FEDERAL REPUBLIC OF NIGERIA

Law Reports

of the High Court of Lagos

1966

To be cited as 1966 L.L.R.

1970

Published by High Court of Lagos and
Printed by The Federal Government Printer, Lagos

TABLE OF CASES REPORTED

N

O

R

S

T

U

TABLE OF CASES REFERRED TO

A

B

C

G

H

I

K

L

M

N

O

R

S

T

V

W

TABLE OF STATUTES

ORDER IN COUNCIL

RULES AND REGULATIONS

(1966) INDEX OF SUBJECT MATTER

HIGH COURT, LAGOS

MELVILLE EKUNDAYO KUSHIKA ROBERTS .. .. PLAINTIFF/RESPONDENT

v.

1. THE ATTORNEY-GENERAL OF THE FEDERATION
(*a*) ALHADJI SULE KATAGUM
(*b*) ALHADJI YESUFU JEDA
(*c*) GEORGE S. SOWEMIMO } DEFENDANTS/APPLICANTS

(SUIT NO. LD/375/65)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J.; 3rd January, 1966]

Jurisdiction—Federal Commissions (Privileges and Immunities) Act, 1963—"in the due exercise of their duties"—Order XXVIII High Court (Civil Procedure) Rules.

The plaintiff, following allegations made against him, which he denied, was on 29th January, 1965, served with a notice calling upon him to retire under the provisions of section 9 (1) of the Pensions Act by the second, third and fourth defendants. The plaintiff proceeded on leave on 1st February, 1965 but in spite of the notice of 29th January, 1965, he was again called upon to resume duties as Deputy Inspector-General of Police. On 10th May, 1965 he received another notice from the Police Service Commission intimating the intention of the Commission (the last three defendants are members of the Commission) to retire him under section 9 (1) of the Pensions Act. The plaintiff on receipt of this notice protested and questioned the right of the Commission to proceed as suggested. The plaintiff was later served with a letter confirming his removal from service under section 9 (1) of the Pensions Act, and brought an action to declare his removal illegal. The defendants brought an application under Order XXVIII of the High Court (Civil Procedure) Rules for an order dismissing the suit "without any answer upon the questions of fact being required from the applicants" on three grounds :

(*a*) that the Court had no jurisdiction to entertain the proceedings against the 2nd, 3rd and 4th defendants ;

(*b*) that the proceedings disclosed no cause of action ;

(*c*) that the proceedings were frivolous and amounted to an abuse of the process of the Court.

HELD : (*i*) that if the act of the Police Service Commission compelling the respondent to retire under section 9 (1) of the Pensions Act was an act done "in the due exercise of" the duties of the Commissioners as the Police Service Commission, the action could be maintained against them.

(*ii*) that where an appropriate action is brought in the High Court in which the plaintiff averred that a report was not called from his Head of Department or that he was not asked to reply to complaints made against him (in accordance with the provisions of the General Orders which govern the acts of the Commission) the Court would be competent to hear and determine the action.

(*iii*) that the Courts were bound in appropriate actions to entertain the complaint that the Commission did not act "in due exercise of their duties".

(*iv*) that the word "due" must be given a meaning equivalent to "proper", "correct" or some such word denoting that the Commission must act within the scope of the powers given to it.

(*v*) that a plaintiff who averred that his services were brought to an end not by virtue of the provisions contained in the General Orders which govern the acts of the Commission, but under section 9 (1) of the Pensions Act, had disclosed a cause of action and his claim could not be said to be frivolous or that the Courts could not entertain it.

Application dismissed.

Statute and Rule referred to :

Pensions Act, Cap. 147, *Laws of Nigeria* (1958 *edition*)

Order XXVIII, High Court (Civil Procedure) Rules.

Peter Thomas for the plaintiff.

Y. A. O. Jinadu for the defendants.

(*Note :* This Judgement was upheld on appeal to the Supreme Court in S.C.749/1966 decided on 28-4-67).

RULING

TAYLOR, C.J. :—The applicants move under O.XXVIII of the High Court Rules and what Mr Jinadu described as the inherent powers of the Court for an order dismissing the suit "without any answer upon the questions of fact being required from the applicants on the following grounds :—

(*a*) that the Court has no jurisdiction to entertain these proceedings against the 2nd, 3rd and 4th defendants/applicants;

(*b*) that the proceedings disclose no cause of action against the defendants/applicants;

(*c*) that they are frivolous and an abuse of the process of the Court."

The provisions of Order XXVIII are as follows :—

> (1) "Where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him."

To my mind, the important words in this rule are the words, "so that even if the allegations of the plaintiff were admitted or established," and the importance of them is further stressed in the next rule which provides that :—

> (2) "*For the purposes of such application*, the defendant *shall be taken as* admitting the truth of the plaintiff's allegation, and no evidence respecting matters of fact, and no discussion of questions of fact shall be allowed."

I have underlined the words "For the purposes of such application" and "shall be taken as admitting" to indicate the important matters in this rule. It is also important to bear in mind that no discussion of questions of fact should be allowed at the hearing. Now what are the facts as alleged by the plaintiff/respondent and which, for the purposes of this application, the respondents must be, or to use the words of the relevant rule "shall be taken as admitting the truth." Paragraphs 1, 3 to 5, parts of 6 and the portion in 10 relating to the respondent's age and 11 to 21 set out facts on which the respondent relies and which shall be taken as admitted. The most material ones however for the purposes of this application are, in my view, the following :—

(1) *Paragraph* 10 as to the age of the respondent being 48 at the time of this action

(2) Paragraph 11 which avers that :—

> "The plaintiff following certain allegations against him which were at the time and still are denied by him, was on the 29th January, 1965 served with a notice calling upon him to retire under the provision of 9 (1) of the Pensions Act by the 2nd, 3rd and 4th defendants. A copy of this letter is attached and marked exhibit "A".

