a statute does not bind the Crown in the absence of express or necessarily implied provision to that effect. Whether the criticism is valid or not is immaterial here because section 15 of the Criminal Code referred to excludes the police from any exemption which they might otherwise have as agents of the Crown.

As to the first count, it may be said fairly, perhaps, that the police officers and the native doctor cannot be regarded as accomplices because any conspiracy into which the accused had entered had been entered into before the intervention of the police officers and the native doctor. That may be a nice academic point for discussion at law student's moots but the judgment in *R* v. *Prater* [1960] 2 W.L.R. 343 C.C.A. shows that too great a nicety is not to be applied in determining whether an apparently interested witness is in fact an accomplice. In my opinion, to apply the statutory warning to the third count and not to apply it to the first count would open the door, in the circumstances of this case, to a psuedo-justification of the popular fallacy that the law is an ass.

It follows, so far as I am concerned, that the first consideration on the substantial question is whether there is independent evidence which is capable of corroborating the evidence of the two police officers and the native doctor against each accused. In my judgment such evidence is supplied by the youth, the intended victim of the alleged conspiracy and attempt, against each accused, if it is true, as to the following matters:— (*a*) that the youth was left outside the third accused's house on his arrival with the first and second accused there; (*b*) that the first accused had said to the police officers that the youth had been brought under pretence that he was to be apprenticed to a doctor at Lagos; and (*c*) that the boy had been brought into the room later and introduced to the police corporal as the doctor to whom he was to be apprenticed. If the youth's evidence is true as to those matters they not only render probable the evidence of the police officers and the native doctor as to the commission of the alleged crime but as to the complicity of all three accused in those crimes, since the evidence of those witnesses is that all the three accused participated in the discussions manifesting the crimes, while the evidence of the three accused is that no such discussions took place but that they were interrupted by the police while they were having an innocent discussion in the presence of the youth as to the terms of the latter's apprenticeship as a brick-maker and layer. Against the third accused, by way of corroboration of the police officers and the native doctor, but against the third accused only, is also the evidence that he had made a statement to the police under caution in which he admitted that the native doctor had had a preliminary discussion with him as to buying the youth, though he alleged a discussion different to that deposed to by the native doctor, and he admitted that a conversation had taken place between the police officers and the first and second accused as to the sale of the youth substantially as deposed to by the three Crown witnesses, although he denied participating in it. It should be noted here that the third accused denied having made the alleged statement, alleging that he had been correctly recorded as to certain other parts but not as to the parts referred to.

The second question is whether I am statisfied beyond reasonable doubt that the youth's evidence on the three matters mentioned is true. The youth's evidence has to be considered, of course, with regard to the possibility that he was tutored as to it, as was alleged by the accused, in that he did not mention first calling at the native doctor's house on arrival at Oja-Odan and, according to him, he did not express his willingness

to be apprenticed to the corporal as a doctor when he was brought into the house but remained silent, whereas both the corporal and constable deposed that he expressed his willingness. Those divergences suggest to my mind that the youth had not been tutored as to his evidence. Further, the youth deposed to having heard, while he was outside the house, one of the accused state that he had been brought to be apprenticed to a doctor. While the question must necessarily be asked why he heard only that and not the more damning parts of the alleged conversation going on inside, it must be recognised, I think, that his evidence fits in with the common experience as to snatches only of conversation being heard, and it is to be expected that had he been tutored as to his evidence he would have been tutored to say that he had heard more damning passages of conversation.

The police officers, of course, may have been blessed with machiavellian cunning in their tutoring but that appears to me to be unlikely. Then, the youth's evidence, in contradiction of the accused, that he was brought to Oja-Odan without the consent of the guardian is corroborated by the evidence of the guardian himself who appeared to me to be a credible witness. Then, I must have regard to the straight-forward and definite way in which the youth rejected the accused's suggestions in cross-examination.

In favour of the accused, on the other hand, must be placed the difficulty which I had in assessing the intelligence of the youth, as distinct from his honesty, particularly having regard to the obvious falsity of his evidence that he was senior to his relative, the first accused. My difficulty in that respect, however, does not really assist the accused as the youth's apparent honesty, not being affected by his intelligence, does not affect the weight of his evidence except, perhaps, to leave unremoved any doubt in their favour which may have been raised by the accused in their evidence contradicting the youth.

After weighing the youth's evidence with regard to the consideration mentioned along with the evidence of each accused, and the manner in which each accused gave his evidence, I have no doubt that the youth's evidence on the matters mentioned is true. The three accused have told a more or less consistent but improbable story as to how the youth was brought to Oja-Odan. More important is the credibility of the accused themselves. Each impressed me, although in varying degrees of apparency, as liars.

The third accused is an unmitigated liar. He obviously, having regard to his reactions under cross-examination, lied in his denial of the police evidence as to his statement under caution—I have no doubt that he made the statement as alleged by the police—while the look of consternation on his face, when he was challenged as to his evidence that he had known the corporal for some time at Ilaro by being asked if he knew that the corporal had only arrived at Ilaro for the first time a few days before the arrests, could almost have been the answer to a cross-examiner's prayer. The other two accused were not such blatant liars but they proved themselves to be liars to my satisfaction when seeking for explanations as to their taking the youth to Oja-Odan in the small hours of the morning and their concern in having him apprenticed to the third accused. Some of their explanations may not be patently unreasonable but the manner in which the two accused gave them I regard as significant.

The result is that I have no doubt that the youth's evidence as to the three matters mentioned is true, as I have said, and that to the extent of them the police officers', and the native doctor's evidence is corroborated. As to the truth of the third accused's statement, which I have already found was made by him, I am not prepared to make a finding independently of the evidence of the two police officers and the native doctor, and therefore I do not regard that statement as corroboration against him.

Having found corroboration of the evidence of the two police officers and the native doctor in the youth's evidence the remaining question is whether I am satisfied beyond reasonable doubt that the first mentioned evidence is true—the substantial question. To a large extent that is answered by what I have already said as to credibility, or lack of credibility of the accused. The three accused appear to me to be not only liars but liars of such intelligence above the average as to appreciate that success in lying rests in departing from the truth as little as possible. In their favour, however, in considering the evidence of the three main witnesses, that of the native doctor did not appear to me to be very satisfactory. That evidence was inconsistent with that of the police officers in that he said that all three accused became suspicious of the police officers on the day of arrest; he gave a most improbable account of how the accuse reacted to their suspicions, and he stated that both police officers were on that day producing note books, leaving the room and returning and replacing their note books in their pocket, whereas the police officers gave, so far as the knowledge of each extended, a consistent account of the third accused querying the *bone fides* of the constable on the night before the arrests, and of the corporal having made a note on a piece of paper during the discussions preceding the arrest. The inconsistencies of the native doctor's evidence do not justify me, I think, in rejecting the police officers' evidence, since it is corroborated by the youth's evidence. The police officers impressed me, notwithstanding the role they had assumed, or had had to assume as agents provocateur, as being very honest witnesses, and the nature of the native doctor's inconsistencies are such that it is difficult to see how any improper motive would be served by them. The inconsistencies were in fact of a stupid kind and at the worst can perhaps be attributed to a mind weakened by too much dealing with the occult. There is one aspect of the police officer's evidence to which I should refer: the making of a note on a piece of paper by the corporal in the course of the discussions. It seemed to me at first that had that happened, it would have roused the suspicions of the accused and have been challenged at the time by them. However, I do not consider that matter to justify a doubt as to the truth of the officers' evidence, since it may well be that accused regarded it as a natural thing to do when future sales were being discussed, and particularly having regard to the definite opinion which I have formed as to the respective credibility of the police officers and the accused, to which may be added regard to the inconsistency between the evidence of the first two accused and the third accused, as to them having been informed of the reasons for the arrests at the time of the arrests.

The result is that I have no doubt that each of the three accused is guilty upon the first and third counts. In as much, however, as the first offence is really embodied in the second offence I propose to exercise the power conferred by section 180 of the Criminal Procedure Ordinance by returning a verdict of guilty only on the third count and staying the trial on the first count. I should add that the particulars of the third count contain a variance from the evidence in that those particulars alleged that the offence was committed at Agada while the evidence shows that it was committed at Oja-Odan. Having regard to section 168 (*e*) of the Criminal Procedure Ordinance I do not propose to stay judgment on that ground.

The three accused will each be found not guilty on the second count, guilty on the third count and the trial will be stayed on the first count.

Accused not guilty on second count; guilty on third count; trial stayed on the first count.

THE CHAIRMAN OF THE BOARD OF CUSTOMS AND EXCISE ... ... *Appellant*

v.

AYO BAYE... ... ... *Respondent*

[HIGH COURT OF JUSTICE: Williams, J., 20th October, 1960.]

Criminal Law and Procedure—fraudulent evasion of customs duty, contrary to section 145 (a) of the Customs and Excise Management Ordinance, 1958—onus of proof of knowledge and intention—section 68 of the Ordinance considered—appeal court will not interfere with findings of fact by lower court.

The appellant brought this appeal against the discharge and acquittal of the respondent by an Ibadan Magistrate's Court on a charge alleging that she knowingly and with intent to defraud the Government of duty payable on certain goods acquired possession of them contrary to section 145 (*a*) of the Customs and Excise Management Ordinance, 1958. The evidence adduced in the Magistrate's Court showed that when a police officer stopped the respondent at Ogunpa Motor Park on 8th September, 1959, and asked her what the carriers engaged by and following her were carrying she started to tremble and she told the police officer that they were carrying cigarettes which she had bought from a certain man at Amunigun. There was evidence that the goods valued at £285 12*s* were chargeable with duty, but there was no evidence that duty had been paid on them. In her defence the respondent stated that she bought the cigarettes from one Edward at Agbeni and that on her apprehension by the police officer at Ogunpa Motor Park she offered to take him to the man, Edward, but that he refused.

Held: (1) that once it was proved that goods on which no duty had been paid were in possession of the respondent a *prima facie* case was established against her that she possessed the goods knowingly and with intent to defraud the Government of the duty payable thereon;

(2) that the onus of disproving knowledge and intent to defraud which vested on the respondent by virtue of section 68 of the Customs and Excise Management Ordinance, 1958, was less than that required of the prosecution in proving a case beyond reasonable doubt and was no more than that required of a party to a civil suit; and that this onus might be discharged by evidence satisfying the jury of the probability of that which the respondent was called upon to establish;

(3) that the Magistrate having accepted the explanation of the respondent and having been satisfied by it, the appeal court would not interfere with his finding of fact.

Appeal dismissed.

Cases cited:

R v. *Cohen*, [1951] 1 K.B. 505.

R v. *Carr-Briant*, 29 Cr. App. R. 76.

Ibadan Criminal Appeal No. I/33CA/60.

Ayorinde, Crown Counsel, for the appellant.

Craig, for the respondent.

Williams, J.: The appellant in this case is the Chairman of the Board of Customs and Excise. He has appealed against the discharge and acquittal of the respondent,

one Ayo Baye who was charged with and tried in the Magistrate's Court, Ibadan, for the following offence:—

"That you on the 8th day of September, 1959, at Ogunpa Motor Park in Ibadan in the Ibadan Magisterial District, knowingly and with intent to defraud the Government of duty payable thereon, acquired possession of 529 tins of Craven "A" cigarettes, 168 tins of Capstan cigarettes, and 119 tins of Consulate cigarettes, being goods chargeable with duty, which duty has not been paid, contrary to section 145 (*a*) of the Customs and Excise Management Ordinance, 1958".

The evidence in support of the charge was that the respondent was stopped at Ogunpa Motor Park on the material date by a police officer who asked her what the two carriers following her were carrying. The respondent started to tremble and told the Police Officer that they were carrying cigarettes which she had bought from a certain man at Amunigun. The prosecution also led evidence to show that the cigarettes valued at £285 12*s* were chargeable with duty and that no duty had been paid on them. In her defence the respondent admitted buying the cigarettes from one Edward at Agbeni and when she was apprehended by the Police Officer she asked him to accompany her to the place where she bought the cigarettes but that he refused and instead called a taxi and took her and the cigarettes to the Police Station. She said further that she did not know that duty was payable on the cigarettes or whether the duty had been paid by Edward from whom she had bought them.

The learned trial Magistrate in discharging and acquitting the respondent stated as follows:

"On the face of goods such as Exhibit A there is nothing to put a petty trader or purchaser on enquiry when buying in market overt and that the police must round up the real large scale dealers in the smuggled goods as they are the actual distributors and therefore the real offenders. In conclusion I am not statisfied that the second element of the offence is complete".

Being dissatisfied with the findings of the learned trial Magistrate the appellant has now appealed to this Court on the following grounds:—

"1. The learned trial Magistrate erred in law when he stated as follows:

'Now, what are the main elements of the offence under section 145 (*a*) of the Customs and Excise Management Ordinance, 1958?

(*i*) Knowingly acquiring possession of goods chargeable with duty and on which duty has not been paid.

(*ii*) Acquiring the said possession knowingly and with intent to defraud the Government of any duty payable thereon'.

2. The learned trial Magistrate erred in law when he held as follows:

'In conclusion I am not satisfied that the second element of the offence is complete. I find the defendant not guilty of the offence'."

In support of ground 1 the learned Crown Counsel argued that according to section 145 (*a*) of the Ordinance (No. 55 of 1958) the ingredients of the offence are as follows:

1. That the possession of the goods is acquired knowingly;

2. that the goods are chargeable with customs duty which is unpaid at the material time; and

3. that there is intent to defraud the Government of the duty payable thereon.

He argued further that the above are the three ingredients of the offence and not those referred to by the learned trial Magistrate in his judgment. Counsel for the respondent on the other hand argued that there is in reality no differences between the ingredients stated by the learned Crown Counsel and those listed by the learned trial Magistrate. I am inclined to agree with the views of the learned Counsel for the respondent. While the ingredients as enumerated by the learned trial Magistrate could be improved upon I am unable to see, on a close analysis, the difference between these and those enumerated above by the learned Crown Counsel.

With regard to ground 2 the learned Crown Counsel argued that there was evidence from which it could be inferred that the goods were acquired knowingly and with intent to defraud the Government of the duty payable thereon and that the learned Magistrate was therefore wrong in law in holding otherwise. In support of his argument the learned Crown Counsel referred to the following facts:—

(*a*) that the respondent was trembling when she was stopped by the Police,

(*b*) that the respondent could not produce the person who sold the cigarettes to her, and

(*c*) that there are material discrepancies between the Statement made by the respondent to the Police and the evidence given by her in Court.

Lastly, the Crown Counsel argued that failure on the part of the respondent to call Edward or Mayabikan to prove her innocence goes further to show that when she acquired the cigarettes she knew she was doing something illegal. Counsel for the respondent on the other hand argued that the learned Magistrate was right in coming to the conclusion he arrived at. The learned trial Magistrate, Counsel pointed out, heard the evidence of the respondent and watched her demeanour in the witness box. As a resu lt he believed her explanation and found as a fact that she did not know that no duty was paid on the goods and that she had no intent to defraud Government of the duty payable thereon. Counsel also argued that where the legislature imposes any onus on a defendant to disprove a specified intent the onus is analogous to that laid on the plaintiff in a civil action.

Again, I agree with the views of the learned Counsel for the respondent. To my mind, the onus of disproving knowledge and intent to defraud was transferred to the respondent by section 168 of the Ordinance which states as follows:

"In any prosecution for an offence under the customs and excise laws it shall not be necessary to prove knowledge or intent, but where the prosecution is in respect of an offence of doing anything knowingly or recklessly or with a specified intent, the onus of disproving that he did such thing knowingly or recklessly or with such intent shall be on the defendant".

In my view, the knowledge and intent which the respondent must disprove cannot be inferred from the facts enumerated by the learned Crown Counsel. In the first place, it is not unusual for petty traders to tremble when arrested by the Police no matter how innocent they may be. Furthermore, it is surprising that although the respondent was arrested at 11.45 a.m. she was not taken to the shop from where she said she bought the cigarettes until 4.30 p.m. on the same day especially when she said in her statement made earlier in the day that the man who sold the cigarettes to her had more in the shop. Lastly the discrepancy between the statement tendered by the police and the evidence given by the respondent, particularly in connection

with the name of the person who she said sold the cigarettes to her, does not count for much when it is realised that the respondent made three statements to the police although only one was tendered in evidence. In her evidence she said she mentioned the man Edward as the vendor in one of the statements.