Now section 9 (1) of the Pensions Act Cap. 147 is a provision dealing with retirement by the officer being given six months notice in writing. The plaintiff does not aver, nor is it alleged that he did retire under s. 9 (1) aforesaid. He then proceeded on leave on the 1st February, 1965 and the same plaintiff respondent who had been called on in January to retire is now called upon three months later to resume duties as Deputy Inspector-General of Police as per paragraph 13 of the Statement of Claim which states that :—

> "On the 26th April, 1965, the plaintiff was informed by the Inspector-General of Police that the Police Service Commission of which the 2nd, 3rd and 4th defendants

> are members, had ruled that on the expiration of his leave the plaintiff should resume duties as the Deputy Inspector-General of Police and on the 28th day of April, 1965, the plaintiff did so resume duties."

(3) *Paragraph* 15 then avers that on the 10th May, 1965 the respondent was served with a notice of intention by the Police Service Commission to retire him under section 9 (1) of the Pensions Act. The respondent wrote Exhibit D in reply to this notice the relevant portions of which are paragraphs 7 and 8 which state *inter alia* that the exercise of the powers under s. 9 (1) of the Pensions Act is vested in the Federal Minister of Establishments and that those powers have not been delegated to the Police Service Commission. In reply to this, paragraph 17 of the Statement of Claim avers that :—

> "As a result of Exhibit D, the plaintiff was invited by the 2nd defendant to his office and then he (the plaintiff) was threatened with removal in accordance with Section 04114 of the General Orders."

Now, as I have said, and I repeat, all these averments shall be taken as admitted. General Order 04114 also deals with enforcement of retirement but lays down certain conditions which must be complied with. Be that as it may, paragraph 21 of the Statement of Claim goes on to aver that on the 23rd June, 1965, the plaintiff was served with Exhibit G confirming his removal under s. 9 (1) of the Pensions Act, and this, the plaintiff seeks to declare illegal in the substantive suit.

It was submitted by Mr Jinadu that the Court has no jurisdiction to entertain these proceedings against those defendants who constitute the Police Service Commission by virtue of s. 1 of the Federal Commissions (Privileges and Immunities) Act 1963 which provides that :—

> "No member of a Commission shall be liable to be sued in any Court of law for any act done or omitted to be done in the due exercise of his duties as such Member."

If the act of the Police Service Commission compelling the respondent to retire under s. 9 (1) of the Pensions Act is an act done "in the due exercise of" the duties of the Commissioners as the Police Service Commission then without doubt this action cannot be maintained against them. The respondent's contention and his whole case is based on allegations that the Police Service Commission in acting as they did were exercising powers vested

not in them but in the Federal Ministry of Establishments. On the other hand Mr Jinadu's contention is that the Police Service Commission regarded compulsory retirement under s. 9 (1) of the Pensions Act as a form of disciplinary action. I have said earlier that paragraph 17 of the Statement of Claim must for the purposes of this application be taken as admitted. It is in that paragraph that the Chairman of the Police Service Commission is said to have threatened the respondent with removal under Section 04114 of the General Orders. As far as I am aware from a perusal of the General Orders, and reference has not been made by Mr Jinadu in his address or in his motion to any other section of the General Orders, this section is the relevant one dealing with the powers of the Commission to enforce retirement of an officer and it reads thus :—

> "Notwithstanding the provisions of this chapter of the General Orders, if the Federal Public Service Commission considers that it is desirable in the public interest that an officer should be required to retire from the service on grounds which cannot suitably be dealt with by the procedures laid down in General Orders 04107 and 04108, it shall call for a full report from the Heads of the Departments in which the officer has served ; and if, after considering that report and giving the officer an opportunity of submitting a reply to the complaints by reason of which his retirement is contemplated, the Commission is satisfied having regard to the conditions of the Service, the usefulness of the officer thereto and all other circumstances of the case, that it is desirable in the public interest so to do it may require the officer to retire, and the officer's service shall accordingly terminate on such date as the Commission shall specify. In every such case the question of Pension will be dealt with under the Pensions Act 1958 (Cap. 147)."

It can be seen here that provision is made to ensure that an officer is not dismissed or his services terminated without a report being submitted by the Head of Department and more important still without giving the officer an opportunity of being heard. Now supposing the Commission were to act under this Order and terminate the officer's services without either calling for a full report from the Head of the Department or for an explanation from the officer, can it be said that the Commission was acting "in due exercise" of its duties ? Surely not. Can it be further said that, where an appropriate action is brought in the High Court and the plaintiff avers that a report was not called for from his Head of

Department or that he was not asked to reply to the complaints made against him, the Courts cannot hear his complaint and determine whether the Commission did so act in the due exercise of its duties ? Again the answer to this can only be in the negative. Then again in Orders 04107 and 04108 which are referred to in Order 04114, elaborate provisions are contained therein to ensure that officers holding junior and senior posts in the Service are not dismissed without certain conditions and formalities being complied with. I have no doubt that if any of these formalities are not complied with, the Courts are in appropriate actions bound to entertain the complaint of the complainant that the Commission have not acted "in the due exercise of their duties." The result of all this can only mean that the word "due" must be given a meaning equivalent to "proper", "correct" or some such word denoting that the Commission must and I repeat must act within the scope of the powers given to it. If it steps outside those powers, then again I say in an appropriate action the Court will assume jurisdiction. Mr Jinadu was unable to give a meaning to the word "due." While conceding as he must that in interpreting an enactment it must be presumed that parliament has not used any word in vain, he proceeded to give or insert different words for the words "in the due exercise of," and those words were "while performing." It is obvious that "while performing" also covers the words "in the exercise of" with the result that no meaning has been ascribed to the word "due."

Bearing that interpretation in mind as well as the examples I have given, can it with any degree of seriousness be said that a plaintiff who avers that his services were brought to an end not by virtue of the provisions contained in the General Orders which govern the acts of the Commission but under s. 9 (1) of the Pensions Act, which provides that :—

> "It shall be lawful for the Governor-General to require an officer to retire from the public service of the Federation at any time after he attains the age of forty-five subject to six months notice in writing of such requirement being given to the officer by the Governor-General."

has disclosed no cause of action, or that his claim is frivolous or that the Courts cannot entertain it because the Commission has acted "in the due exercise" of its duties ? I think not. I am aware of the argument put forward by Mr Jinadu that the Commission in the words of paragraph 8 of the affidavit :—

> "regards compulsory retirement under section 9 (1) of the Pensions Act as a form of disciplinary action."

The General Order 04114 which I have cited refers to the Pensions Act only for the purposes of determining the pension due to the officer retiring. I have been unable to find, and Mr Jinadu has not referred me to any provision empowering the Commission to use s. 9 (1) of the Pensions Act as a mode of dealing with or disciplining an officer. The difference between the provisions of s. 9 (1) and the General Orders to which I have made reference is really too patent to set out, but I find that I should in the circumstances of this application. In s. 9 (1) all that is required is the giving of six months notice to the officer concerned, and having reached the retiring age no explanation would be required of him, but under the General Orders the Commission is obliged to comply with the formalities which I have enumerated and the officer is entitled to be heard. Mr Jinadu has made no endeavour to show me that the powers exercisable under s. 9 (1) of the Pensions Act can also be exercised by the Commission by delegation or under any provision of the law.

It is said at page 353 of the *9th Volume of the 3rd Edition of Halsburys Laws of England* that :—

> "The right of the subject to have access to the courts may be taken away or restricted by statute, but the language of any such statute will be jealously watched by the courts and will not be extended beyond its least onerous meaning unless clear words are used to satisfy such extension."

In my view there is no merit whatsoever in this application as far as the Police Service Commission is concerned and I dismiss it. Different considerations however apply to the 1st defendant. Beyond the averment in paragraph 2 of the Statement of Claim that :—

> "The first defendant is sued as representing the Federal Government of Nigeria."

there is no allegation of any step or action taken by the 1st defendant personally or as representing the Federal Government of Nigeria, and nothing has been said by Mr Peter Thomas to justify the 1st defendant being made a party to this action. I therefore order that he be dismissed from the suit.

I want to make it clear that there has been no argument before me, nor is the motion brought on any point challenging the nature of the action and I am therefore not in any way deciding whether this is the appropriate form of action or not.

HIGH COURT, LAGOS

STELLA OLAYINKA DURODOLA .. PETITIONER

v.

MICHAEL BABATUNDE DURODOLA .. RESPONDENT

MISS KUNBI OLAGBAIYE .. .. .. INTERVENER

(SUIT NO. WD/23/65)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J. ; 4th January, 1966]

Husband and wife—dissolution of marriage—Matrimonial Causes Act 1963—*Collusion—agreement between parties to prosecute petition on certain conditions.*

The petitioner prayed for dissolution of her marriage with the respondent on the grounds of adultery with the intervener and other women. The intervener filed a reply denying the alleged adultery and the respondent filed his answer also denying the allegations of adultery and charged the petitioner with adultery with several persons. He averred in respect of a paragraph of the petition which stated that the petition was not presented or prosecuted in collusion with the respondent, as follows :

"With regard to paragraph 14 of the petition he avers that the petitioner in or about February 1965 approached him in the presence of a friend and requested him to set a divorce proceeding ball rolling and that she would not oppose it provided that he would not allow the press to give publicity to the matter as she feared scandal relating to a charge of adultery".

After the Registrar's certificate was obtained the Petitioner filed a Summons under Rule 2A of the Matrimonial Causes Rules, 1957, praying that the Court do take into consideration the agreement or agreements made between the parties as set out in the supporting affidavit. The affidavit stated that the parties had met and the respondent agreed to withdraw his answer and cross petition if the petitioner did not press her claim for maintenance.

HELD : (After consideration of the few authorities on the point) that the proper order to make was one requiring the parties and their counsel to give an undertaking that the proposals would not be implemented, and this as a condition precedent to allowing the suit to proceed.

Editor's Note : This case is reported to show what matters a Judge should examine and what orders he could make in a case where the parties have made agreements under section 4 of the Matrimonial Causes Act, 1963.

Statutes and Rules referred to :

Matrimonial Causes Act 1950.

Matrimonial Causes Act 1963.

Matrimonial Causes Rules 1957.

Cases referred to :

Head v. Cox (1964) 2 *W.L.R.* 358.
Nash v. Nash (1965) 2 *W.L.R.* 317.

A. A. Ariori for the petitioner.

J. Olu Awopeju for the respondent.

RULING

TAYLOR, C.J. :—On the 18th May, 1965, the petitioner filed a petition praying for the dissolution of her marriage to the respondent on the 26th August, 1961 on the grounds of adultery with the Intervener and other women. In her prayer she also asks for the custody of the only child of the marriage, alimony *pendente lite* and maintenance for herself and the child.

A reply was filed by the Intervener on the 8th June, 1965 denying the allegations of adultery. On the 19th June, 1965 the respondent filed an Answer denying the allegations of adultery and alleging that the petitioner has committed adultery with several persons. Paragraph 9 of the Answer is of particular interest in the matter under consideration. It reads thus:—

> "With reference to paragraph 14 of the Petition he avers that the petitioner in or about February 1965 approached him in the presence of a friend and requested him to set a divorce proceeding ball rolling and that she would not oppose it provided that he would not allow the press to give publicity to the matter as she feared scandal relating to a charge of adultery."

Now this paragraph is in answer to paragraph 14 of the Petition which reads thus :

> "That this petition is not presented or prosecuted in collusion with the respondent."

This paragraph, *i.e.* 14, is not specifically admitted or denied in the Answer, and paragraph 9 quoted above is the only answer made to paragraph 14 of the petition.

The respondent in his cross petition also prays for a dissolution of the said marriage on the ground of adultery committed by the petitioner. He also asks for the custody of the child of the marriage.

After the Registrar's certificate was obtained, the Petitioner filed a Summons on the 8th December, 1964, under Rule 2A of the Matrimonial Causes Rules 1957, praying that the Court do take into consideration the agreement or arrangements made between

the petitioner and the respondent as set out in the accompanying affidavit. Now the affidavit was sworn to, not by the petitioner herself but by learned Counsel representing her. I am of the view that the material portions of this affidavit are matters which should have been sworn to by the petitioner herself and not by learned Counsel representing her. In this respect I refer particularly to paragraphs 7, 10, 11 and 12 of the said affidavit in which denials are made in respect of allegations of adultery levelled against the petitioner by the respondent and said to have been committed in Ghana and the United Kingdom. Be that as it may, the affidavit states in paragraphs 13, 14 and 15 that the parties had met and the respondent agreed to withdraw his Answer and the cross petition if the petitioner did not press her claim for maintenance. As a result of the meetings the following four points were formally agreed upon :—

(*i*) The claim for maintenance for the petitioner should stand adjourned generally.