Once it was proved that the goods on which no duty had been paid were in the possession of the respondent a *prima facie* case was established that she knowingly and with intent to defraud the Government of the duty payable thereon, possessed the goods. Section 168 of the Ordinance (No. 55 of 1958) then shifted on her the onus of giving an explanation from which the Court could infer that duty was in fact paid on the goods, or that having acquired them in the ordinary way of business she did not know that duty had not been paid. In considering what amount of evidence was necessary to discharge that onus, however, the Court must have regard to the opportunities of knowledge of the facts to be proved possessed by the parties. In this connection I will refer to the case of *Rex* v. *Cohen*, [1951], 1 K.B. page 505 where it was held that "once it is proved that a person was in possession of dutiable goods on which he has not proved that duty has been paid, he may, if he gives no explanation of his possession, be convicted of unlawful harbouring. If he gives an explanation, the jury should be told that if it either satisfies them that he did not know that the goods were uncustomed, or leaves them in doubt whether he knew, he should be acquitted."

Finally, the burden of proof required in such cases is less than that required of the prosecution in proving the case beyond any reasonable doubt. It is, in fact, analogous to that laid on the plaintiff or defendant (as the case may be) in a civil action. According to the decision of *Rex* v. *Carr-Briant*, 29 Cr. App. A. 76, the burden may be discharged by evidence satisfying the jury of the probability of that which the accused person is called upon to establish.

The learned trial Magistrate saw and heard all the witnesses including the respondent herself. After considering all the evidence adduced before him he accepted the explanation of the respondent. Having regard to the law on the matter I do not think it is open to the appellant to question the findings of fact made by the learned trial Magistrate.

For the above reasons I uphold the submission of the learned Counsel for the respondent that the appeal should be dismissed.

The appeal is dismissed.

Appeal dismissed.

STEPHEN L. A. ELLIOT ... ... *Appellant*

v.

THE COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Quashie-Idun, C.J., 28th October, 1960.]

Criminal Law and Procedure—charge containing counts for corruption of public officers, contrary to section 42 (2) (a) of the Public Administration Law, 1959 and official corruption contrary to section 98 (2) of the Criminal Code—whether conviction on both counts possible if based on same facts—proof of intention under both sections—sections 159, 161, 173, 175, 176, 177, 178 and 179 of the Criminal Procedure Ordinance and section 43 (3) of the Public Administration Law considered.

The appellant who was anxious to have his name registered with the Ministry of Works and Transport as a contractor was on 21st September, 1960 taken to one Shobamowo, an Executive Officer in that Ministry in charge of registration of contractors to whom he submitted an application for registration. On 10th October, 1959 he sent two bottles of whisky with an accompanying letter to the Executive Officer stating that after he had submitted his application for registration as a contractor he had gone to Lagos on tour and as he would be going to Lagos the following day he was sending along with the letter two bottles of whisky as "Abo-Eko" for the officer's week-end drinks. He ended the letter by thanking the officer in advance for his kind assistance. On these facts the appellant was charged before the Ibadan Chief Magistrate for (1) corruption of public officers, contrary to section 42 (2) (*a*) of the Public Administration Law, 1959 and (2) official corruption, contrary to section 98 (2) of the Criminal Code. He was convicted on both counts and it is against the convictions that he brought this appeal.

Held: (1) that the intention with which an offer to a public officer is made can be specifically proved or can be inferred from the circumstances of the case;

(2) that in this particular case there was ample evidence to prove that the intention of the appellant was to influence the Executive Officer who was a public officer;

(3) that although it was proper to charge the appellant under the two sections of the law on the same facts, he could be convicted only on one of the two counts.

Appeal dismissed; *but conviction on first count set aside.*

Case cited:

Biobaku v. *Police*, 20 N.L.R. 30.

Ibadan Criminal Appeal No. I/37CA/60.

Fani-Kayode (*Fakayode* with him), for the appellant.

Ademola, Acting Director of Public Prosecutions, for the respondent.

Quashie-Idun, C.J.: The appellant was charged before the Chief Magistrate, Ibadan on a count of corruption of public officers contrary to section 42 (2) (*a*) of the Public Administration Law, 1959 and another count of official corruption contrary to section 98 (2) of the Criminal Code.

The facts of the case which are simple are as follows:

On the 21st September, 1959 the appellant went to the first prosecution witness Isaac Olatunde Aro who was employed as an architect in the Ministry of Works and Transport, and told him that he had sent an application to the Department for registration as a contractor and that he had received no reply from the Department. The first prosecution witness told the appellant that the application was not dealt with by his section but took the appellant to the Executive Officer, Michael Sobamowo who according to the first prosecution witness was the officer in charge of the registration.

The appellant was advised by the second prosectuion witness to make a new application. On the following day the appellant took an application to the second prosecution witness in his office and was told by the second prosecution witness that the application would be considered.

On the 10th October, 1959 the second prosecution witness returned home from work at 1 p.m. and a co-tenant of his, Mrs Onafowope delivered to him a letter signed by the appellant together with two bottles of whisky. The second prosecution witness then made a report to his superior officers.

The letter accompanying the two bottles of whisky reads as follows:

"Hon. Stephen L. A. Elliot, M.H.R.,
Elliot's Chambers,
S 1/378 Aleshinloye's Compound,
Isale 'Jebu,
P.O. Box 1117, Ibadan.
10th October, 1959.

Dear Sir,

I have to say that after I had submitted my application for r gistration as a contractor sometime last month, I had gone to Lagos and some other places on political tour As I would like to go to Lagos again tomorrow, I send herewith two Bottles Whisky as "Abo-Eko" for your week-end drinks.

Thanking you very much in advance for your kind assistance.

Yours faithfully,
Signed S. L. A. ELLIOT.

In his defence the applellant stated in his evidence that although he wrote the letter quoted above it had nothing to do with his application to be registered as a contractor. He said the second prosecution witness had shown himself as a good friend by attempting to settle a dispute between the appellant and his wife and that it was to show his gratitude to the second prosecution witness that he had presented the two bottles of whisky to him. Under cross-examination the appellant admitted that he did not know the second prosecution witness before the 21st September, 1959, but said that it was after he had submitted his application to be registered as a contractor that the second prosecution witness settled the dispute between the appellant and his wife. After the appellant had concluded his evidence his counsel applied for an adjournment to enable him to call the appellant's wife as a witness.

At the resumed hearing appellant's Counsel informed the Court that he did not wish to call any more witnesses.

Both Counsel made their submissions, and the learned trial Chief Magistrate in a lengthy judgment which reviewed the facts before him and the law relating to the particular class of offences, found the appellant guilty on the two counts and convicted him accordingly. The appellant has appealed on a number of grounds which are not necessary to be specified in full in this judgment, but which, by the leave of the Court, his Counsel has argued.

In arguing the 1st, 2nd and 7th and also the 5th and 6th of the additional grounds, the important submissions made by Mr Fani-Kayode which I have to consider are—

(1) That it was not proved by the prosecution that the second prosecution witness to whom the appellant sent the two bottles of whisky was discharging the duty of approving and registering applications from contractors.

(2) That the application submitted by the appellant was for the registration of Petty Contract and therefore fell outside the duty of the complainant. In Mr Kayode's submission the trial Chief Magistrate should not have accepted the evidence of the second prosecution witness as to the nature of his duties. He contended that other evidence should have been led in proof of the duties performed by the complainant at the material time.

As has been submitted by Mr Ademola, the question as to what duties were performed by the second prosecution witness at the material time was a question of fact for the trial Magistrate. The second prosecution witness stated in his evidence that he was solely responsible for approving and registering contractors. He also said that he dealt with applications for registration of Petty Contractors and that at the time he gave evidence he was employed in the Ministry of Agriculture and Natural Resources. Although there was no direct evidence as to when he left the Ministry of Works, it is clear from the evidence that when he said that in September he was employed in that Ministry, he was merely referring to the occasion when the appellant was brought to him by the first prosecution witness. He was not cross-examined as to when he was transferred to the Ministry of Agriculture. He however stated that when he received the two bottles of whisky and the letter on the 10th October, 1959 he made a report to his superior officer in the office, who he had said earlier, was the Superintending Engineer in the Ministry of Works. It is absolutely clear from the evidence that on the 10th October, 1959, the second prosecution witness was discharging the duties of an Executive Officer as stated by him in his evidence. That evidence was not challenged and it is my view that the trial Chief Magistrate was justified in accepting it. The second submission that it was not the duty of the second prosecution witness to approve Petty Contractors is answered by the evidence of the second prosecution witness when he said that he approved applications for petty contracts. This evidence was also not challenged. Further, as has been pointed out by Mr Ademola, the application of the appellant which he submitted on the 22nd September included an application for registration as a Petty Contractor. The evidence of the second prosecution witness shows that Petty Contracts included the supply of sand, gravels, transport of department goods.

Applicant's letter of the 22nd September, 1960 applying to be registered as a contractor reads as follows:

"The Superintendent Engineer,
Ministry of Works and Transport,
Ibadan.

Sir,

Registration of Contractors

I have the honour most humbly and respectfully to apply to you for registration of my name as one of your contractors.

For your information, I am mostly noted for making Buildings, Clearing, Road-making, Tarring, and I could supply any size of Timber and all other building materials. Moreover, I have sufficient means to carry out any kind of contracts given to me. I hope that my application would be favourably considered and I shall show no cause whatsoever to regret the honour accorded me. I herewith attach two copies of my portrait for your necessary action."

The application which was marked as Exhibit C at the trial does not say that the appellant wished to be registered as a Petty Contractor but it is clear that the appellant was among other things, asking to be registered as such. In his evidence, the second prosecution witness stated that all applications other than for Petty Contractors were submitted on printed forms and no photograph were submitted if they were not for registration of Petty Contracts. This was not denied.

The submission therefore that the application was not one which the second prosecution witness was expected or charged to deal with was not substantiated by the evidence. There was evidence that the appellant knew that the second prosecution witness was the officer whose duty it was to approve and register the application.

In respect of the third ground of appeal, Mr Kayode submitted that there was no evidence that the two bottles of whisky were offered with the intention to corrupt the second prosecution witness and that there was no evidence that the appellant knew that the seond prosecution witness was in a position to do him any favour.

In proving the intention with which an offer is made to a public officer, I do not think it is necessary to go beyond the evidence and the circumstances which preceded the time the offer was made. The intention can be specifically proved or inferred from the circumstances of the case. In this case there is the evidence that the appellant was anxious to have his name registered as a contractor, he was taken to the second prosecution witness and was told that he was the person in charge of the registration; he submitted an application to the second prosecution witness in his office. He then wrote the letter on the 10th October, 1959 (Exhibit B) and left two bottles of whisky with a co-tenant of the second prosecution witness and thanked the second prosecution witness in advance for his kind assistance. It is my view that there was ample evidence to prove that the intention of the appellant was non other than to influence the second prosecution witness, a public officer, to show the appellant favour in approving and registering his application.

The conduct of the appellant amounts to corruption. It is my view that his explanation as to why he sent the two bottles of whisky is fantastic and was properly rejected by the trial court. It is unbelievable that the second prosecution witness who had only met the appellant for the first time on the 21st September, 1959 would offer or attempt to settle a dispute between the appellant and the appellant's wife whom the second prosecution witness said he did not know before the appellant was arrested. Furthermore, the appellant's letter of the 10th October made no mention of the alleged settlement of any dispute between the appellant and his wife.

Mr Kayode also referred to the case of *Biobaku* v. *Police* 20 N.L.R., page 30 in support of his submission that there was no evidence that the two bottles of whisky were offered with the intention of corrupting the second prosecution witness. In that case Bairamian, J., explained that a conduct or offer that may be improper may not necessarily be corruption in law in a particular case. I am in agreement with the learned Judge. But the facts in the case cited are quite different from the facts in the present case. I would also like to say that the offence of extortion by a public officer is different from the offence of corruption. In the case of extortion the person who is induced to "give" is almost always a victim while in the case of corruption the giver is not a victim. Again while in both cases it is necessary to prove that the person who extorts or corrupts is a public officer and that it is by virtue of his office that he extorted, received or was offered a bribe, the person who extorts may be guilty of the offence of obtaining or attempting to obtain by false pretences where it cannot be proved that the offence was committed by virtue of the public office which the offender holds. In the present case, my view is that the conduct of the appellant was not only improper but amounts to corruption. The last ground argued by Mr Kayode is ground 4 of the additional grounds of appeal. It reads as follows:

"The learned trial Magistrate erred in law in convicting the accused on both the first and second counts in the trial".

It is contended by Mr Kayode that the two counts are alternative charges and that the learned Magistrate could only find the appellant guilty on one of them and not on both.

Mr Ademola, on the other hand has contended that the charges are not alternative and that the Magistrate was right in convicting the appellant on both, although in law he could not punish the appellant separately on the two counts. Mr Ademola has referred to the provisions of sections 159, 161, 173, 175, 176, 177, 178, and 179 of the Criminal Procedure Ordinance, Cap. 43, in support of his contention. I have given careful consideration to the submission made by both Counsel on this issue. It is unnecessary in this judgment to quote the various sections referred to. I think it is sufficient to say that some of the section contain provisions whereby, for an example, a person charged with stealing may be convicted of receiving or where a person charged with the offence of rape may be convicted for indecent assault. I think, however, that the guiding section as far as this case is concerned is section 159 of Cap. 43 which reads as follows:

"If the acts or omissions alleged constitute an offence falling within two or more separate definitions in any written law for the time being in force under which offences are defined or punished, the person accused of them may be charged with and tried at one trial for each of such offences".

The two charges were brought respectively under the Public Administration Law of 1959 and the Criminal Code. Both counts contained allegations of corruption of a Public Officer. The second count also contained allegation that the person sought to

be corrupted was charged with the duty of approving applications submitted for registration.

The relevant provisions of section 42 (2) (*a*) of the Public Administration Law of 1959 reads as follows:

"Any person who corruptly gives, confers or procures to, upon or for any other person, any property, benefit or advantage whatsoever, as an inducement or reward for any such act or function on the part of a public officer shall be guilty of an offence and liable on conviction to imprisonment for five years".

Section 98 (2) of the Criminal Code also reads as follows:

"Any person who corruptly gives, confers, or procures or promises or offers to give or confer or to procure or attempt to procure, to, upon or for any person employed in the Public Service, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed is guilty of a felony and is liable to imprisonment for seven years.

It is my considered opinion that the appellant could have been charged under either the Criminal Code or under the Public Administration Law or under both Code and Law. Section 43, sub-section (3) of the Public Administration Law provides:

"For the avoidance of doubt it is hereby declared that the provisions of this section are not in substitution for any provisions of the Criminal Code".

Apart from this proviso I think section 159 of the Criminal Procedure Ordinance to which I have already referred, supports my view that the charges could be preferred under the Criminal Code and the Public Adminstration Law at the same time. Section 159 of Cap. 43 however only deals with trials of offences falling within two definitions. It does not say that when such offences are tried together the offender could be convicted in respect of all the offences. It cannot be said that the appellant in the present case committed two separate offences and therefore could be convicted as, for an example, where it is proved that an accused person falsified accounts and also stole money belonging to his employer in the same series of transaction. The appellant committed one offence by his act and conduct and thereby offended against two enactments of the law. He could be convicted only for that one offence. I hold, therefore, that whereas it was proper for the prosecution to have preferred the two charges under the Criminal Code and the Public Administration Law, it was wrong for the learned trial Magistrate to have convicted the appellant on both counts.

For the reasons given, I dismiss the appeal but set aside the conviction on the first count.

Appeal dismissed; *conviction on first count set aside.*

AUDU MAIZAKO
AUDU GUNNI } ... ... *Appellants*

v.

SUPERINTENDENT-GENERAL OF POLICE ... *Respondent*

[HIGH COURT OF JUSTICE: Quashie-Idun, C.J., 1st November, 1960.]

Criminal Law and Procedure—accused cast imputations on the character of witnesses for the prosecution—cross-examination of accused as to his previous convictions—matters to be considered in imposing punishment.

During the trial of the appellants before the Grade A Customary Court at Oyo for assault occasioning harm, the prosecution put questions to the first appellant to show that he had been previously convicted of some offences. In spite of the Court's warning that he need not answer the questions, he nevertheless answered and admitted that he used to be a dangerous burglar. The appellants were thereafter convicted and sentenced to a term of two years imprisonment with hard labour each. The present appeal is against the conviction and sentence of the first appellant and against the sentence of the second appellant.