(*ii*) Custody of the child to be given to the petitioner and an award made for the child's maintenance.

(*iii*) Arrangements to be made for the child's education and this to be agreed upon by the parties, and

(*iv*) The Answer and cross petition are to be withdrawn.

During the hearing of this application, my attention was drawn to two cases of some importance on this newly trodden field of the Divorce Law created by s. 4 of the Matrimonial Causes Act of 1963 amending s. 4 (2) of the 1950 Act.

In the case of *Head v. Cox* 1964 *W.L.R.* 358 the facts stated shortly at page 359 were as follows :—

The learned Judge then goes on to state three matters to which a Judge's mind should be devoted in the consideration of this matter, at the same time making it quite clear that this was no attempt by him to lay down with completeness or precision the principles which should be examined. The three matters are these :—

1. Whether the agreement was likely to lead to a result contrary to the justice of the case.

2. Whether any children of the family might be prejudiced by implementing the agreement.

3. Whether the parties had treated the Court with complete and unreserved candour.

The other case to which my attention was drawn is the case of *Nash v. Nash* 1965 2 *W.L.R.* 317, and in this respect I quote from the Judgement of Scarman J. at page 321 where he said *inter alia* that :—

> "The application cannot achieve its purpose of saving time and expense unless parties treat the Court with the 'complete and unreserved candour' of which Wrangham J. speaks in *Head v. Cox.* The evidence in support must not only be true as far as it goes ; it must reveal all that is known upon the following topics : (1) the agreement or arrangement, and its intended consequences for the parties, (2) the financial circumstances of husband, wife and children, in sufficient detail to enable the Court to form a view as to the reasonableness of the provision made for them, (3) the nature of the suit, an assessment of the strength of the parties' respective cases and available defences."

From the report of the case of *Head v. Cox* to which I have already made reference all the parties were represented in the agreement and in this I include Counsel for the party cited. In the matter before me the intervener has not been made a party and consequently no appearance is made on her behalf. That however presents little or no difficulty for what I am most concerned with is whether I can say, in the words of Wrangham J. that the parties have treated the Court with complete and unreserved candour. In paragraph 10 of the petition filed on the 18th May, 1965 the petitioner alleges that the respondent has committed adultery with the intervener as a result of which the latter was pregnant for the respondent. In a reply filed by the intervener on the 8th June, 1965, she stated in paragraphs 3 and 4 of her answer as follows :—

> "3. That paragraph 10 of the said petition is not only untrue but is embarrassing, scandalous and defamatory and that she would contend at the trial of the Suit that the said paragraph be struck out."
>
> 4. That the intervener (falsely and wrongly so called) avers that she has never at any time had any improper or adulterous association with the respondent herein and roundly denies the charge of adultery made against her in the aforesaid paragraph 10 of the petition."

A few days after this, the respondent filed his answer and cross petition and stoutly denies paragraph 10 of the petition. He has filed no discretion statement and does not seek the exercise by the

court of its discretion in his favour. Now some six months after this an agreement is reached and in the motion and affidavit filed, the petitioner alleges that the intervener has delivered the child referred to in paragraph 10 of the petition then en ventre sa mere ; and that the respondent bore the medical expenses in respect thereof. The respondent has filed no counter affidavit or affidavit in support nor has his counsel in any way made any admission in respect of these allegations, and finally I have no statement from his Counsel or affidavit from him that his allegation of adultery levelled at his wife, whom he described in his Answer in these strong words as someone :—

> "..... who is more obsessed with the gratification of her sensual and sexual lust in a most promiscuous and unbashful manner."

is mere fiction and untrue. If there is any basis for its truth and this were proved at the hearing then of course the failure of the petitioner to file a discretion statement may very well spell doom to her petition.

I am very far from satisfied that the parties to this petition have been frank in any way with the Court on the affidavits and pleadings before me. I am not satisfied that the justice of the case will be met by my subscribing my approval to this agreement. The courses open to a Court in such circumstances are set out in *Nash v. Nash* (supra) at page 321 in these words :—

> "The purpose of the rule is to save time and expense by enabling parties to obtain a ruling before trial. Such applications are no substitute for trial : they leave undiminished the trial judge's duty of inquiry, they do not in any way fetter his discretion. Nevertheless, upon such an application, the court possesses considerable powers : it may, *inter alia :*
>
> (1) dismiss the petition, if of the opinion that there has already occurred, in the suit, collusion causing an "irremediable perversion of the course of justice" :
>
> (2) require the discharge of the agreement or an undertaking that the proposals will not be implemented as a condition of allowing the suit to proceed :
>
> (3) approve the agreement or arrangement and give consequential directions as to the conduct of the suit :

(4) adjourn the application to the trial judge :
or

(5) simply make no order upon the application."

After a full consideration I am of the view that the most appropriate order to make is the second of the five just stated and I call on the parties and their Counsel to give an undertaking that the proposals will not be implemented and this as a condition precedent to allowing the suit to proceed.

Ariori on behalf of the Petitioner: I hereby give my undertaking that the Agreement will be discharged.

Awopeju: I give an undertaking that the Agreement will be discharged.

Court : On this condition I order the Petition to proceed to hearing and will fix a hearing date for it.

Ariori says the Petitioner is now in France on a Study Course and will be there for 2 years. Would like a date for mention in May.

Court : Petition is fixed for hearing on 28th July, 1966.

> "The wife petitioned for divorce on the ground of cruelty. By his Answer, the husband denied the allegation, cross-charged the wife with cruelty and adultery with the party cited and prayed for divorce in the exercise of the Court's discretion in respect of adultery admitted by him. The wife denied both cruelty and adultery, the party cited denying the adultery alleged against him. Before the hearing of the suit began it was compromised by a collusive agreement made between Counsel representing the parties."