Held: (1) that since the first appellant in his cross-examination of the witnesses had cast imputations on the character of some of the prosecution witnesses, the evidence of his previous convictions was properly accepted and his appeal against his conviction failed;

(2) that having regard to the previous character of the first appellant the sentence passed on him was not excessive; but that as the second appellant had no previous conviction the sentence passed on him was excessive and would be reduced to one of one year imprisonment with hard labour.

Appeal of first appellant dismissed; sentence passed on second appellant reduced.

Cases cited:

Rex v. *Morrissey*, 23 Cr. A.R. 188.

Regina v. *Clerk*, [1955] 2 Q.B. 469.

Ibadan Criminal Appeal No. I/35CA/60.

Fagbenro, for appellants.

Ayorinde, for respondent.

Quashie-Idun, C.J.: The two appellants were convicted by the Grade A Customary Court, Oyo, of the offence of assault occasioning harm and sentenced to three years and two years imprisonment with hard labour respectively.

In this appeal the material grounds argued on their behalf are:

(1) That the Court wrongfully accepted evidence of previous convictions against the first appellant, and

(2) That the sentences imposed on the appellants are excessive.

Mr Fagbenro has referred the Court to the case of *Rex* v. *Morrissey*, 23 Cr. A.R. 188 in which it was held that the mischief caused by questions put to an accused person as to other offences committed by him was incurable and that although the jury was warned in the summing-up to disregard the evidence, the conviction should be quashed.

In the present case, as Mr Ayorinde has correctly pointed out, the first appellant in his evidence made imputations against the Police and one of the witnesses to the effect that no charge of assault was made by the complainant against the appellant, that the Police had no intention of detaining the appellants but that it was the second prosecution witness who had threatened the Police that if they did not lock up the appellants the Police Station would be broken down.

The prosecution then put questions to the first appellant to show that he had been previously convicted of criminal offences.

The first appellant was warned by the Court that he need not answer the question but he answered and admitted that he used to be a dangerous burglar.

The facts of the case of *Rex* v. *Morrissey* are distinguishable from the facts in the present case, in that there is nothing to show that the prisoner in that case had made any imputation against the prosecution, or the witnesses that they were lying witnesses. In the present case the first appellant made serious allegations against the Police that they had yielded to threats by one of their witnesses to prefer a false charge against the appellants and that the witnesses were not speaking the truth. The imputation was similar to an imputation made by a prisoner against a police officer that a confession alleged to have been made by him was in fact not made by him but was dictated by another officer and was written down by the constable who said it was made by the prisoner—*See Regina* v. *Clerk* [1955] 2 Q.B. 469.

In my view the evidence of the first appellant's previous conviction was properly accepted and the ground fails. As to the submission that the sentence imposed was excessive, I hold the view that having regard to the previous character of the first appellant, the sentence passed on him is not excessive. The second appellant had no previous conviction and I agree that a lesser punishment should have been inflicted. I accordingly dismiss the appeal but vary the sentence passed on the second appellant to read one year.

Appeal of first appellant dismissed; sentence passed on second appellant reduced.

BRITISH BATA SHOE COMPANY... ... ... *Plaintiff*

v.

N. ABIZAKHEN
ALLI KAMAL } ... ... *Defendants*

[HIGH COURT OF JUSTICE: Fatayi Williams, J., 4th November, 1960.]

Landlord and Tenant—suit for possession—counter-claim for forfeiture for breach of covenants against assignment and for breach of other covenants—section 14 (1) of the Conveyancing Act, 1881 (act of general application) and section 14 (1) of the High Court Law, 1954, applied.

The plaintiff brought this suit against the defendants for possession of the premises situate at New Court Road, Ibadan, occupied by the defendants as tenants of the plaintiff. The defendants counter-claimed for forfeiture of the lease under which the plaintiff held possession of the premises because he had assigned or underlet the premises without consent and also because the premises were not being used for the purposes of the plaintiff's business and residence of their employees and domestic servants. On a preliminary objection to the counter-claim it was argued on behalf of the plaintiff that the institution of the counter-claim was irregular and premature because the defendants had not served notice on the plaintiff as required by section 14 (1) of the Conveyancing Act, 1881.

Held: (1) that the Conveyancing Act of 1881 was a statute of general application and was therefore applicable to this Region by virtue of section 14 of the High Court Law, 1954;

(2) that by virtue of the exception to section 14 (1) of the Conveyancing Act no notice was required before instituting proceedings for forfeiture of a lease because of assignment or underletting without consent;

(3) that in the case of the allegation of breach of the other covenants, the plaintiff could not forfeit the lease without notice under section 14 (1) of the Act.

[*Note.*—Section 14 of the Conveyancing Act, 1881, was replaced in England by section 146 of the Law of Property Act, 1925. Similar provision is contained in section 161 of the Property and Conveyancing Law, Cap. 100, Laws of the Western Region of Nigeria, 1959].

Counter-claim struck out.

Cases cited:

Jolly v. *Brown* [1914], 2 K.B. 109.

In re Rigg ex parte Lovell [1901], 2 K.B. 16.

Ibadan Civil Suit No. I/158/57.

Adenekan Ademola, for plaintiff.

Ogunkeye, for defendants.

Fatayi Williams, J.: In this case the plaintiff brought an action against the defendants for possession of the premises situate at New Court Road, Ibadan, occupied by each of the defendants as tenants of the plaintiff. The defendants counter-claimed for forfeiture of the lease under which the plaintiff holds possession of the premises.

The original action for possession was filed in the Magistrate's Court and so was the counter-claim but since the Magistrate had no jurisdiction in respect of the counter-claim he transferred the case to the High Court for adjudication on the application of the defendants. Pleadings were ordered and were duly filed including a reply to the counter-claim.

At the hearing on the 26th October, 1960, Counsel for the plaintiff raised a preliminary objection in respect of the counter-claim, the objection being that the institution of an action for forfeiture by way of counter-claim by the defendants is irregular and premature and that consequently it should be struck out. In support Counsel referred to paragraph 6 of the reply to the counter-claim where it was pointed out that the defendants have failed to serve on the plaintiff the statutory notice required under the provision of section 14 (1) of the Conveyancing Act, 1881.

Counsel in reply admitted that they have not given the statutory notice required under section 14 (1) of the Conveyancing Act of 1881 but submitted that section 14 does not apply in this case where a breach of covenant complained of is a breach against assignment or underletting which was expressly exempted from the provisions of section 14.

The first point to be considered in this objection is whether the Conveyancing Act of 1881 applies. In my view the Conveyancing Act of 1881 was a statute of general application in force in England on 1st January, 1900, and was therefore in force within the jurisdiction of this Court at the material time by virtue of the provisions of section 14 of the Western Region High Court Law (No. 3 of 1955). As a result of the re-enactment of most statutes of general application in force in the Region, this section of the Western Region High Court Law has now been repealed.

Section 14 (1) of the Conveyancing Act of 1881 provides as follows:

"A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach".

It should be noted, however, that covenants or conditions against assigning, underletting, or parting with the possession or disposing of the land leased were expressly exempted from the operation of section 14.

I am unable to accept the argument of Counsel for the defendants. It is obvious from the counter-claim that the defendants are asking for forfeiture for breach of covenant on two grounds—

(*a*) assignment or underletting without consent; and

(*b*) that the premises were not being used "for the purpose of their business and residence of their employees and domestic servants only".

In view of the exception to the operation of section 14 of the Conveyancing Act of 1881, I agree that no notice is necessary in respect of the first ground. To my mind, however, notice is required in respect of the second ground. I derive support for this view from the following statement of Vaughan-Williams, L.J., when considering the question of the notice required under section 14 in *Jolly* v. *Brown* [1941], 2 K.B. 109 at page 120—

"The giving of the notice required by section 14 is a condition precedent to the commencement of the action. This condition in the words of the section is that "a right of entry or forfeiture under any proviso or stipulation in a lease shall not be enforceable by action or otherwise unless and until the lessor has served a notice on the lessee". The section goes on to define the notice thus required as a condition precedent to enable the landlord to enforce his right to re-entry or forfeiture.

One has first to construe the words of the section prescribing the essentials of the notice, and if any doubt arises as to what the defined essentials are, the Court may properly take into consideration the purpose of the notice as set forth in the section. I will first take the words of the section independently of the purpose. The words are "a notice specifying the particular breach complained of". I think that this means each particular breach complained of".

Another case in point is that of *In re Rigg ex parte Lovell* [1901], 2 K.B. 16. In that case a lease contained a proviso for re-entry on bankruptcy of the lessee or breach of any covenant. The lessee having been adjudicated bankrupt on his own petition, the lessor purported to determine the lease under the proviso of re-entry, and obtained peaceable possession from the lessee without giving any notice under section 14 of the Conveyancing Act, 1881.

It was held that the lessor's re-entry was void as against the lessee's trustee in bankruptcy, for the statutory notice was necessary before the lessor could obtain possession either peaceably or by action.

For the above reasons, I hold that the condition precedent to the bringing of the counter-claim, that is, the serving of the statutory notice on the defendants has not been complied with. The counter-claim is, for that reason, not properly before the Court and I therefore order that it should be struck out.

Counter-claim struck out.

LATUNJI AJIMOTI OLOFA ... ... *Plaintiff (Respondent)*

v.

BELLO ADEDIBU MOGAJI ... ... *Defendant*

and

ATANDA OYENIRAN AND OTHERS ... ... *Co-defendants (Applicants)*

[HIGH COURT OF JUSTICE: Fatayi Williams, J., 14th November, 1960.]

Civil Procedure—breach of an order of interim injunction—whether procedure for committal for such breach is governed by order 10, rules 8 to 16 of the High Court (Civil Procedure) Rules or by order IX, rule 13 of the Judgments (Enforcement) Rules—sections 2 and 71 of the Sheriffs and Civil Process Ordinance referred to.

On 4th July, 1958, on the application of the defendant, Bello Adedibu Mogaji, the Court made an on Order restraining the parties to this suit from going on the land, subject matter of the suit, for any purpose whatsoever and from alienating any portion of it pending the final determination of the suit. The persons shown as co-defendant brought this application under order 10, rules 8 to 16 of the High Court (Civil Procedure) Rules for an order calling on the plaintiff to show cause why he should not be committed to prison for contempt of court for violating the Order of 4th July, 1958. At the hearing of the application, preliminary objection was taken on behalf of the respondent that the procedure adopted by the applicants was erroneous and that the application ought to have been brought under order IX, rule 13 of the Judgment (Enforcement) Rules.

Held: that the procedure adopted by the applicant was irregular in that he did not comply with order IX, rule 13 of the Judgments (Enforcement) Rules and that the application would be dismissed.

Application dismissed.

Case cited:

Omopena v. *Adelaja*, 19 N.L.R. 17.

Olu Ayoola, for plaintiff.

Adewunmi, for first defendant.

Ganiyu Agbaje, for the other defendants.

Fatayi Williams, J.: On the application of the first defendant, Bello Adedibu, the Mogaji of Iba Oluyole Family, for an "order to restrain the plaintiff, his agents, servants or assigns from going on the land in dispute, digging for sand therefrom and selling, wasting and alienating the same" the Court made the following order on 4th July, 1958:—

"Both parties are hereby restrained from going on the land for any purpose whatsoever and from alienating any portion of it pending the final determination of this suit."

In consequence of this order which, in my opinion, is in the nature of an interim injunction the other defendants who were joined at a later stage in the proceedings applied *ex parte* to this Court on 31st October, 1960 for an order calling on the plaintiff to appear on a certain day and show cause why he should not be committed to prison for contempt of Court for violating the order referred to above. Attached to the

application is a certified copy of the order made by the Court on 4th July, 1958. For reasons which are not material to the determination of this application I ordered that both the plaintiff and the first defendant, Bello Adedibu, should be put on notice. This order was duly complied with and the same application came up again for determination on 7th November, 1960.

At the hearing on 7th November, 1960, Counsel for the plaintiff raised a preliminary objection to the application. He submitted that since this is an application for the enforcement of an order of the court, the appropriate procedure is that laid down in order 9, rule 13 of the Judgments (Enforcement) Rules (Cap. 205 at page 589 of volume VI of the Laws of Nigeria) and that failure to follow this procedure makes the application irregular. Counsel for the other defendants, the applicants, admitted that he followed the procedure laid down in order 10, rules 8 to 16 of the High Court (Civil Procedure) Rules (W.R.L.N. 293 of 1958) and not that provided for in the Judgments (Enforcement) Rules which, in his opinion, deals with orders made by the Court generally while that in the High Court Rules deals with interlocutory applications in particular.

In considering whether the objection has any merit, it will be necessary to consider the scope and extent of order 9, rule 13 of the Judgments (Enforcement) Rules (Cap. 205). Section 71 of the Sheriffs and Civil Process Ordinance (Cap. 205) provides as follows:

> "If any person refuses or neglects to comply with an order made against him, other than for payment of money, the court, instead of dealing with him as a judgment debtor guilty of the misconduct defined in paragraph (*f*) of section 65, may order that he be committed to prison and detained in custody until he has obeyed the order in all things that are to be immediately performed and given such security as the court thinks fit to obey the other parts of the order, if any, at the future time whereby appointed, or in case of his no longer having the power to obey the order then until he has been imprisoned for such time or until he has paid such fine as the court directs."

Section 2 of the same Ordinance defines "judgment" as including an order and "order" as including an injuction without indicating whether the injuction is interim or perpetual. Order IX, rule 13 of the Judgments (Enforcement) Rules which was made under section 93 (*i*) of the Ordinance laid down the procedure to be followed when applying for an order of committal under the provisions of section 71 of the Ordinance. Its provisions are as follows:

> "13 (1) When an order enforceable by commital under section 71 of the Ordinance has been made the registrar shall, if the order was made in the absence of the judgment debtor and is for the delivery of goods without the option of paying their value or is in the nature of an injunction, at the time when the order is drawn up, and in any other case, on the application of the judgment creditor, issue a copy of the order endorsed with a notice in Form 48, and the copy so endorsed shall be served on the judgment debtor in like manner as a judgment summons.
>
> (2) If the judgment debtor fails to obey the order the registrar on the application of the judgment creditor shall issue a notice in Form 49 not less than two clear days after service of the endorsed copy of the order, and the notice shall be served on the judgment debtor in like manner as a judgment summons.
>
> (3) On the day named in the notice the court, on being satisfied that the judgment debtor has failed to obey the order and, if the judgment debtor does not appear—
>
> (*a*) that the notice has been served on him; and

(*b*) if the order was made in his absence, that the endorsed copy thereof has also been served on him;

may order that he be committed to prison and that a warrant of commitment may issue".

In section 2 of the Ordinance, "judgment creditor" is defined as "any person for the time being entitled to enforce a judgment" and "judgment debtor" as "a person liable under a judgment".

In view of the definitions of "judgment", "judgment creditor" and "judgment debtor" in section 2 it seems to me that section 71 of the Ordinance empowers the Court to enforce its order, which includes an interlocutory or final injunction, by means of committal for contempt while rule 13 in order 9 of the Judgment (Enforcement) Rules lays down the procedure to be followed under such circumstances. To my mind, the provision of this particular procedure for the enforcement of the court's order makes it clear that it was not the intention that the procedure in order 10, rules 8 to 16 of the High Court (Civil Procedure) Rules should be used for such purpose.

The order which the Court has been asked to enforce in this application is in the nature of an injunction. The procedure adopted by the applicant and which has been described briefly above does not accord with the one laid down in the Judgments (Enforcement) Rules. The procedure for the enforcement of this particular order is, in my view, that laid down in rule 13 of order IX of the Judgments (Enforcement) Rules. This view is supported by the case of *Omopena* v. *Adelaja*, 19 N.L.R. page 17, where it was held that a motion for committal to enforce a judgment granting an injunction was bad in law because it did not comply with the procedure required by rule 13 in order IX of the Judgments (Enforcement) Rules for enforcing such a judgment by committal under section 71 of the Sheriffs and Enforcement of Judgments and Orders Ordinance.

For the above reasons I find that the procedure adopted in this application is irregular. The application is, therefore dismissed.

Application dismissed.

THE QUEEN
v.
ISAAC AJIA

[HIGH COURT OF JUSTICE: Charles, J., 19th November, 1960.]

Law of Evidence—admissibility of incriminating statement made to police by an accused—onus of proof at Common Law whether accused was induced to make a statement—sections 5, 27 (2) and 28 of Evidence Ordinance, Cap. 63 considered.

During the trial of this case of defilement of a child, the defence counsel objected to the admissibility of a statement alleged to have been made voluntarily to the police by the accused. The trial court then stopped the proceedings and took evidence from the prosecution and the defence as to the admissibility of the statement. Evidence for the prosecution was given by a police officer to the effect that when arrested on 5th November, 1959 and charged with the offence of defilement of a child, the accused made a voluntary statement which he wrote out himself. The accused was then placed in a cell. The following day the witness took the accused and the girl alleged to have been defiled to a doctor for medical examination and that the medical examinations of both the accused and the girl were conducted in the presence of all of them including the witness. The accused was then taken back to the police station, Criminal Branch Office, where the accused was told to sit down. The witness then took a piece of paper after which he cautioned the accused, wrote down the caution on the piece of paper and handed the paper to the accused. On receiving the paper the accused wrote the incriminating statement. On the other hand the accused stated that he was examined separately and in the absence of the police officer; that at the Police Station (after the examination) he was placed in the cell; that he was later brought out of the cell to the office where the constable promised to allow him to go for his father so that the matter might be settled with the child's parents if he, the accused, would make a confession. The accused said that he then wrote out the disputed statement. The accused admitted that the incriminating statement was not dictated by the constable but was written by him on his own initiative as to its contents.

Held: (1) that at Common Law the onus is upon an accused person to prove, on the balance of probabilities, that when he made his incriminating statement he was incapable of exercising volition but acted as an automaton but that once the admissibility of the statement is challenged on the ground that it was induced, or the evidence renders the admissibility of the statement on that ground suspect, the onus shifts on the prosecution to prove beyond reasonable doubt that the accused was not induced to exercise his volition to make the statement.

(2) that the admissibility of the statement in this case was governed by this Common Law rule and not by sections 27 (2) and 28 of the Evidence Ordinance, Cap. 63, and that as the prosecution had not discharged the onus placed upon it by the Common Law rule the statement was inadmissible.

Statement not admitted.

Cases cited—

R v. *Thompson* [1893], 2 Q.B. 12.

R v. *Joyce* (1958), W.L.R. No.

R v. *Ebong* (1947) 12 W.A.C.A. 139.

R v. *Baldry* (1852) 5 Cox. C.C. 523.

Abeokuta Criminal Case No. AB/11c/60.

Osinibi, Crown Counsel, for the Crown.

Odusote, for the accused.

Charles, J.: This is a *voir dire* held to enquire into the admissibility of an incriminating statement which was allegedly made by the accused to a police constable and which has been objected to as not having been made voluntarily.

The evidence on the *voir dire* was given by the police officer and the accused. The former's evidence was to the following effect:—The accused was arrested on the 5th November, 1959, upon a charge of what is commonly called child defilement. After being charged and cautioned he elected to write out a statement—a statement which was not incriminating and which has been admitted in evidence. The accused was then placed in a cell. On the following day, the witness took the accused and the child upon whom the offence had allegedly been committed to a hospital for medical examination. The accused and child were examined by a doctor in the witness' presence, and the witness observed that each had a discharge from his or her private parts. After the examination, the doctor said that the accused was the one who had defiled the child and the accused then admitted that he was the one. The witness and accused went by vehicle to the Police Station and, on arrival there, they went to the Criminal Branch Office where the accused was told to sit down, the witness then took a piece of paper after which, in the following order, he cautioned the accused, wrote down the caution on the piece of paper and handed the paper to the accused. On receiving the paper the accused wrote the incriminating statement which has been challenged and is the subject of the *voir dire* as to its admissibility. The witness denied in cross-examination that he had replaced the accused in the cell on returning from the hospital and had subsequently taken him out and brought him to the Criminal Branch Office, where he ascertained from the accused that his father lived three days journey away, and had offered to release him if he would make a confession, whereupon the accused had written the challenged statement.

The accused's evidence was that at the hospital the doctor examined him and the child separately and in the absence of the police constable, the latter being told to go when he tried to enter into the examination room with the accused: that neither the doctor nor the accused said that the latter was the one who had defiled the child; that after the examination the accused and police constable walked back to the Police Station where, on arrival, he was placed in the cell: that later the accused was brought out of the cell by the constable and taken to an office where the constable enquired as to where the accused's father was and promised to allow the accused to go for his father, so that the latter might settle the matter with the child's parents, if the accused would make a confession: that the accused then wrote out the disputed statement and was then taken to the Charge Room where the constable left him after a while and from where another constable took him back to the cell. The accused admitted that the incriminating statement, which is more than a bold admission, was not dictated by the constable but was written by him on his own initiative as to its contents.

It will be convenient to consider the admissibility of the disputed statement at Common Law before considering the effect of the Evidence Ordinance which was discussed during argument. The admissibility of confessional statements by accused persons is a subject upon which I have had both occasion and interest to have studied

over the years with regard to the English, Irish, Australian and New Zealand authorities. As a result, in my opinion, the Common Law Rule, based on *The Queen* v. *Thompson* (1893), 2 Q.B. 12, (C.C.R.) which has been consistently approved by the House of Lords and Privy Council may be stated thus—An incriminating statement by an accused person is inadmissible in evidence against him unless it was made by him voluntarily in the sense that it was made by him in the exercise of his volition and free from any belief induced by words, act or conduct on the part of a person in authority that it was his duty to make, or it would be to his material advantage to make, or his material disadvantage not to make a statement when the opportunity for doing so presented itself or was presented to him. The onus is upon the accused to prove, on the balance of probabilities, that when he made his incriminating statement he was incapable of exercising volition but acted as an automaton. However, once the admissibility of the statement is challenged on the ground that it was induced, or the evidence renders the admissibility of the statement on that ground suspect, the onus is upon the prosecution to prove beyond reasonable doubt that the accused was not induced to exercise his volition to make a statement by any of the beliefs mentioned. That onus, when it arises, is a heavy one and it is not to be lightened by considerations of executive expediency or difficulties but rather to be applied with regard to the Common Law rule having its basis in the Rule of Law. Mr Justice Cave's remarks in *Thompson's Case* (sup. at p.18) always appear to me to be pertinent too:—

> "I would add that for my part I always suspect these confessions, which are supposed to be the off-spring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire borne of penitence and remorse to supplement it with a confession; a desire which vanishes as soon as he appears in a court of justice".

In *Regina* v. *Joyce* (1958), W.L.R. 140, Slade J., revived an early nineteenth century heresy, namely, that to render an induced incriminating statement inadmissible, the inducement must have related to the charge or accusation, and it is such an inducement which must be disproved by the prosecution. With all respect to the learned judge, there is no such qualification on the kind of inducement which vitiates an incriminating statement. The learned judged cited no authority for his proposition which is inconsistent with the judgment in *Thompson's Case* (*supra*). In fact, apart from Joyce's case, the qualification has not been propounded, so far as I am aware in any English case since *Thompson's case*. The fallacy of the qualification is shown when it is realised that it would render admissible a statement obtained by one of the worst forms of inducement, namely, prolonged and continuous questioning in practice of what have come to be called "the third degree method". An accused who yields to the pressure of that method by making a statement does not succumb to an inducement relating to the charge, that is, to an inducement of hope or expectation that his lot in relation to the charge will be better off if he confesses, but to the inducement that his immediate position will be better by reason that the pressure upon him will end when he confesses. Yet, a confession obtained in such circumstances is no more obtained voluntarily than if it had been obtained by flogging or racking.

Applying the Common Law Rule to the evidence adduced in this *voir dire*. I am not satisfied that the accused made the incriminating statement without an inducement from the constable to whom it was made. The accused's story that he was medically

examined in the absence of both the child and the constable seems to me to be more probable than the constable's that both he and the child were present at the examination. There may be cases in which the attendance of a constable at the medical examination of an accused is necessary, but I cannot see any necessity, and I trust that no doctor will see any necessity for a young child, the victim of alleged defilement, being examined medically in the presence of the accused or being present while the accused is examined. It also seems to me improbable that the doctor would make any comment as to the effect of examination in respect of the accused's guilt to the accused. Further, the police officer was conflicting and obscure as to how the accused came to make the disputed statement, having given three different versions.

First, he said in examination-in-chief, after some hesitation, that the accused said as soon as he arrived back at the police station that he wanted to make statement. Then he said in cross-examination, that as soon as the accused admitted at the hospital that he was the one who defiled the child, he, the constable, assumed that the accused would wish to make another statement, and so he took the accused straight into the Crime Branch Office and cautioned him. Finally, in answer to the court, the constable said that when the accused made his admission at the hospital he, the constable, told the accused that he would put that in writing—a statement which almost savours of an inducement to the accused to believe that he was bound to comply. It may be that the confusing and conflicting answers of the constable were not due to dishonesty but to him becoming confused when faced with being required to answer question upon an aspect of the case as to the importance of which, and as to the need for accurate recollection and evidence of which, he had not been taught and had not had impressed upon him in the course of his training. Be that as it may, his conflicting answers, and the improbabilities mentioned cannot but leave me with at least a doubt whether the accused's evidence that he was induced to make the disputed statement by a promise to see his father was true, and consequently, with a doubt whether that statement was made voluntarily.

The latter doubt is not resolved by the fact that, before the accused made the statement, the usual caution was administered to him. If the alleged promise were made, and the accused were induced by it, it is unlikely that the effect of the inducement would be removed by a caution, the administration of which is too often regarded as a mere piece of meaningless ritualism.

Learned Counsel for the defence has submitted that the effect of section 27 (2) of the Evidence Ordinance is to render applicable the Common Law Rule relating to incriminating statements. If that submission is correct, it follows that, in view of my conclusions, the disputed statement should be held to be inadmissible.

Learned Counsel for the Crown has submitted, however, that section 27 (2) of the Evidence Ordinance must be read as so governed by section 28, that an incriminating statement is to be held to be admissible unless "the making of it appears to the court to have been caused by an inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him to be reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporary nature". If that submission is correct, the disputed statement is, in my judgment admissible on the basis that, while I am not satisfied that the alleged inducement was not made, neither am I satisfied on the balance of probabilities that it was made.

Section 27 (2) of the Evidence Ordinance provides—

"Confessions, if voluntary, are deemed to be relevant facts as against the persons who made them only".

The opening words of section 28, which precede the part of that section already quoted are:

"A confession made by an accused person is irrelevant in any criminal proceeding if.....".

The basis of the submission for the Crown is that section 28, in effect, defines what is an involuntary confession for the purpose of criminal proceedings, and thereby impliedly defines what is a voluntary confession for the same purpose. In my judgment the section cannot be read that way. The expressed antithesis between the section and section 27 (2) is not between voluntary and involuntary confessions but between relevant and irrelevant voluntary confessions. Section 27 (2) in its term, renders a confession admissible in either civil or criminal proceedings subject to two qualifications, that it was made voluntarily, which, I take it, is used in the Common Law sense, and that it is only admissible against the party making it. Section 28 in its term thus renders inadmissible in criminal proceedings a voluntary confession which is shown not to satisfy certain conditions. How it can apply on that basis it is difficult to see, since a confession proved to be voluntary at Common Law would of necessity be free from any of the grounds for its exclusion under the section. The words and context used in the section, however, cannot be disregarded on that account as indicating that the legislative intention was different from what appears from them. After all the section does appear in an Ordinance which is intended, having regard to section 5 (*a*) to define rather the grounds for exclusion of evidence than to provide a complete code of evidence, and so it may well have been asserted *ex abundunti cautela*. In any case, it is to be expected that if the Legislature had intended by section 28 to render admissible involuntary confessions which did not offend against it, in other words to make the section govern admissibility as well as inadmissibility, it would have been more specific. Support for this view is to be found in *R* v. *Ebong* (1947), 12 W.A.C.A. 139 where the West African Court of Appeal seems to have regarded section 26 of the previous Evidence Ordinance, which corresponds to section 28, as not being applicable and to have decided the admissibility of a confession by reference to *R.* v. *Baldry* (1852), 5 Cox C.C. 523, a leading Common Law authority, under section 27 (2) of the previous Ordinance, a section which corresponds with the same section in the present Ordinance.

The result is that in my judgment the admissibility of the disputed statement must be determined in the first instance by the Common Law Rule. Under that rule, for the reasons given, I hold the statement to be inadmissible.

Statement not admitted.

JAMES OGIDI ... ... *Appellant*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[FEDERAL SUPREME COURT: Brett, Unsworth and Taylor, F.JJ., 24th November, 1960.]

Criminal Law and Procedure—seditious publication contrary to section 51 (1) (c) of the Criminal Code, Cap. 42—what amounts to seditious intent—publication to the Minister responsible for redressing the grievance and to the world at large—whether the Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958, L.N. 65 of 1958, was validly made under section 110 of the Nigeria (Constitution) (Amendment) Order in Council, 1958—sections 1 (3), 50 (2), 52 (2) of the Criminal Code, section 2 (8) of the Nigeria (Constitution) Order in Council, 1954, section 37 of the Interpretation Act, 1889, and section 19 of the Interpretation Ordinance, considered.

The appellant brought this appeal against the judgment of the Warri High Court upholding his conviction in a Warri Magistrate's Court on a charge of publishing a seditious publication contrary to section 51 (1) (*c*) of the Criminal Code, Cap. 42. The publication which was sent by the appellant to a number of persons including the Minister of Justice of the Western Region of Nigeria was published in the front page of the *Midwest Champion* of the 2nd July, 1959. The publication in a series of categorical assertions accused the Customary Courts of Warri Division of being the creatures of the Action Group party, of deliberately discriminating against the opponents of that party, and denying them justice, so that citizens were not safe with the courts.

In this appeal it was contended on behalf of the appellant that the law of sedition was not to be used to stifle criticism, and that the worst that could be said of the publication was that it contained intemperate criticism and that since the only media in Nigeria for mass persuasion were the press and the radio it was only reasonable for the appellant to have resorted to them in order to draw attention to the state of affairs complained of with a view to stimulating a demand for reform. It was also contended that the Adaptation of Laws (Criminal Proceedings) Order, 1958, purported to have been made under section 110 of the Nigeria (Constitution) (Amendment) Order in Council, 1958, was invalid; that therefore the authority to prosecute purported to have been given under section 52 (2) of the Criminal Code by the Director of Public Prosecutions acting under the 1958 Order was invalid, and that accordingly the Magistrate had no jurisdiction to hear the case.

Held: (1) that the law of sedition is not to be stretched beyond its function of protecting public order and that it is the duty of the court to safeguard the right of freedom of expression, but the court would not agree that these principles were in any way endangered by the conviction of the appellant in this case;

(2) that the courts should be slow to attribute a seditious intent to a communication published only to the Minister responsible for redressing the grievance complained of, and that the court might have taken a different view of the publication in question had it been communicated only to the Minister;

(3) that the intention behind the publication to the whole world of categorical assertions that customary courts of a whole Division were creatures of a political party, that they deliberately discriminated against the opponents of the party, and that the courts denied such opponents justice so that citizens were not safe with the courts, could not be anything but a calculated attempt to bring into hatred or contempt the administration of justice in Nigeria;

(4) that the Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958, was validly made under section 110 of the Nigeria (Constitution) (Amendment) Order in Council, 1958, and that the written authority required under section 52 (2) of the Criminal Code was properly given by the Director of Public Prosecutions; and that therefore the Magistrate had jurisdiction to hear the case.

Appeal dismissed.

Note.—The decision of the High Court in this case was reported at page 95, *supra*. Cases cited:

R. v. *Wrightson*, 11 Mod. 165; 88 E.R. 965.

R. v. *Shaftow*, 11 Mod. 195; 88 E.R. 984.

R. v. *Pocock*, 2 Strange, 1158; 93 E.R. 1098.

Ambard v. *Attorney-General for Trinidad and Tobago*, [1936] A.C. 322.

Chief Okorodudu, for the appellant.

Eboh, *Senior Crown Counsel*, for the respondent.

Brett, F.J.: This is an appeal against the judgment of the High Court of the Western Region upholding the conviction of the appellant in the Magistrate's Court of the Warri Magisterial District on a charge of publishing a seditious publication contrary to section 51 (1) (*c*) of the Criminal Code.