The facts of the agreement are shortly set out at pages 358-359 as follows :—

> "By that agreement, the wife and the husband each abandoned a charge of cruelty alleged against the other ; the husband abandoned a charge of adultery against the wife and the party cited ; the husband consented to the wife proceeding on an undefended basis by amending her petition to allege adultery between him and an unnamed woman as disclosed in his discretion statement, the wife undertook to apply for her claim to maintenance to be dismissed : the husband having abandoned his prayer for relief in the suit, also undertook to abandon all claim

> to an interest in the matrimonial home and agreed to pay the wife's costs and a specified sum in respect of the costs of the party cited, who was to be dismissed from the suit."

In delivering his Judgement Wrangham J. said *inter alia* at page 360 of the report :—

> "I was told that this is the first case in which the question has arisen in this form and that, therefore, no guidance could be found for me upon the question what principles should be applied in considering how the discretion of the court should be exercised."

HIGH COURT, LAGOS

1. SIMBIATU ATINUKE
2. TAORIDI AYINLA
3. SIDIKATU ABENI
4. MUNIRU ATANDA
5. FATAI BABATUNDE OSHODI

.. PLAINTIFFS

v.

1. YISA BOLAJI OSHODI
2. SADATU OSHODI
3. SULEMONU AKANBI OSHODI
(Trustees/Executors of the Estate of Lawani Folami Oshodi (Dcd.))

.. DEFENDANTS

(SUIT No. LD/237/65)

[HIGH COURT, LAGOS: G. S. SOWEMIMO, J.; 1st February, 1966]

Will—construction of will—survivorship.

The deceased made a will in the following terms:

"..... The remaining two parts (that is to say two-thirds) to be withdrawn and distributed in equal shares among my children namely: ABDULAI, AMODU TIJANI, YESUFU ISHOLA, SABITIYU, ABUSATU, SADATU, SABALEMOTU, SULAIMAN AKANBI and BRAIMOH BABATUNDE"

Of the nine children five died after the death of the deceased and the question to be decided was whether the bequest of two-thirds of the rents which were to be collected from the properties mentioned were to be shared among the remaining four children, or, as the plaintiffs contended, among the remaining children as well as the children of the five deceased children.

HELD: that the bequest as regards the two-thirds was to be shared equally; the testator himself created a common interest and the question of legal survivorship did not arise. The share of an individual would devolve on his death as part of his estate.

Ibobi (holding *D. Balogun's* brief) for the plaintiffs.

Mrs Williams for the defendants.

JUDGEMENT

SOWEMIMO, J.:—In this suit the plaintiffs claim as against the defendants, three reliefs:—

(1) an account of all the rents accruing from all the houses and landed properties, left under the Last Will and Testament of one Lawani Folami Oshodi (Dcd.).

(2) the distribution of the assets among the plaintiffs and other children and grandchildren of the said Lawani Folami Oshodi (Dcd.) and payment over what is found due to the plaintiffs.

(3) an impounding order against what is found due to the defendants.

The plaintiffs are the grandchildren of the deceased, the probate of whose will was tendered by consent of both parties as Exhibit "A". The parties agreed, without calling evidence, that the issue to be determined is a question of construction of the Will. In other words a matter of law.

It is the contention of the plaintiffs, that they, being grandchildren, are entitled to that portion of the share of the bequest which was made to their parents, by their grandfather. The defendants on the other hand, who were appointed Trustees some time in 1959, contended :—

> "The defendants will rely at the trial of this action on the legal doctrine of survivorship."

The portion of the Will which was the matter of legal argument and construction, reads as follows. Apart from the portion quoted in paragraph 5 of the Statement of Claim the following portions are also material :—

> "At the end of one year after my death and at the end of every succeeding year I authorise my Trustees to divide into three equal parts the income accruing from rents collected and deposited in the Bank ; one part (that is to say "one third") to be retained in the said Bank. And out of it to carry out any necessary repairs to the said properties ; to pay water and improvement rate ; to pay rents on leasehold property as they become due ; to pay farm labourers ; to render some financial assistance to any member of my family whenever an occasion to do so shall arise (that is to say if there shall be any funeral or Marriage Ceremonies to be performed) and my said Trustees shall be the sole judges of what occasion deserves such financial assistance and what sum of money to be given as an assistance....."

And the relevant one which is the subject matter of this case I quote :—

> "The remaining two parts (that is to say two-thirds) to be withdrawn and distributed in equal shares among my children namely :—ABUDULAI, AMODU TIJANI, YESUFU ISHOLA, SABITIYU, ABUSATU, SADATU, SABALEMOTU, SULAIMAN AKANBI and BRAIMOH BABATUNDE."

The defendants admit that out of the 9 children left by the Testator, five have died after the deceased and four only remain.

What, therefore, is to be decided is whether the bequest of two-thirds of the rents which are to be collected from the properties mentioned, are to be shared either by the four remaining children or as the plaintiffs contend, by the four remaining children as well as the grandchildren of the five deceased children.

The law as to the construction of wills is well set out by Ker on WILLS, PROBATE AND ADMINISTRATION, and I refer to this relevant portion on page 187 :—

> "When a gift is given to several people it must be decided first whether the testator intended them to enjoy it concurrently or in succession. But, assuming that this has been done, and that their interests are concurrent we must consider the two types of concurrent interest now recognised by the law. There are joint interests and interests in common. Where they are joint each beneficiary has a right to the entire gift ; where they are in common each has only a share of the gift and no more. The distinction at first may seem unnecessary because if a donee of a joint gift wants to take out his interest he can and must "sever" the gift, that is turn it into a gift in common and then take his share ; so that as far as enjoyment is concerned there has to be a dividing up some time. *But the important difference between them is this. If a joint tenant dies without severing his interest the latter passes automatically to the surviving joint tenant or tenants. This is never the case with an interest in common ; each donee's share will devolve on his death as part of his estate.*"

It has been indicated in that portion of the Will which I have referred to that the bequest as regards the two-thirds was to be shared equally, in other words the Testator himself created a

Common Interest and the question of legal survivorship does not arise at all. The share of a particular individual will devolve on his death as part of his estate.