The publication in question was sent by the appellant as a telegram to the Minister of Justice, Ibadan; Broadcasting, Ibadan and Lagos; the *West African Pilot*, Lagos; and Chief Okotie-Eboh, Lagos, on the 1st July, 1959, and was also published, at the instance of the appellant, in the *Midwest Champion* newspaper on the 2nd July, 1959. It reads as follows:

"We strongly suggest abolition customary courts Warri Division or replace Judges in them X since establishment Customary Courts acted deliberately against political opponents of Action Group X Justice denied Nation-Co supporters charged to Court X Accused sentenced refused Bail on Appeal by undue conditions X option fines denied X Customary Courts procedure based on Action Group Doctrine X British Justice not in practice in Courts X Warri Customary Courts are Action Group institutions destined punish Nation-Co supporters X British protected persons nay Warri Citizen not used to this unBritish Justice X unless these Courts abolished we deem them communist institutions X Citizens not safe with Customary Courts still existing Warri X aims of Customary Courts still misinterpreted X in Warri X Nation-Co and all Citizens lost confidence and West Regional Government's name and good intention dragged in mud due primitive interpretation of Justice Customary courts Warri Division X Minister Justice called upon take immediate action abolish or order enquiry".

The Magistrate found that this was a seditious publication, that is to say a publication having a seditious intention as defined in section 50 (2) of the Criminal Code and having regard both to the wording of the publication and to the extent of its dissemination we are in entire agreement with him. Chief Okorodudu, for the appellant, after quite justifiably submitting that the law of sedition is not to be used to stifle criticism, has tried to persuade us that the worst that can be said of the publication is that it contains intemperate criticism; it is common in Nigeria, he says, for demands of the kind contained in the publication to be published in the press, and since the press and wireless broadcasting are the natural media for mass persuation it was

reasonable to have resort to them in order to draw attention to the state of affairs complained of with a view to stimulating a demand for reform. He further submits that criticism of particular customary courts does not show an intention to bring into hatred or contempt or to excite disaffection against the administration of justice in Nigeria, and he has drawn our attention to various cases in which personal abuse of individual justice of the peace was held not to be indictable: *R.* v. *Wrightson*, 11 Mod. 165; 88 E.R. 965; *R.* v. Shaftow, 11 Mod. 195; 88 E.R. 984; *R.* v. *Pocock*, 2 Strange, 1158; 93 E.R., 1098.

We fully agree that the law of sedition must not be stretched beyond its function of protecting public order and that it is the duty of the courts to safeguard the right of freedom of expression, which is now embodied in the constitution of Nigeria. As regards the administration of justice, the classic statement of the right to criticise was made by Lord Atkin in delivering the judgment of the Privy Council in *Ambard* v. *Attorney-General for Trinidad and Tobago*, [1936] A.C. 322: "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men". We are unable to agree, however, that these principles are in any way endangered by the conviction of the appellant in the present case. Our attention has not been drawn to the exact responsibilities of the Minister of Justice of the Region in relation to customary courts, but we are willing to assume that he was the proper person to receive complaints. Although a person genuinely seeking the removal of abuses might reasonably be expected to cite actual instances, instead of confining himself to generalities, we consider that the courts should be slow to attribute a seditious intention to a communication published only to the Minister responsible for redressing the grievance complained of, and we might have taken a different view of the publication which is now in question if it had been communicated only to the Minister.

What we are concerned with here is a publication which the appellant caused to appear in one newspaper, and for which he sought further publicity in another newspaper and over the wireless. It gives no particulars from which the persons to whose notice it might come could form their own opinions as to the truth of the allegations it contains, and references to the media of mass persuation seem quite out of place in relation to it. In a series of categorical assertions it accuses the customary courts of a whole Division of being the creatures of a political party, of deliberately discriminating against the opponents of that party, and of denying them justice, so that citizens are not safe with the courts. It is difficult to conceive of anything better calculated to bring into hatred or contempt the administration of justice in Nigeria than such an attack, and since an appeal lies from the customary courts to the High Court of the Region it is not at all clear that the attack does not, by implication, extend to the High Court. However, that may be, we cannot take the view that the intention behind such a publication, when communicated to the world at large, was anything but a seditious one, or that the publication was intended only to point out errors or defects. We consider that the conviction was amply justified on the facts of the case.

We have still, however, to deal with a point of law which goes not only to the jurisdiction of the court in this case but to the validity of any of the actions of the Directors of Public Prosecutions of the Eastern and Western Regions under the statutory powers which the Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958 (L.N. 65 of 1958), purported to transfer to them. Before the series of constitutional changes which started with the establishment of a federal form of constitution in 1954, section 52 (2) of the Criminal Code provided that a person should not be

prosecuted for an offence under section 51 without the written consent of the Attorney-General, which until the 30th September, 1954, meant the Attorney-General of Nigeria. The Nigeria (Constitution) Order in Council, 1954, provided for an Attorney-General of the Federation and an Attorney-General of each Region, all of whom were to be members of the public service, and section 52 (2) of the Criminal Code was adapted by the Adaptation of Laws Order, 1954, so as to require the written consent of the Attorney-General of the Federation or of the Region concerned for a prosecution for an offence under section 51. The Nigeria (Constitution) (Amendment) Order in Council, 1958 (hereinafter called the Order in Council) amending the constitution, so that in the Eastern and Western Regions the Attorney-General should no longer be a member of the public service, and at the same time established in each of those Regions the office of Director of Public Prosecutions, of which the holder would be a member of the public service and would assume, in relation to the conduct of criminal proceedings, the functions which had previously been carried out by the Attorney-General of the Region.

Section 110 (1) of the Order in Council provides as follows:

> "The Governor-General may, by Order published in the *Official Gazette* of the Federation, at any time within twelve months after the commencement of this Order provide that any existing law shall be read and construed with such adaptation and modifications as may appear to the Governor-General to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the principal Order, as amended by this Order, or otherwise for giving effect or enabling effect to be given to those provisions: and any existing law shall have effect accordingly from such date as may be specified in the Order, not being a date earlier than the commencement of this Order."

The Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958 (hereinafter called the Adaptation Order), purported to be made under the powers conferred by section 110 of the Order in Council, and inserted a new sub-section (3) in section 1 of the Criminal Code, which reads as follows:

> "In the application of this Ordinance to the Western Region and the Eastern Region a reference to the Attorney-General of the Region or the Solicitor-General of the Region shall mean the Director of Public Prosecutions of the Region".

If the Adaptation Order was a valid one, the Director of Public Prosecutions of the Western Region was a person whose consent was sufficient, in August 1959, for a prosecution under section 51 of the Criminal Code, and the written consent of the Director of Public Prosecutions of the Region, dated the 15th August, 1959, was produced in the Magistrate's Court on the 31st August, 1959, the first day of the trial. Chief Okorodudu submits that the Adaptation Order was invalid on the ground that it was made and published before the enabling provision had come into operation. The Order in Council was made on the 14th March, 1958, and did not come into operation until the 1st April, 1958. The Adaptation Order was made on the 26th March, 1958, published in the Supplement to the *Gazette* of the 29th March, 1958, and expressed to come into operation on the 1st April, 1958.

The Order in Council is to be construed as one with the Nigeria (Constitution) Order in Council, 1954 which means that by virtue of section 2 (8) of the 1954 Order in Council the Interpretation Act, 1889, is to apply for the purpose of interpreting both Orders in Council as it applies for the purpose of interpreting an Act of Parliament, save as is otherwise provided by the orders themselves or required by the context.

Section 37 of the Interpretation Act, on which section 19 of the Interpretation Ordinance of Nigeria is based, provides for the exercise of statutory powers between the passing and commencement of an Act and is clearly sufficient to validate the Adaptation Order, unless it can be said that the contrary intention appears. Chief Okorodudu submits that the contrary intention appears in section 110 of the Order in Council, but so far from accepting this submission we consider that the concluding words of sub-section (1) which lay down that a law adapted by an Order shall have effect accordingly from such date as may be specified in the Order, not being a date earlier than the commencement of the Order in Council are designed to allow for the making of an Order between the making of the Order in Council and its commencement. We hold, therefore, that the Adaptation of Laws (Conduct of Criminal Proceedings) Order, 1958, was validly made, and that the Magistrate's Court in the present case had jurisdiction.

The appeal against conviction is dismissed.

Appeal dismissed.

BRITISH BATA SHOE COMPANY ... ... *Plaintiff*

v.

N. ABIZAKHEN
ALLI JAMAL ... ... *Defendants*

[HIGH COURT OF JUSTICE: Fatayi Williams, J., 25th November, 1960.]

Landlord and Tenant—lease agreement—whether this can be varied by previous written agreement—notice to quit—whether notice under section 8 of the Recovery of Premises Ordinance, Cap. 193, necessary—Recovery of Premises (Withdrawal of Application to Certain Areas) Order in Council, 1946, and section 14 (1) of the Conveyancing Act, 1881, applied.

The first defendant owned certain premises at New Court Road, Ibadan, which he leased to the plaintiff by an indenture dated 23rd May, 1949 for a term of twenty-nine years at £172 *per annum*. At the time the lease was agreed to in March 1948 but before the signing of the indenture, the first defendant asked to be allowed to occupy part of the premises free of rent for four months. This was agreed to by the plaintiff and after the four months' period the first defendant was allowed to continue to occupy the same part of the premises at a monthly rent of £6. The indenture which was subsequently signed by the parties and the Olubadan of Ibadan on 23rd May, 1949 did not mention anything about the defendant continuing to remain in possession of that part of the premises then occupied by him. On 29th March, 1954 the plaintiff gave the first defendant three months' notice to vacate the premises but the first defendant refused to comply with the notice. The second defendant who was also occupying part of the premises had given up possession since this action started.

Held: (1) that the agreement by which the first defendant occupied part of the premises could not be construed as an agreement reserving part of the premises for his use for the twenty-nine years or until he decided to vacate them;

(2) that even if it could be so construed the provisions of the indenture executed subsequently on 23rd May, 1949 could not be varied by the provisions of the earlier agreement because if that were the intention of the parties, the provisions of the earlier agreement should have been incorporated in the later one;

(3) that in any event the indenture of 23rd May, 1949 being a tripartite agreement between the plaintiff, the first defendant, and the Olubadan of Ibadan, it could not be varied by an agreement between the plaintiff and the first defendant only;

(4) that it was unnecessary for the plaintiff to serve on the first defendant notice to quit under section 8 of the Recovery of Premises Ordinance (Cap. 193) as the Ordinance did not apply to Ibadan by virtue of Recovery of Premises (Withdrawal of Application to Certain Areas) Order in Council; 1946.

Judgment for plaintiff; first defendant ordered to give up possession.

Ibadan Civil Suit No. I/158/1956.

Adenekan Ademola, for plaintiff.

Ogunkeye, for defendant.

Fatayi Williams, J.: This is an action brought by the plaintiffs against the defendants for the possession of part of the premises situate at New Court Road, Ibadan occupied by the defendants. The second defendant has however given up possession since the action started. The only defendant left is the first defendant who I will

hereinafter refer to as the defendant. The defendant resisted the claim for possession and stated that he occupied the flat in the premises under a tenancy agreement dated 5th March, 1958 which made no provision for notice on the part of the plaintiff to terminate the tenancy. The defendant also counter-claimed for forfeiture of the lease which he had granted to the plaintiff in respect of the premises in question for breach of covenant on two grounds—

(*a*) assignment or underletting without consent; and

(*b*) that the premises were not being used "for the purpose of their business and residence of their employees and domestic servants only".

Pleadings were ordered and filed along these lines. At the hearing on the 4th November, 1960 I ruled that the counter-claim for forfeiture for breach of covenant should be struck out on the ground that the giving of notice for breach of covenant on ground of misuser required by section 14 (1) of Conveyancing Act of 1881 is a condition precedent to the commencement of the action of forfeiture and that since no notice was given to the plaintiffs the counter-claim was not properly before the court and should be struck out.

In support of the claim the plaintiffs stated in evidence that by an agreement under seal dated 23rd May, 1949 and later identified as an indenture dated 23rd May, 1949 and registered as No. 17 at page 17, volume 816 of the Land Registry in the office in Lagos (exhibit "M", the defendant demised to the plaintiffs the premises in question situate at New Court Road, Ibadan, for a term of twenty-nine years at £172 per annum. At the time the lease was agreed to, the defendant asked that he should be allowed to occupy part of the demised premises free of rent in order to give him time to get another accommodation. At the expiration of the four months the defendant was permitted to remain on the same part of the premises which he occupied paying a monthly rent of £6. These two agreements were borne out by exhibit "A". According to the plaintiffs the defendant knew at the time exhibit "A" was entered into that it was the intention of the plaintiffs to modernise the premises. In fact the defendant gave the plaintiffs permission for the modernisation in exhibit "B" and the substance of this was later incorporated in clause 2 (*b*) of the indenture of lease, exhibit "M". In pursuance of the plaintiffs' intention the necessary plans for the alteration were prepared by an architect and agreement (exhibit "D") was entered with a firm of building contractors to carry out the alteration. After this had been completed the plaintiffs gave the defendant three months notice (exhibit "E") on the 29th March, 1954 to vacate the flat. The defendant through his brother, J. Abizakhen who has been occupying the flat with defendant since 1946 and later on his own replied referring the plaintiffs to the rent agreement in exhibit "A" and, of course, refused to vacate the flat when the notice expired. Although the defendant has physically left the premises since 1954 and has gone to Lebanon, he had refused to vacate the flat and still has the keys. He has put his brother Joseph Abizakhen in physical possession of the flat.

Joseph Abizakhen who holds a power of attorney from the defendant gave evidence. This witness deposed that he is the brother and attorney of the defendant and that he is also the manager of his business. He produced three powers of attorney exhibits "H", "J" and "K". He admitted being in possession of the flat and said he has been paying rent every month at the rate of £6 per month in accordance with paragraph 2 of exhibit "A". When he received the notice to quit exhibit "E" which was meant for his brother he replied in exhibit "F" for his brother indicating that the agreement exhibit "A" permitted his brother to occupy the flat. He also admitted that he did not vacate the premises at the expiration of the three months notice given in exhibit "E". He insisted

that rent was demanded and paid after notice had been given and referred to exhibit "G" a receipt which he alleged was obtained from one Mr Hyde a former manager of the plaintiffs. The witness said that he did not think that the plaintiffs were entitled to eject the defendant from the premises because the defendant had an agreement with the plaintiffs to stay in the flat. Finally he contended that the plaintiffs are not entitled to possession.

There is one point which I think I ought to deal with at this stage. The receipt exhibit "G" was tendered through the witness for the plaintiffs presumably to show that rent had been demanded and paid since the notice to quit was given by the plaintiffs to the defendant. I believe the evidence of the plaintiffs that no rent was demanded or paid since the notice to quit was given. I disbelieved the defendant in this respect. In any case the payment of rent after notice had been given was not pleaded. An application was made to amend the statement of defence to enable the defendant to plead waiver of the notice given by the plaintiffs after the case for the plaintiffs had been closed but I refused this application on the ground that the desirability for an amendment, if rent was actually paid as alleged, was abundantly clear to the defendant both before and during the trial.

To my mind, the points to be decided in this case are—

(*i*) whether exhibit "A" can be construed as a written agreement which reserves a flat in the demised premises for the use of the defendant for the duration of the twenty-nine-year lease or until he, the defendant decides of his volition to vacate the flat;

(*ii*) if the answer to (*i*) above is in the affirmative, whether its terms can vary the terms agreed to in the Agreement under seal (exhibit "M") whereby the premises, which are the subject matter of the action, were demised by the defendant to the plaintiffs.

I am unable to construe paragraph 2 of exhibit "A" to mean that the defendant reserves the flat for his own use during the continuation of the plaintiffs' tenancy or until the defendant of his volition desires to vacate the flat. In the face of the covenant in clause 2 (*b*) of the Agreement under seal (exhibit "M") that the plaintiffs "will be free to put up any buildings they require on the land" such a reservation appears to me to be preposterous. To my mind exhibit "A" is merely an agreement allowing the defendant to occupy a flat in the demised premises and I believe the evidence of the plaintiffs that the defendant was allowed to stay on in the flat for a short time until he can find other accommodation.

Even if it can be argued that exhibit "A" is such an agreement it cannot, in my view, vary the terms of exhibits "M" for the following reasons:—

(*a*) although the lease was to take retrospective effect from 1st January, 1948 it was nevertheless created by the Agreement under seal exhibit "M" which was executed on 23rd May, 1949, about seventeen months later. The provisions of exhibit "M" cannot be varied by exhibit "A", the so-called written agreement, dated 5th March, 1948, because it stands to reason that if it was the intention of the parties that the contents of exhibit "A" which was an earlier document were meant to vary the terms of exhibit "M" a document executed much later, the provisions of exhibit "A" would have been incorporated in the subsequent agreement, exhibit "M":

(*b*) the agreement under seal exhibit "M" is a tripartite agreement entered into by the plaintiff, the defendant and the Olubadan for and on behalf of the people of Ibadan District. In my view for any variation of the terms of the Agreement (exhibit "M") to be effective the same three persons or their assigns or successors in office as the case may be and not only the plaintiffs and the defendant, must be parties to the variation of such terms.

In the circumstances, I hold that exhibit "A" did not reserve a flat in the premises for the defendant for the duration of the lease which he had granted to the plaintiffs.

In view of the provisions of the Recovery of Premises (Withdrawal of Applications to Certain Areas) Order in Council (No. 10 of 1946) made under section 1 (2) of the Recovery of Premises Ordinance (Cap. 193 of the Laws of Nigeria), the Recovery of Premises Ordinance does not apply to Ibadan and the notice required under section 8 of the Ordinance would not therefore apply. The plaintiffs however have a duty to give the defendant notice equal to the length of the period of tenancy, *i.e.*, one month notice in respect of the monthly tenancy, and the giving of three months notice is, to my mind, an act of generosity on their part. I hold that the notice is valid and consequently I also hold that the plaintiffs are entitled to recover against the defendant possession of the premises situate and being at New Court Road, Ibadan and covered by the Indenture of lease, exhibit "M".

It is therefore ordered that the defendant do give to the plaintiffs possession of the said premises on or before the 1st day of January, 1961.

Judgment for plaintiff; first defendant ordered to give up possession.

ADESANYA IDOWU ... ... *Appellant*

v.

M. A. ADEKOYA ... ... *Respondent*

[HIGH COURT OF JUSTICE: Quashie-Idun, C.J., 25th November, 1960.]

Civil Procedure—counsel appearing and at the same time giving evidence for a party to a civil suit—whether this constitutes an irregularity.

During the trial of this suit before an Ibadan Magistrates' Court, Counsel for the respondent who acted for him throughout the trial gave material evidence on his behalf. Judgment was given for the respondent. The appellant then appealed.

Held: that the procedure adopted in this case was not only contrary to the practice of the courts but that it was also an irregularity which rendered the trial unsatisfactory.

Appeal allowed; case remitted back to the Magistrates' Court for re-trial.

Cases cited:

R v. *Secretary of State for India-in-Council and Others ex parte Ezekiel* (1941) 2 K.B.D. 175.

Ibadan Civil Appeal No. I/12A/60.

Adenekan Ademola for appellant.

Adaramaja, for respondent.

Quashie-Idun, C.J.: This appeal raises an important question of law. It is whether or not proceedings in a Court should be declared irregular because Counsel engaged in the case gave evidence for his client and at the same time continued to appear in the case.

The facts which have brought about the appeal are that the respondent sued the appellant in the Magistrates' Court at Ibadan claiming arrears of rent and an amount which it was alleged the defendant agreed to pay as costs incurred by the plaintiff in a previous litigation and which the defendant failed to pay.

At the hearing before the learned Magistrate (Mrs Oguntoye) the plaintiff testified that he leased some premises to the defendant and that he instructed his Counsel, Mr A. Adaramaja, to sue for arrears of rent and possession of the premises when the defendant defaulted in the payment of the rents. He said that when the action was instituted the defendant approached the Oba of the town in which his Counsel and the defendant lived to try to effect a settlement of the litigation. The Plaintiff himself was not present when the settlement was effected but he was advised by his solicitors about the settlement. The defendant denied having approached the Oba to effect a settlement. The Oba was not called by the plaintiff to give evidence of the settlement but at the end of the plaintiff's evidence his Counsel indicated to the Court that he would like to give evidence for the plaintiff in view of the allegations made against him. The allegation was that the defendant has served a notice of termination of his tenancy in respect of premises on the plaintiff's Solicitor. When plaintiff's Counsel gave evidence he testified not only on the issue as to whether or not notice had been served on him but also on the important issue as to whether or not the defendant had approached the Orimolusi of Ijebu-Igbo who was the Head of the Town to appeal to the plaintiff to withdraw the action instituted against the defendant and to effect a settlement of the dispute.

Plaintiff's Counsel also gave evidence that in consequence of the approach made to him by the Oba he agreed with the defendant to withdraw the action instituted on payment of costs by the defendant of £13 3*s* 6*d* incurred by the plaintiff.

The evidence of the plaintiff's Counsel was seriously challenged by the defendant who contended that he only owed plaintiff arrears of rent of £8. The learned trial Magistrate accepted the evidence of the plaintiff and his Counsel and gave judgment for the plaintiff for the whole amount claimed.

In this Court Mr Adenekan Ademola has argued on the following grounds of appeal:—

"That an irregularity of a fundamental nature has been committed thereby prejudicial to defendant's case by the Magistrate allowing Counsel for the plaintiff to conduct this suit and giving evidence on a material issue in support of plaintiff's case".

In support of his submission Mr Ademola has referred the Court to Halsbury's Laws of England, 3rd Edition, Volume III, page 68 paragraph 102 which reads as follows:

"A Barrister should not act as Counsel and witness in the same case and he should not accept a retainer in a case in which he has reason to believe he would be a witness, and if, being engaged in the case, it becomes apparent that he is a witness of a material question of fact, he ought not to continue to appear as Counsel if he can retire without jeopardising his client's interests".

In the case of *Rex* v. *Secretary of State for India in Council and Others ex parte Ezekiel*, (1941) 2 K.B.D. 175, it was held by Humphreys, J. as follows:

"Before the Court parts with the case, there is a short observation which the other members of the Court desire me to make and with which I agree. It was brought to the attention of the Court that, on the hearing at Bow Street Court, Junior Counsel on one side was called as a witness to prove certain aspects of Indian law and continued thereafter to act as Junior Counsel in the case. No objection was taken to this by Counsel on the other side. We think it right to point out that this is irregular and contrary to practice. A Barrister may be briefed as Counsel in the case or he may be witness in the case. He should not act as Counsel and witness in the same case."

It is submitted on behalf of the respondent by his Counsel Mr Adaramaja that although an irregularity has been committed by his giving evidence during the trial, it has occasioned no miscarriage of justice, and that apart from his evidence there was other evidence which would have entitled the learned trial Magistrate to have found in favour of the plaintiff. I do not agree.

The evidence given by Mr Adaramaja was the only evidence which sought to establish the fact that the defendant had approached the Oba to effect a settlement of the dispute between the plaintiff and the defendant. That evidence should have been given by the Oba himself and I think that it was irregular for Counsel to have given that evidence instead of calling the Oba himself to do so, particularly as the evidence that the defendant appealed to the Oba to effect a settlement was seriously challenged by the defendant. The plaintiff's Counsel should have advised the plaintiff to engage another Counsel when he decided to give evidence and not to call the Oba as a witness.

I think that this case amply illustrates the importance of adhering to the practice of not allowing Counsel to appear both as Counsel and as a witness in the same case. It is my view that the procedure adopted in this case is not only contrary to the practice

of the Courts but it is also an irregularity which has rendered the trial unsatisfactory in that a more competent witness than plaintiff's Counsel was not called to give evidence on a very important issue in the case.

In the circumstances of the case I think the ends of justice will be amply met by ordering a new trial.

The appeal is accordingly allowed and the case remitted to the Magistrate's Court for a new trial by another Magistrate.

Appeal allowed; case remitted back to the Magistrate's Court for re-trial.

KARIMU SALISU ... ... *Appellant*

v.

SUPERINTENDENT OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Charles, J., 29th November, 1960.]

Criminal Law and Procedure—charge containing counts for felonies and simple offences—whether such a charge is triable by a Customary Court—section 3 of the Criminal Code Ordinance and section of the Criminal Code referred to.

The appellant was tried and convicted by the Egba Grade A Customary Court on a charge containing five counts, two for felonies and the other three for simple offences. The present appeal is against that conviction on two grounds, only one of which was considered, namely, whether the Customary Court was right in trying the appellant on the charge containing these two different kinds of offences.

Held: that since the Customary Courts Law, 1957, is silent on the point of whether counts alleging different kinds of offences could be tried together on the same charge, the court would apply the Common Law rule against such a joinder and the charge would be held to be had and the trial and convictions thereon declared nullities.

Appeal allowed; *trial declared a nullity.*

Cases cited:

Castro v. *The Queen*, 6 App. Cas. 239.

Murugiah v. *Jaimudeen*, [1954] 3 W.L.R. 682.

Abeokuta Criminal Appeal No. AB/31CA/59.

Kolawole, for appellant.

Aofolaju, Crown Counsel, for respondent.

Charles, J.: This was an appeal against convictions by the Egba Grade A Customary Court on five counts. The appeal has been allowed by setting aside the convictions and substituting for them orders for discharge without acquittal. The five counts upon which the appellant was prosecuted and convicted were as to the following miscellaneous offences:—

(1) offering a sum of money to a Local Government constable so that he would not prosecute the appellant for unlawful possession of illicit gin, contrary to section 248 (2) (*a*) of the Local Government Law, 1957;

(2) assaulting the Local Government constable contrary to section 356 (2) of the Criminal Code;

(3) driving a private vehicle without a driving licence contrary to section 7 (1) of the Road Traffic Ordinance;

(4) operating a vehicle with an expired vehicle licence contrary to regulation 14 (4) (1) (*sic*) of the Road Traffic Regulations;

(5) operating a vehicle without a certificate of roadworthiness contrary to section 31 (2) of the Road Traffic Regulations.

The appeal was argued on two grounds: that the convictions were nullities because the constitution of the court had changed during the course of trial, in that the accused had been arraigned before the court sitting with two assessors, the hearing had been before the court sitting with two different assessors, and the judgment had been given

by the court sitting without assessors; and that the convictions were nullities because the five counts were in respect of unrelated offences and the court had no jurisdiction to try the accused on a charge containing such a combination of counts.

The appeal has been allowed substantially upon the second of those grounds.

The customary courts of this Region owe their creation to, and have their jurisdiction defined and their procedure regulated by and under, the Customary Court Law, 1957. That Law presents the anomaly that, although customary courts are inferior courts and rank below Magistrates' Courts in the judicial hierarchy, it authorises the vesting of jurisdiction in some of the former courts to try persons upon charges of felonies and to try them without having the right to elect trial before this Court. The anomaly is the more marked because the division of crimes into felonies, misdemeanours and simple offence is generally fixed in this Region by section 3 of the Criminal Code according to the seriousness of offences as indicated by the maximum punishments prescribed or allowed; a division which applies, by necessary implication from section 3 of the Criminal Code Ordinance, to all crimes, and not merely to those created by the Code, and in all courts.

The question which arises from this anomaly is whether counts alleging different kinds of offences can be joined in one charge before a customary court which has jurisdiction to try for alleged felony. The common law rule is that, while any number of counts alleging offences of the same kind, whether related or not, may be charged together, counts alleging offences of different kinds cannot be charged together and a trial upon such a joinder is a nullity. Thus, a person could not be charged and tried upon an indictment which contained a count alleging a felony and a count alleging a misdemeanour. This rule, which is one of law, is not to be confused with the rule of practice by which a court before which a person was charged on an indictment containing a number of counts of unrelated offences of the same kind could require the prosecution to elect to proceed upon only some of the counts in order to avoid embarrassment to the defence. (*See* Stephen, History of the Criminal Law, Vol. 1, page 291; *Castro* v. *The Queen*, 1881, 6 App. Cas. 239. (H.L.) at page 244 per Lord Blackburn).

The rule of law against the joinder of counts alleging offences of different kinds continues, like all common law rules, to apply except so far as it has been abrogated either expressly or by necessary implication by statute. (Cf. *Murugiah* v. *Jaimudeen*, [1954] 3 W.L.R. 682 P.C.). The Criminal Procedure Ordinance has abrogated that rule but only in respect of the joinder of counts in the High Court and Magistrates' Courts, so that rule remains applicable to the Customary Courts unless the Customary Courts Law, 1957 has itself abrogated it. The Customary Courts Law, 1957 is silent upon the point, with the result that the common law rule applies to joinder of counts in the customary courts.

In this case, each of the first two counts alleged a felony and each of the other three counts alleged a simple offence. Therefore, under the common law rule mentioned, the charge was bad and the trial and convictions upon it were nullities.

In reaching that conclusion, I have had regard to the original basis of the common law rule being both the absurdity of joining a felony which was punishable with death with a misdemeanour which was otherwise punishable, and the impracticability of trying for felony and misdemeanour together because the incidents of a trial for each kind of offence differed greatly. An established rule of the common law is not, however, affected by the reasons by which it was ascertained either having ceased to exist or having been shown to be fallacious. In any case, it is to be presumed that, if the

Legislature had intended that the fair trial of an accused charged with felony before an inferior court, perhaps constituted worthily but indifferently as to ability, was to be endangered by the charge being a hotch-potch of felonies and lesser offences it would have said so explicitly.

Having decided this appeal on the second ground, it is unnecessary to consider the first ground.

Appeal allowed; *trial declared a nullity.*

S. A. OSHUNTAYE AND THREE OTHERS ... *Appellants*

v.

COMMISSIONER OF POLICE ... ... *Respondent*

[HIGH COURT OF JUSTICE: Charles, J., 29th November, 1960.]

Criminal Law and Procedure—charge for assault contrary to section 351 of the Criminal Code—differentiation in sentences imposed on persons found guilty of same offence—admissibility of medical report in lieu of medical evidence—section 41 of the Evidence Ordinance, Cap. 63, considered.

The appellants were charged before an Ijebu-Ode Magistrate's Court for assaulting one Solomon Oni, contrary to section 351 of the Criminal Code, and convicted. The first appellant was sentenced to a fine of £100 or in default to serve a term of four months imprisonment whilst the other appellants were sentenced to a term of four months imprisonment each without option of a fine. The Magistrate, in imposing a different sentence on the first appellant, said that he took into consideration his Counsel's submission that the first appellant was a prominent member of a political party, and that he was a Senior Produce Officer and that he was for fifteen years a school teacher. At the trial no doctor was called to give evidence but a medical report issued by the doctor who treated the complainant was tendered and admitted. Against the convictions and the sentences the appellants brought this appeal.

Held: (1) that the reasons advanced by defence Counsel before the Magistrate were quite specious tending to introduce irrelevant and nonsensical political grounds for leniency and if they showed any ground for differentiation at all it was on the basis that the first appellant was a worse offender because, with his background, he should have more fully appreciated the seriousness of his offence;

(2) that the admission of the medical report was wrongful;

(3) that the wrongful admission was fatal to the case because it could not be said with certainty that had the Magistrate not been influenced by it he would have inevitably arrived at the same conclusion.

Appeal allowed.

Abeokuta Criminal Appeal No. AB/21CA/60.

Adesokan, for appellants.

Aofolaju, Crown Counsel, for respondent.

Charles, J.: The four appellants were convicted before the Senior Magistrate, Ijebu-Ode, on the 13th July, 1960 on a charge of having unlawfully assaulted Solomon Oni on the 1st January, 1960 at Ago Iwoye, contrary to section 351 of the Criminal Code. The first appellant was sentenced to a fine of £100 or, in default, four months' imprisonment with hard labour. The other three appellants were each sentenced to four months imprisonment with hard labour, without the option of a fine.

The prosecution's case was that the four appellants called on Solomon Oni in his house; that the first appellant there produced a pamphlet and asked Solomon Oni if he were the author of it: that Solomon Oni answered that he was: that thereupon the first appellant slapped him: and that the other three appellants then took hold of Solomon Oni, on the instructions of the first appellant, and beat and dragged him round as a result of which he sustained injuries all over his body.

The case for the defence was that the four appellants had made a friendly visit to Solomon Oni and that, in the course of it, the first appellant asked Solomon Oni if he were the author of a certain pamphlet: that Solomon Oni then told the first appellant that he should clear out of the house if that was the purpose of his visit: that the first appellant asked Solomon Oni what he would do if he did not leave: that Solomon Oni thereupon slapped the first appellant who then left with the other appellants.