If my construction of the law is right then the Plaintiffs are entitled to succeed on the 1st and 2nd reliefs they sought. An account must be filed within one month from the time probate was obtained, that is the 27th March, 1932 up to date showing all the rents collected in respect of properties named in the Will. The Plaintiffs will be given leave to falsify and surcharge such accounts within 14 days after filing and service on them. After both parties are satisfied as regards the account filed the case should be listed before the Court for a final order on the 28th February, 1966.

With regards to the third relief, which asks for an impounding order against what is due to the Defendants, I do not see how I can make an order for such a relief except of course where it is shown that they are not entitled to any share whatsoever.

I will in the meantime not award costs, until this case comes finally for consideration on the 28th February, 1966. I shall ask that the Probate Registrar be served with a copy of this Judgement so as to check up whether any administration account has been filed as provided by Rules of Court, since the grant of the Probate, in this case.

HIGH COURT, LAGOS

DAISY M. NORMAN-WILLIAMS .. .. PETITIONER

CHARLES MODUPE NORMAN-WILLIAMS RESPONDENT

YINKA COKER .. .. WOMAN CITED

(SUIT NO. WD/37/62)

[HIGH COURT, LAGOS: G. S. SOWEMIMO, J.; 7th February, 1966]

Husband and wife—Judicial separation—Setting aside of order obtained against a party in his absence—Re-hearing distinguished from reversal of an order—Extension of time for doing an act.

The application was made as a result of a petition brought by the respondent for judicial separation. The applicant's solicitor filed the necessary papers in answer to the petition. It was discovered that the proper procedure had not been followed and that it was necessary that an extension of time would have to be asked for to enable the respondent to perfect the condition precedent to entering an appearance and filing an answer to the petition. Before this could be done the respondent's solicitor took ill and had to leave Nigeria. The respondent himself was posted to Brazzaville outside Nigeria. When the petition came up for hearing it was treated as an undefended cause, and evidence was taken in the absence of the respondent, judicial separation was granted and, an alimony of £166-13*s*-4*d* a month awarded in favour of the petitioner.

The respondent thereupon applied by motion under Order XL rule 5 for an order setting aside the judgement obtained against him in his absence.

HELD : (*i*) That a re-hearing must be distinguished from a reversal of an order for a decree of judicial separation; that it would be wrong for a Judge who has decreed judicial separation to sit on the case again and order a reversal of his order. In doing so he would be sitting on appeal over his judgement.

(*ii*) A Court may order a re-hearing of a matter provided for by the Rules of Court, but it would be wrong for it to order a reversal of its own order when no special or specific order or rule has made provision therefor.

(*iii*) That by virtue of Order XI rule 3 of the High Court Rules, the Court had power to extend the period for the acceptance of application in the case as also of granting an application for a re-hearing of the matter.

Extension for 14 *days notice under Order XXXVI granted.*

Statute and Rules referred to :

High Court of Lagos Act, Cap.

Matrimonial Causes Rules 1957.

High Court of Lagos (*Civil Procedure*) *Rules.*

Case referred to :

Oram v. Oram (1923) 39 *Times Law Report* 332.

D. Coker for the respondent/applicant.

Okafor for the petitioner/respondent.

RULING

SOWEMIMO, J.—This is a motion which came for hearing on the 10th January and was further adjourned for argument and affidavit by the leading Counsel for the applicant, Chief Moore, for the 31st January.

This motion was supposed to have been brought under Order XL rule 5 of the High Court of Lagos Rules and which provides as follows :—

> "Any Judgement obtained against any party in the absence of such party may on sufficient cause shown, be set aside by the Court upon such terms as may seem fit."

The application in this cause was as a result of a petition brought by the Respondent for a Judicial Separation. The applicant obtained the services of Chief Moore as his Solicitor and filed the necessary papers in answer to the petition of the applicant for judicial separation. It was however discovered that the proper procedure had not been followed and it was necessary that an extension of time would have to be asked for to enable perfection of the condition precedent to the entering of an appearance and filing of answer to the petition for judicial separation. By the time such action could be taken Chief Moore had sworn to an affidavit that he was ill and had to leave Nigeria. The respondent who is the applicant in this case was also posted to Brazzaville.

The result was that when this case came up for hearing Mr David who held Chief Moore's brief for the respondent found himself in a difficult position with the papers not having been properly filed and therefore had no *locus standi* in the case. He had to ask leave to withdraw his representation of the respondent/applicant in the case. The case was treated, therefore, as being undefended. I heard the petition in the absence of the respondent, granted the judicial separation asked for and ordered that alimony of £166-13*s*-4*d* per month be paid to the respondent in this case.

I have since discovered on reading the file in this case that an appeal was lodged against my judgement to the Supreme Court but the respondent and his Counsel did not put in an appearance when the appeal came up for hearing and so it was struck out. There was no doubt that the respondent would have been advised that an appeal was not the proper procedure, but a re-hearing of the matter since his own side of the case had not been put before the Court.

Section 16 of the High Court of Lagos Act provides as follows :—

> "The jurisdiction of the High Court in Probate, Divorce and in Matrimonial causes and proceeding may subject to the provisions of this Ordinance and in particular of section 27, and to Rules of Court, be exercised by the Court in conformity with the law in practice for the time being in force in England."

It was on this ground that Mr Okafor who appeared for the respondent in this application objected to the application in the prayer, and referred me to the provision of Rule 42 (1) of the Matrimonial Causes Rules 1957. This particular rule deals with the reversal of judicial separation. It is therein provided that where a reversal is sought for, the procedure as shown on page 749 of the 9th Edition of *Rayden on Divorce* should be followed, that is to say a petition would have to be filed by the person seeking the reversal of the order accompanied by a form of acknowledgement of service and this must be served in the same manner as the previous petition for a judicial separation. It is Mr Okafor's contention, therefore, that filing of a motion is a wrong procedure in this case. Mr David on the other hand submitted that a Motion could be filed in such circumstances and referred to the decision of *Oram v. Oram* (1923) 39 *Times Law Report* p.332 in which it was held that the Court had power to discharge the decree of judicial separation in such a case and this was done on motion. The peculiar fact in that case as shown in the report was that this had occurred before the Matrimonial Causes Act 1957 came into effect and that Mr Justice Hill, as he then was, stated *inter alia*

> "that no procedure had been laid for the reversal or discharge of a decree for judicial separation."