The learned Magistrate convicted the four appellants after expressing regret that they had not been charged with assault occasioning actual bodily harm. It appears to me that the differentiation in the sentences imposed upon the first appellant and the other appellants calls for comment. Counsel for the appellants stated, in mitigation, that the first appellant was a prominent member of a political party, that he was a Senior Produce Officer, and that he had fifteen years experience as a school teacher. The learned Magistrate gave a dissertation upon the prevalence of such lawlessness and the taking of the law into one's own hands, and expressed the opinion that fines would not have a deterrent effect. With those statements I concur. The learned Magistrate then said that, after taking Counsel's plea into consideration, he had decided to impose the sentences mentioned. In as much as the learned Magistrate had accepted the prosecution's evidence and had found the alleged assault proved, he should also have found that the first appellant had been the instigator of that assault, and he should, at least, have imposed the same sentence of imprisonment without the option of a fine upon the first appellant as he imposed upon the others, or else he should have given the others the option of a fine. The reasons advanced by Counsel for leniency were quite specious, tending to introduce some irrelevant and nonsensical political grounds for leniency. If they showed any ground for differentiation at all it was on the basis that the appellant was a worse offender because, with his background, he should have more fully appreciated the seriousness of his offence.

The ground upon which these appeals were allowed were that the learned Magistrate had admitted into evidence a medical certificate as to Solomon Oni's injury. The certificate showed that Oni had sustained abrasions on his left ankle, left knee, left elbow and right knee. Its admission obviously was not prejudicial to the appellants, having regard to their defence.

It is, I understand, a common practice for Magistrates, in criminal cases, to admit into evidence medical certificates like the one mentioned with the laudable object, no doubt, of saving the doctor from attendance. The practice, however, is quite wrong. In a criminal trial a certificate, which is a form of hearsay, can only be admitted in evidence under statutory authority, such as section 41 of the Evidence Ordinance, Cap. 6. There is no statutory authority for the admission of certificates of the kind admitted in this case. The fact that the certificate was not objected to did not render the certificate admissible. In a civil case, non-objection may operate as an admission of the facts stated in the certificate and render a certificate admissible on that basis. But in a criminal trial the necessity to adduce evidence cannot be avoided by the admissions of facts by the accused at the trial, except by a full and unequivocal plea of guilty. On a plea of not guilty the prosecution must prove its case strictly by legally admissible evidence, and not otherwise, and the accused cannot be bound by any admission made expressly, or impliedly by non-objection, on the part of his Counsel. Hence, it is the duty of the court itself, in a criminal trial, to reject what is inadmissible in evidence although objection has not been taken to it.

The wrongful admission of the medical certificate would not have been fatal to the convictions in this case if it could have been said with certainty that the learned Magistrate had not been influenced by the certificate in reaching his decisions or that his decisions would inevitably have been the same had the certificate not been admitted. The appellants' several stories rouse one's scepticism as to their truth but, as learned Counsel for the respondent rightly conceded, not to the extent of finding that either condition mentioned for upholding the convictions had been satisfied.

The appeals therefore have to be allowed.

Appeal allowed.

CHIEF ANTHONY ENAHORO ... ... *Plaintiff*

v.

1. ASSOCIATED NEWSPAPERS OF NIGERIA LTD.
2. S. N. IWEANYA, EDITOR OF THE "SOUTHERN NIGERIA DEFENDER" ... ... *Defendants*

[HIGH COURT OF JUSTICE: Fatayi Williams, J., 1st December, 1960.]

Defamation—newpaper report of the proceedings of the Western House of Assembly—grossly inaccurate report and editorial comment based thereon—pleas of fair comment and qualified privilege—matters to be considered in assessing damages—section 21 of the Legislative Houses (Powers and Privileges) Law, 1956, applied.

The plaintiff, an elected member of the Western House of Assembly, a Cabinet Minister, as well as the Leader of the House, brought this action against the defendants claiming £5,000 damages for an alleged libel contained in the issues of the "Southern Nigeria Defender" of 30th April, 1959 and 1st May, 1959. The former issue contained an alleged report of the proceedings of the Western House of Assembly of 29th April, 1959 and the latter contained an editorial comment based entirely on the former. A comparison of the official report of the proceedings of the House on 29th April (which was put in evidence for the plaintiff) and the two publications in the defendants' paper showed that the publications were grossly inaccurate. The defendants set up pleas of fair comment and qualified privilege.

[The claim against the second defendant was discontinued before trial].

Held: (1) that for the plea of fair comment to succeed, the comment must be based on facts accurately stated; and that since the facts as stated by the defendant in this case were grossly inaccurate the plea of fair comment failed;

(2) that for the defence of qualified privilege to succeed the defence must prove that the report of the Parliamentary proceedings was fair and accurate and was published *bona fide* and without malice; and that as the defendant had been grossly reckless and had acted in utter disregard for accuracy, this defence also failed;

(3) that in assessing damages the court would take into consideration the circulation of the defendants' paper, the fact that in this community not only subscribers but also others read the newspapers and the fact that in spite of plaintiff's correction of the facts as reported on 30th April, the defendant did not publish the correction but rather launched a more vicious attack.

Judgment for plaintiff.

Cases cited:

Davies v. *Shepstome*, (1886), 11 A.C. 187.

Royal Aquarium and Summer and Winter Garden Society v. *Parkinson*, [1892], 1 Q.B.D. 431.

Ibadan Civil Suit No. I/146/59.

Chief Rotimi Williams (*Eboh*, *Senior Crown Counsel* with him), for the plaintiff.

Olowofoyeku, for the defendants.

Fatayi Williams, J.: The plaintiff, Chief Anthony Enahoro, a member of the House of Representatives, who had, until December 1959, been a member of the Western House of Assembly and a cabinet Minister holding the portfolio of Home and Midwest Affairs in addition to being the Leader of the said House of Assembly has

brought this action against the Associated Newspapers of Nigeria Limited, printers and publishers of the "Southern Nigeria Defender", a newspaper published daily (except on Sundays) and against one S. N. Iweanya, the Editor of that newspaper claiming the sum of £5,000 as damges for alleged libel contained in the issues of the "Southern Nigeria Defender" dated 30th April, 1959 and 1st May, 1959 respectively. The words complained of were as follows:

30th April, 1959 (front page)

"UROMI COURT ISSUE NCNC MEMBER GAGGED FROM SPEAKING

"The Action Group in the Western House of Assembly yesterday killed an important question that was about to be raised by NCNC member for Egbado, Mr Bolarinwa Abioro during the motion of adjournment. Mr Abioro had wanted the Government to make categorical statement about the alleged suspension of the Uromi Grade "B" Customary Court of which the father of Chief Anthony Enahoro, West Minister of Home Affairs and Midwest Affairs, is the Judge.

"Immediately, Mr Abioro started to say that rumour had it that the Uromi Grade "B" Customary Court had been suspended, Chief Rotimi Williams, Minister of Justice and Attorney-General, jumped up, and warned the honourable member to only speak on the suspension of the said Customary Court and not to attack the office of the judge.

POINT OF ORDER

"Mr Abioro cleared his voice and was getting set on the topic, when 'a point of order' came from the Parliamentary Secretary to the Minister of Finance Mr Emmanuel Idowu. That honourable member should not base question on newspaper publications.

"That was supported by Chief Rotimi Williams with the words 'Yes Mr Speaker, irresponsible people are fund of giving informations to irresponsible newspapers'.

GOVERNOR'S PAY

"Mr Aboro denied the allegation that he got his information from a newspaper.

"The Speaker, Mr Adedoyin: Order: Order: the Honourable member must tell us from where he got his information.

"Mr Abioro again denied getting his information from any paper and that some reliable people of Uromi had informed him.

"Chief Anthony Enahoro then said that if Mr Abioro wanted to hear the facts he should come to him, and moved that the House be adjourned."

"The House then adjourned."

1st May, 1959 (Editorial Comment at page 2)

GAGGING THE LEGISLATOR

"NCNC Legislator Bolarinwa Abioro member for Egbado raised the question in the Western House of Assembly about the alleged suspension of Grade 'B' Customary Court at Uromi, at which the father of the Minister for Home Affairs and Midwest Affairs, Chief Anthony Enahoro presides. Chief F. Rotimi Williams jumped up as reported and warned the NCNC legislator that if he was going to speak about the

court he should not discuss the office of the President. As the legislator was about to start off a Parliamentary Secretary raised a 'point of order' mentioning that legislators should not base their questions on newspaper publications. The Speaker of the House Mr Adeleke Adedoyin wanted to know the source from which Mr Abioro had got his information. Mr Abioro said he got it from a reliable source and not from newspaper. Chief Rotimi Williams remarked. 'Irresponsible people are fond of giving information to irresponsible newspapers.' Then Anthony Enahoro joined the debate and said if the NCNC member would want to know the facts about the suspension of the court he (NCNC) should see him. That done, Mr Abioro was hushed up with the motion of adjournment moved by Chief Enahoro. The whole affair seemed to end in a drama.

"Why the NCNC legislator had been treated in the manner described is best known to the Action Group Government. The point at issue is of public interest. Before the news about the suspension of the Uromi Court was published, some reports had been made concerning the same court. It is therefore obvious that the suspension story ought to have aroused great speculation among most of the people in the area of that court and others who were following the affairs of the court with interest. The NCNC legislator was therefore perfectly in order and had raised the question in the proper place and at the proper time for Government to clear the atmosphere.

"ENAHORO SHOULD BE NEUTRAL

"The appropriate Minister who should have explained to the House as to whether or not the court was suspended, was Chief Rotimi Williams, the Minister of Justice and Attorney-General. It is impolitic for Chief Enahoro to have said anything in the matter since his father was connected with the court. He should not have taken part in the debate. He should be neutral. Instead, he thrust himself into the debate to the extent of asking the legislator to see him if he (legislator) would want to know the fact about the court. Is the court a private affair of the Enahoro family?

"A legislator wanted information which those whom he represented would like to know. The information was not one likely to be against public morality or policy if released. He was fired with qeustions right and left and in the end he was hushed up. What does this mean? It seems to us that the legislator was refused freedom of speech under the Human Rights. He was denied the privilege of speaking for those he represented and obtaining for them what by right they were entitled to have. This is not democratic. It's like gagging the legislator".

At this stage I think I should mention that the claim against the second defendant was discontinued on 30th October, 1959.

By his Statement of Claim the plaintiff alleged that the said publications were false and defamatory and that consequently he had been injured in his reputation and credit as a member of the Legislature of the Western Region and Leader of the House of Assembly as well as a Regional Minister and had been brought thereby into hatred, ridicule and contempt.

The defendants denied that the words were defamatory. Alternatively, they pleaded that the said words, in so far as they consist of statement of facts, form part of a fair and accurate report of Parliamentary proceedings of the Western House of Assembly, and were published by the defendants *bona fide* for the information of the public and without malice towards the plaintiff and are for that reason privileged.

Finally, the defendants pleaded that "the said words in so far as they consist of expression of opinion are fair, honest and impartial comment on facts truly reported in the said publication on a matter of public interest and were published in good faith and without malice towards the plaintiff. The particulars of the facts on which the words were claimed to be fair comment are as follows:

"(*a*) The plaintiff in fact interrupted Hon. Abioro when he was speaking on a motion on adjournment in the Western House of Assembly on 29th April, 1959.

"(*b*) The plaintiff in fact moved a closure whilst the said Hon. Abioro was speaking.

"(*c*) The said Hon. Abioro in fact spoke about the rumour which he said he heard, that the Uromi Grade 'B' Customary Court had been suspended.

"(*d*) The President of the said Uromi Grade 'B' Customary Court is in fact the father of the plaintiff.

"(*e*) Chief Rotimi Williams the Minister of Justice and Attorney-General is in fact the Minister responsible for matters pertaining to Customary Courts".

The plaintiff gave evidence. According to his evidence, he was formerly a Cabinet Minister in the Western Region Government and held the portfolio of Home Affairs and Midwest Affairs. As a member of the Western House of Assembly he was the Leader of the House, an office which he held together with his portfolio from 1954 to December 1959, when he was elected a Member of the House of Representatives. As Leader of the Western House of Assembly it was his duty to assist the House and, the members, both individually and collectively, in any difficulties which they might encounter in the House. It was also his duty to deal with the members of the Opposition on behalf of the Government and always represented the Government in its contact with the Opposition. Finally it was his duty to see that—

(*a*) the procedure laid down in the Standing Orders of the House was observed at all times,

(*b*) the House was kept to its time table,

(*c*) discussion did not drag on too long if it was likely to upset the programme drawn up for the Session of the House.

The plaintiff admitted that his father, Chief A. O. Enahoro, is the President of the Uromi Grade "B" Customary Court. On 29th April, 1959, plaintiff was present at the meeting of the Western House of Assembly. He, however, denied taking part in the debate on the Uromi Grade "B" Customary Court on that day and referred to the following report at page 453 of Exhibit "A" (The Official Report of the Western House of Assembly Debates) tendered by the first witness for plaintiff, the acting Clerk of the Western House of Assembly in support:

"ADJOURNMENT"

"**Chief Fadayiro:** Mr Speaker, Sir, I beg to move that the House do now adjourn.

"Suspension of Uromi Grade 'B' Court"

"**Mr Y. B. Abioro:** Mr Speaker, Sir, some weeks ago, there was a rumour that the Uromi Grade "B" Court (*interruptions*) was suspended by the Local Government

Service Board and we on this side of the House believe that there is some truth in that rumour, taking into consideration the alleged partial attitude by this Judge to members of the Uromi community.

"**Chief Williams:** On point of order. The Hon. Gentleman can only criticise the Local Service Board but he cannot criticise the Judge in his judicial capacity, so that his reference, whether it is an allegation or not, to the Judge in his judicial capacity is out of order and cannot be raised except on a substantive Motion."

"**Mr Abioro:** My point is that this allegation (*Government Benches: What allegation?*) It is a rumour.....(*Government Benches: What rumour?*) that the Court has been suspended (*loud interruptions*) and as it is usual with the Government of the day, this allegation was.....(*loud interruptions*).

"**The Parliamentary Secretary to the Minister of Finance (Mr E. O. Idowu):** On point of order, Standing Order section 9. It is out of order to base a question on Newspaper report. (*Loud interruptions*).

"**Mr Abioro:** Mr Speaker, Sir, but the text.....(*interruptions*).

"**Chief Williams:** A fresh point of order has been raised and I think there is very good reason behind the rule. It is quite easy for any group of irresponsibles to go to an irresponsible section of the Press to raise a spurious question and get a spurious letter published and then come and raise it in this House on the adjournment. I think there is very good reason behind the rule that a question cannot be raised on a Newspaper report. (*interruptions*).

"**Mr Speaker:** Order, Order. I think the hon. Member is not making a reference to a Newspaper report.

"**Mr Abioro:** The next move.....(*interruptions*) (*Government Benches: What is the source of your information?*) The source of the information is from a section of Uromi Community.

"**Chief Enahoro:** I think the hon. Member is not entitled to depart from the rule. He said the question is derived from rumour.

"**Mr Abioro:** I was well informed, Mr Speaker.

"**Chief Enahoro:** If I may interrupt the speaker. If the hon. Member will see me tomorrow, I will try and teach him how he can best raise this question. This question has not been properly raised on the floor of this House and I beg to move, Sir, that the question be now put."

He also denied asking Mr Abioro to see him so as to ascertain the facts concerning the suspension of the Uromi Grade "B" Customary Court. He admitted that what he had read out from Exhibit "A" was a fair report of what took place in the House on 29th April, 1959. Bearing in mind the publication made by the defendants the previous day, the plaintiff, *ex abundanti cautela*, made another statement on the following day, 30th April, 1959, concerning the matter. This was reported at page 456 of Exhibit "B" (Official Report of the House of Assembly Debates) and is as follows:

"**The Minister of Home Affairs and Midwest Affairs (Chief Anthony Enahoro):** .....The third point which I should like to mention is in connection with procedure. I notice in the Papers this morning that there is an allegation that Mr Speaker has attempted to deny an hon. Member of his right to air his grievances.

I should like to explain as I said yesterday that if the hon. Member had come to me I would have told him what the procedure is on a matter of that nature. The correct procedure is for the hon. Member to put the question to the Minister concerned who will give him the answer and having ascertained the facts, he can then either pursue the matter on the adjournment or by a substantive Motion. There is certainly no attempt to deprive hon. Members of their rights to air their grievances".

In spite of this statement the first defendant published an editorial comment containing the words complained of concerning the debate on 1st May, 1959.