In that case the woman who had obtained the decree had for good reasons decided to go and live with the husband again and if no reversal had been given it was automatic as it was indicated in that judgement that by the acts of the parties they had resumed co-habitation. The decision in that case does not, therefore, set out that a motion can be filed for the reversal of a decree of judicial separation.

On the other hand, however, there is Order 36 of the Matrimonial Causes Rules 1957 which provides *inter alia* as follows :—

> "An application for re-hearing of a cause heard by a Judge alone where no error of the Court at the hearing is alleged shall be made to a Divisional Court of the

> Probate, Divorce and Admiralty Division. The application shall be by notice of Motion stating the grounds on which it is based and the notice shall be filed in the Divorce Registry and served upon the opposite parties (whether they have appeared or not). Within 6 weeks after judgement the notice shall be a 14 days notice and may be amended at any time by leave of the Judge."

It is my opinion on consideration of Order 36 and Order 41 that a re-hearing must be distinguished from a reversal of an order for the decree of judicial separation. It would be wrong I presume, except for a Court of Appeal, for a Judge who has decreed judicial separation to sit on the case again and order a reversal of his order, because it would appear to me that in such circumstances he would be sitting on appeal on his own judgement. It is, therefore my respectful opinion that whereas under Section 16 of the High Court of Lagos Act consideration would have to be given to Orders 36 and 41 of the Matrimonial Causes rules of 1957 distinction must be made in view of the different jurisdiction a Court may exercise; whereas it is my opinion that a Court of Justice may order a re-hearing of a matter if provided for by the Rules of Court, but it would be wrong for the Court to order a reversal of his own order when no such special or specific order or rules had been given by law.

I refer to Order XL, rule 5 of the High Court of Lagos Rules which provides for the setting aside of the judgement made in the absence of a party. In Order 36 of the Matrimonial Causes Rules 1957 it was provided that notice for re-hearing should be given within 14 days after judgement. That definitely has not been done in this case and if this matter had been heard in England the applicant would have found it impossible to get his application heard not having complied with the Rules of Court.

Order XI of the High Court of Lagos Rules, however, provides for extension of time. Rule 3 provides :—

> "The Court may as often as it thinks fit and either before or after the expiration of the time appointed by these Rules or by any judgement, order or rule of the Court, extend or adjourn the time for doing any act or taking any proceeding."

As I have earlier on intimated Section 16 of the High Court of Lagos Act had conferred jurisdiction on Matrimonial Causes on the High Court and further had provided that conformity with

the law and practice for the time being in force in England shall be followed in Nigeria. There is, however, this qualification which is to the effect that the conformity would be subject to the Rules of Court in Nigeria.

If my interpretation of the law is correct I see that by virtue of Order XI, rule 3 this Court has the power to extend the period for the acceptance of application in this case and also of granting an application for re-hearing of the matter.

The matter for extension was not raised by Counsel for the respondent but I think it is only proper in this case that if this application is to be treated under Order 36 of the Matrimonial Causes Act 1957, then the question of computation of time would have to be considered. I therefore grant the extension for 14 days notice given in Order 36 and order that the application for the re-hearing of this matter as applied for be granted.

The re-hearing of this petition would be fixed, subject to the convenience of Counsel for the 8th March, 1966 in order that the necessary applications may be made for the entry of appearance, filing of answer and the issue of the Registrar's Certificate so that the hearing of the case may be expedited.

I will set aside the grant of allowance of £166-13*s*-4*d* per month as ordered by me until a disposition of this matter by the 8th March.

I do not think any undue hardship would be brought on the respondent in this case since the order for payment of maintenance or permanent alimony was made on the 11th May, 1964 and if these amounts had been paid as ordered a delay of one month would not make much difference in this case.

I will make no award of costs on the application before me.

The petition is here re-listed and subject to my observations fixed for hearing on the 8th March, 1966.

HIGH COURT, LAGOS

ADVERTISING ASSOCIATES (NIG.) LTD. PLAINTIFFS

v.

WILMER PUBLICITY LTD. .. .. .. DEFENDANT

(SUIT NO. LD/380/1964)

[HIGH COURT, LAGOS : D. A. R. ALEXANDER, J. ;
18th February, 1966]

Contract—right of option—land in Western Nigeria—jurisdiction of the High Court of Lagos.

The plaintiffs' claim was for £1,000 special and general damages for breach of a contract entered into between the plaintiff and the defendant whereby the plaintiff agreed to rent two advertising hoardings situated at approximately mile 8 on Ikorodu Road, Ikeja for a minimum period of three years with further option for two years. The breach of contract complained of was that the defendant refused to allow the plaintiff to exercise the right of option for the further two years in accordance with the agreement. At the hearing it was contended that the Court had no jurisdiction to entertain the claim because the evidence showed that the subject matter of the dispute in respect of which a right of option was sought to be enforced was a piece of land at Ikorodu Road in Western Nigeria.

HELD : That the action was not based on a contract involving the determination of title to land in Western Nigeria and, even though it incidentally related to land outside the territorial jurisdiction of the High Court of Lagos, the Court had jurisdiction to entertain it.

Statutes and Rules referred to :

Companies Act, Cap. 37 Laws of Nigeria (1958 *edition*).

Land Registration Act, Cap. 99, Laws of Nigeria (1958).

Land Instrument (Registration) Law, Cap. 56 Laws of Western Nigeria.

High Court of Lagos (Civil Procedure) Rules.

Cases referred to :

Lanleyin v. Rufai 4 F.S.C. 184.

The British South Africa Co. v. Companhia de Mocambique & ors. (1893) A.C. 602.

St. Pierre v. South American Stores (Gath and Chaves, Ltd.) (1936) 1 K.B. 382 A. C602.

(*Editor's Note :* This case is reported only on the question of Jurisdiction. See also : *S. A. Okusi v. Abiodun Joseph* (LD/621/65 ; 21st July, 1966) and *Mohamend Kamalud-Deen Owe v. Raufu Owe & 9 ors.* (LD/13/66 ; 5th September, 1966).