According to the plaintiff it was not correct to say that he participated in the debate of the 29th April, 1959 or that he objected to the discussion of the affairs of the Uromi Grade "B" Court on the floor of the House. If Mr Abioro had gone to him he would have advised him as to the proper manner to bring the matter before the House. As Mr Abioro did not come, he mentioned the advice which he would have given him in the House the following morning, *i.e.*, 30th April, 1959. To his knowledge the Uromi Grade "B" Customary Court was never suspended.

Finally, the plaintiff informed the court that to his knowledge the first defendant had never published any correction of the two publications contained in Exhibits "D" and "E" complained of. Under cross-examination and later on re-examination plaintiff admitted that he moved the closure of the House after he had volunteered to teach Mr Abioro the correct procedure to be followed; but pointed out that this did not mean the closure of the debate. As the Leader of the House, he stated that "the question be now put" *not* in respect of the matter being debated but on the motion for adjournment previously moved by Chief Fadayiro. He also pointed out that as the Leader of the House, he made some observation on 29th April, 1959 on a point of order in respect of the rule that members should not ask questions on matter based on rumours. He insisted that apart from this observations made in his capacity as Leader of the House he did not participate in the debate on 29th April, 1959.

In addition to the acting Clerk of the Western House of Assembly who tendered copies of the relevant Debates plaintiff called one witness in support of his claim. He is Mr Adenekan Ademola, a solicitor and advocate of the Federal Supreme Court. Mr Ademola knew the plaintiff both as the Minister for Home and Midwest Affairs in the Western Region Government and also as the Leader of the Western House of Assembly until December 1959. As a subscriber to the "Southern Nigeria Defender" he remembered reading Exhibits "D" and "E" the issues of the paper for 30th April, 1959 and 1st May, 1959 respectively. He also remembered reading the two publications complained of and thought, after reading them, that if what were said therein were true, the plaintiff was using his position as the Leader of the Western House of Assembly to prevent a member of the House from expressing his opinion on a matter upon which, even within the context of the publication, he might be said to have an interest which might be both filial and political. He thought this was bad and was not the sort of behaviour one would expect from a man of good repute.

The defendant called only one witness, one Gabriel Onyidi who was the circulation clerk of the defendant's newspaper. He kept a record of the circulation of the "Southern Nigeria Defender" for the months of April, and May 1959. According to him, the gross circulation of the paper for the 30th of April, 1959 was 1,228 while that for the 1st of May, 1959, was 1,249. The papers circulated mainly in Ibadan with a few copies sent to Ekpoma in Ishan Division and to Oyo. Only thirteen copies of the paper were sent to Ekpoma during 1959.

In view of the above evidence, it seems to me that the points to be considered are as follows:

(*a*) what part, if any, the plaintiff played in the debate on 29th April, 1959 and whether his contribution was in accordance with his duties as Leader of the House;

(*b*) whether the publication in the issues of the defendants paper of the 30th April, 1959 and 1st May, 1959 contained an accurate report of the proceedings of the House of Assembly on those dates;

(*c*) if it did not, whether it is libellous;

(*d*) if it is libellous, whether, in view of its falsity, the defendant can avail himself of the defence of fair comment or of qualified privilege.

After considering the part the plaintiff said he played in the proceedings of the House on 29th April, 1959 and after scrutinising the relevant official report of the debate Exhibit "A" I have come to the conclusion that, upon a fair reading of the proceedings, it would not be correct to say that the plaintiff was trying to prevent the matter from being debated because it concerned plaintiff's father. In my view plaintiff was merely performing his duty as Leader of the House. I am fortified in this view both by the evidence of the plaintiff which I believe and by the following passage on the duties of the Leader of the House of Commons at page 260 of *Erskine May's Parliamentary Practice, 16th Edition:—*

"The member of the Government who is primarily responsible to the Prime Minister for the arrangement of Government business in the House of Commons is known as the Leader of the House. He controls the arrangement of business in that House while the programme and details are settled by the Government Chief Whip.

"When each week's programme of business has been arranged the Leader of the House states the business for the following week in answer to a question put to him at the end of Questions on Thursdays by the Leader of the Opposition, and, whenever necessary, makes further business statements from time to time. He may also move procedural motions relating to the business of the House.

"In the absence of the Prime Minister the Leader acts as spokesman of the House on ceremonial and other occasions; and at all times, being responsible to the House as a whole, he advises the House in every difficulty as it arises."

I believe the plaintiff meant it when he said that he was willing to assist the Legislator to bring the matter properly before the House. This was part of his duties as Leader of the House and his contribution to the proceedings in that respect was in accordance with such duties and did not, in my opinion, constitute taking part in the debate about the Uromi Grade "B" Customary Court.

Secondly, a comparison of the official report of the proceedings of the House on 29th April, 1959 and the publication in the issues of the defendants' paper on the 30th April, 1959 and 1st May, 1959 showed that the reports in the defendants' newspaper were most inaccurate and undoubtedly portrayed the plaintiff as a public man who has used the privileges of his office to protect his father's interests. In this connection the evidence given by Mr Ademola, third witness for the plaintiff is very relevant. His evidence showed quited clearly, and I share this opinion, that the words complained of would tend to lower the plaintiff in the estimation of right-thinking persons generally.

Thirdly, it is my view, having shown that the publications were grossly inaccurate, that the words complained of are capable of a defamatory meaning and are in fact defamatory. It is not enough to say, as the Counsel for the defendant has said, that the plaintiff, being a public man, must have a thick skin, because, as he put it, "what might be a libel of a private person might not be a libel of a public man, a man of affairs". It is pertinent at this point to refer to the following statement of Lord Herschell, L.C., in *Davies* v. *Shepstone*, (1886) 11. A.C. 187 at 190:—

> "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct".

Before considering the defence of fair comment I should like to point out that, in my opinion, the two publications contain the following false statements concerning the plaintiff:—

(*i*) the allegation that plaintiff participated in the debate on the Uromi Grade "B" Customary Court;

(*ii*) the allegation that the plaintiff said that if Mr Abioro wanted *to hear the facts* concerning the alleged suspension of the Uromi Grade "B" Customary Court, he should come to him;

(*iii*) the allegation that the plaintiff moved the adjournment so as to prevent the question of the suspension of the Uromi Grade "B" Court from being raised.

In the face of these false statements contained in the publication, it seems to me that the defendant cannot avail himself of the plea of fair comment. To be fair, the comment must be based on facts accurately stated. It cannot be fair if it is based on the vividness of the defendant's imagination, adorned with dramatic and journalistic flourish.

Finally, I would like to consider the defence of qualified privilege. Section 21 of the *Legislative Houses (Powers and Privileges) Law No. 27 of 1957*) provides as follows:

> "In any civil or criminal proceedings for printing any extract from or an abstract of any report, paper, votes or proceedings published by or under the authority of the House, if the Court or jury, as the case may be, be satisfied that such extract or abstract was published *bona fide* and without malice, judgment or verdict, as the case may be, shall be entered for the defendant or accused".

It would appear from the above that, the essence of the defence of qualified privilege in this case is that the report of the Parliamentary Proceedings was fair and accurate and was published *bona fide* and without malice. It is obvious from a comparison of the official report and the report published in the issues of the "*Southern Nigeria Defender*" for the 30th April, 1959 and 1st May, 1959 that whoever was responsible for the report has been grossly reckless and acted in utter disregard for accuracy. In fact, it was the newspaper report which introduced into the matter, for the first time, the fact that the President of the Uromi Grade "B" Customary Court was the plaintiff's father. All these considered, it seems to me that there is nothing *bona fide* about the motives of the defendant in publishing these grossly inaccurate reports. In view of the plaintiff's explanation in the House on 30th April, 1959, the editorial comment of the 1st May, 1959 was uncalled for and showed, in my view, implied malice towards

the plaintiff. In this connection I would refer to the following extract from the judgment, of Lopes, L.J., in *Royal Acquarium and Summer and Winter Garden Society* v. *Parkinson* [1892] 1 Q.B.D. p.431 at page 454:—

> "If it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it not stopping or taking the trouble to ascertain whether it is true or not—stated it recklessly by reason of his anger or other indirect motive—the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive. Applying this principle to this case, I think there was evidence which justified the jury in their finding of malice".

For the reasons enumerated above there will be judgment for the plaintiff in the terms of the writ subject to the amount of damages to be awarded which I shall now proceed to consider.

With regard to the amount of damages which the defendants should be asked to pay, I have taken into consideration the circulation of the defendants' newspaper containing the reports for the relevant dates. I have also taken into consideration the fact that only a few copies of the paper are sold in the plaintiff's constituency. Nevertheless, I must not lose sight of the fact that, in a country like ours, it is not only the known subscribers who read the defendants' newspaper. I must also take note of the fact that notwithstanding the correction made by the plaintiff in the same House of Assembly on the following day, 30th April, 1959, no correction was published by the defendants. Instead a more vicious attack, based on the same inaccuracies which they have made no effort to correct at any time, was launched on 1st May, 1959. Bearing all these in mind, I award him one thousand pounds damages with costs.

Judgment for plaintiff.

THE QUEEN

v.

THE ALAKE OF ABEOKUTA AND THIRTY-ONE OTHERS Ex PARTE SODAMOLA OWOLABI ... *Applicant*

[HIGH COURT OF JUSTICE: Charles, J., 10th December, 1960.]

Certiorari—*approval of chiefs under Part III of the Chiefs Law, 1957—onus to establish facts to justify issue order on applicant—non-disclosure of material facts by applicant.*

This is an application for an order of *certiorari* to quash a list of approved chiefs of Iporo township, dated the 26th June, 1959, and made by the first respondent. The application was tried on sworn affidavits only. The applicant failed to disclose to the court a previous settlement and approvals made in 1957 with regard to the same chieftaincies.

Held: 1. That the application failed because the applicant did not discharge the onus on him to establish sufficient facts justifying the making of the order;

2. That an applicant for leave to apply for a prerogative order must act with the utmost good faith to the Court and an application pursuant to leave obtained by an applicant who has not so acted is liable to dismissal summarily without the merits being considered; and that as this applicant had failed to disclose to the Court a very material fact, *i.e.*, the 1957 settlement, at the time he was seeking *ex parte* leave to make the application, the application also failed on this ground.

Application dismissed.

Case cited:

The King v. *Kensington Income Tax Commissioner* (1917) 1 K.B. 486.

Abeokuta Suit No. AB/34/59.

E. A. Cole, for applicant.

Soetan, for first respondent.

Osinowo, for other respondents.

Charles, J.: This is an application for an order of *certiorari* to quash a list of approved chiefs of Iporo township, dated the 26th June, 1959, and made by the first named respondent. The other thirty-one respondents are persons who would be affected if the order sought is made.

The list which is sought to be quashed is headed "The following chiefs are the recognised chiefs in Iporo township, Abeokuta". Then follows three lists of chiefs and below them appears: "Approved Ademola II, The Alake of Abeokuta 26th June, 1959".

The order of *certiorari* is sought on grounds which may be shortly summarised as follows: That the first respondent, the Alake, had no jurisdiction under Part III of the Chiefs Law, 1957 to approve of the appointment of Adekunle Coker as the Oluwo, of Ogundele, since deceased, as Apena, R. M. Bamgbola as Jagunna, and Adebisi as Seriki because those offices were held by the applicant, Ajala Idowu, Alakinde Akinrinlowo and Tijani Akintola respectively, they having been duly appointed according to customary law and approved by the Alake and never having been deposed, and because those who had been approved in their stead had not been appointed by customary law.

A further ground was that the office of Balogun, being held by one Oke Sodeke, was not shown in the list and thereby Oke Sodeke was purportedly dismissed from the office. Non-compliance with the rules of natural justice in the compilation of the list constitutes another ground.

The applicant has deposed in a long affidavit to the following:—That he had been duly selected as Oluwo in succession to one Akinwande Thomas after the latter's death in 1956, was presented to the Alake on the 3rd April, 1958, and was installed on the following day: that Ajala Idowu was duly appointed as Apena and was installed in 1956 after confirmation of his appointment by the Alake; that on the following day Ogundele presented himself to the Alake in the regalia of Apena and the Alake seized the regalia from him; that Alakinde Akinrenle was duly appointed Jagunna in December 1958 after R. M. Bamgbola had been deposed from that office with the approval of the Alake; that Tijani Akintola had been installed as Seriki in 1958 after the customary ceremonies had been performed and the customary presents had been offered to and received by the Alake: that Oke Sodeke was orignally installed as Balogun in 1954 but ceased to function as a result of a court order until he was properly installed, which event happened on the 22nd October, 1956: and that neither the applicant nor any of the other four persons had been deprived of his office since his appointment.

In a counter-affidavit by three of the persons affected the following was deposed to:—That Adekunle Coker was duly selected and appointed Oluwo in December 1956, and his appointment was approved by the Alake, in succession to Akinwande Thomas on the latter's death: that Ogundele was duly selected and appointed Apena: that R. M. Bamgbola was duly appointed Jagunna in 1949: that Adebisi was appointed Seriki in 1956: that the applicant was never appointed Oluwo but held the office of Lisa: that Ajala Idowu, Makinde Akinrinlowo and Tijani Akintola had never been appointed to the respective offices alleged by the applicant: that Oke Sodeke was not re-selected as Balogun after the court order as he would not accept certain conditions which were imposed for his re-selection: and that when the applicant and others started to assume wrong chieftaincy titles in 1957 Adekunle Coker and others sued them and the litigation was referred for settlement to the Alake who then made a settllement.

The Alake deposed in an affidavit as follows: That since 1920 he has been approving and disapproving, and settling disputes as to, the appointment of minor chiefs in Abeokuta: that he was appointed a Prescribed Authority for those purposes under the Chiefs Law, 1957 in 1958: that on the 15th December, 1957 the Iporo chieftaincy dispute was referred to him for settlement and he then settled it as shown in a minute exhibited: and that the challenged list is a copy of extracts from that minute which were supplied to the police at their request. The minute of settlement shows that the Alake had approved appointments identical to those contained in the challenged list.

From the welter of allegations, denials and counter-allegations made in the affidavits the following at least clearly emerges: That in 1957 there was a chieftaincy dispute which was the subject of litigation: that that litigation was referred to the Alake: and the Alake determined it by making the appointments which subsequently were repeated in the challenged list. The respondents' affidavits are uncontradicted and are corroborated by exhibits, as to those matters.

I am also satisfied that the challenged list was made by the Alake in purported exercise of his power to approve the appointment of minor chiefs as a Prescribed Authority under the Chiefs Law, 1957. A copy of that document may well have been sent to the police, and as a result of the police reporting the applicant's claim, but, having regard to its form, it seems most improbable that it was prepared solely for the information of the police. Had that been its sole purpose it is to be expected that it would not have been signed by the Alake under the word "approved", and over a different date to that of the settlement, but would have been merely certified by the Alake's private secretary. The paragraph in the Alake's affidavit savours of deception and suggests a lack of appreciation of his duty both to the Alake and to the Court on the part of its draftsman.

It is also a matter for comment that whoever prepared the Alake's affidavit saw fit to leave it silent as to the applicant's allegations that he and others were approved in 1958 by the Alake in the appointments to which these proceedings relate, and that the Alake had removed Ogundele's regalia from him. If anyone would know whether he had received customary gifts from the applicant and others and had approved the applicant and the others at any time in the challenged appointments it would be the Alake himself.

Those criticisms, however, do not dispose of the case in favour of the applicant. It is for him to prove the facts upon which he relies as justifying an order of *certiorari*, assuming, without deciding, that on those facts he could obtain such an order. That onus the applicant has failed to discharge. Having regard to the settlement and approvals given in 1957 it seems to me improbable, in the absence of any explanatory evidence to the contrary, that the Alake resiled from those approvals in 1958 by approving the applicant and the others in the challenged offices. Consequently, I am unable to place any reliance upon the applicant's affidavit and to arrive at any findings of fact favourable to the case which he has sought to make out by that affidavit. On that ground this application fails.

It also fails on the ground that the applicant, when seeking *ex parte* for leave to make this application failed to disclose to the court the settlement and approvals of 1957, very material facts as already indicated. It cannot be stressed too strongly that applicants for leave to apply for prerogative orders must act with the utmost good faith to the Court and applications pursuant to leave obtained by applicants who have not so acted are liable to dismissal summarily without the merits being considered. (*The King* v. *Kensington Income Tax Commissioner* (1917), 1 K.B. 486 C.A.). I consider this a proper case to enforce that liability.

The application will be dismissed.

Application dismissed.