A. O. Oluwole for the plaintiff.

J. A. Cole for the defendant.

JUDGEMENT

ALEXANDER, J. :—The plaintiff's claim, according to the writ of summons, is "for £1,000-0*s*-0*d* (one thousand pounds) special and general damages for breach of contract entered into between the plaintiff and the defendant on the 27th July, 1961, whereby the plaintiff agreed to rent two advertising hoardings size 27′ × 7′ situated at approximately Mile 8 on the Ikorodu Road, Ikeja, for a minimum period of three years with further option for two years at a rent of £150-0*d*-0*d* per annum payable in advance by the plaintiff."

The breach of contract complained of is that "the defendant refused to allow the plaintiff to exercise the right of option for the further two years in accordance with the said agreement."

The plaintiff is a limited liability company, incorporated in Nigeria, carrying on the business of arranging for advertisements, as agents, and has its registered office at No. 95 Igbosere Road, Lagos, while the defendant, also a limited liability company, carries on the business of erection of road signs, posters and screen process printing and has its registered office at 268 Herbert Macaulay Road, Yaba, on the mainland of Lagos.

The defendant denied that there was a contract between it and the plaintiff, and averred that the said contract was between the defendant and a firm known as "Affamal", the proprietor of which is one B. Adedamola. Exhibit A (Certificate of Incorporation of a Company) was produced by the plaintiff's witness, Mr H. J. Olden, and shows that the plaintiff company was incorporated on the 17th October, 1959, and was previously called Affamal (Nigeria) Limited. This change of name is shown to have occurred on the 18th of May, 1961. The document referred to as the "contract" (Exhibit B) is dated 27th July, 1961, and was signed on behalf of the defendant and *not* on behalf of the plaintiff. While, therefore, it is clear that Exhibit B came into existence after the change of name, it cannot be regarded as a written contract between the plaintiff and defendant since it has not been executed by both parties. It may, however, be regarded as memorandum in writing of a parol contract between the parties, since the evidence as a whole indicates that both parties have relied on the terms contained therein as regulating the transaction between them about the renting of the advertisement hoardings and the site at which they were erected.

Mr Cole, in his closing address, took the point that this Court has no jurisdiction to entertain the claim. Such a point should, of course, be taken at the earliest possible stage, so as to avoid having an abortive trial and unnecessary costs. Mr Cole contended that the evidence of the two witnesses in this case is that the subject matter of the dispute between the parties, in respect of which a right of option is sought to be enforced, is a piece of land at Ikorodu Road, situated in Western Nigeria and subject to the control of Ikeja District Council.

Although both Mr Cole and Mr Oluwole referred to Order 7 of the High Court of Lagos (Civil Procedure) Rules, formerly the Supreme Court (Civil Procedure) Rules, and Mr Oluwole relied on certain provisions thereof, in my view, this Order could only have been appropriate at a time (before regionalisation) when there was one Supreme Court for Nigeria exercising original jurisdiction over the whole of Nigeria and divided into judicial divisions, not at present where there are separate High Courts for Lagos and the Regions, each with a separate jurisdiction. Order 7 is, in my view, inconsistent with the constitutional provisions establishing separate High Courts and the laws made pursuant thereto.

Mr Cole maintains that the plaintiff's claim is in respect of an interest in land. He contended, further, that an option is registrable as an estate contract because it is an interest in land. Mr Oluwole, on the other hand, contends that the subject matter of the action is a contract in relation to chattels and *not* land.

It is clear from the evidence of the witnesses, Mr H. J. Olden, a representative of the plaintiff, and Mr L. W. Samuel, a representative of the defendant, supported by Exhibit B, that there was a *lease* by the defendant to the plaintiff of a site to which was attached two advertisement hoardings at a *site rental* of £150 per annum for a minimum period of three years, with a further option for two years. It is also clear from the evidence that both parties regarded the transaction as being one relating to land.

I am of the view, however, that Exhibit B is no more than a memorandum, sufficient for the purpose of section 4 of the State of Frauds, of a contract (not to be performed within a year) made by parol between the plaintiff and the defendant for a lease of land, being the site in question, for a minimum period of three years with an option to renew for a further period of two years. It

must be observed at the same time that the plaintiff and the defendant, being limited liability companies are authorised to contract in this manner by section 80 (1) (*c*) of the Companies Act, Cap. 37. In my view, Exhibit B is not *per se* a written contract and is certainly not a lease or document conveying or transferring any estate or interest in land.

Mr Cole contended that "an option is registrable as an estate contract because it is an interest in land", and referred to *Halsbury's Laws of England, Third Edition, Volume* 23, *page* 473, *para.* 1094. In my view, a *contract* whether it be an estate contract or any other kind of contract is different in legal concept from an *interest in land*, although either may be registrable in appropriate circumstances.

Again, Mr Cole submitted that the contract in question is a contract required by law to be under seal and quoted as authority *Halsbury's Laws of England, Third Edition, Volume* 8, *page* 87, *para.* 150. This contract, as I have already pointed out, is a parol contract and was lawfully entered into by virtue of section 80 (1) (*c*) of the Companies Act. It does not fall to be considered as a contract or conveyance required to be by deed and to be executed pursuant to section 80 (1) (*a*) of the Companies Act. The transaction in question does not fall into the category of "contracts made without valuable consideration and contracts of corporations", or "conveyances of land or incorporeal hereditaments or any interest therein" which are "void for the purpose of conveying or creating a legal estate unless made by deed."

Then, again, Mr Cole contended that Exhibit B purported to convey an interest in land and, since it has not been registered either under the Land Registration Act, Cap. 99 or the Land Instruments (Registration) Law of Western Nigeria, Cap. 56, it cannot be pleaded or given in evidence because of the provisions of section 15 of Cap. 99 or, alternatively, section 16 of Cap. 56 of Western Nigeria. The provisions referred to are applicable to an "instrument" which is defined (see section 2 of Cap. 99) as follows :—

> "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....."

Having already held that Exhibit B is in itself neither a lease nor a written contract, but merely a memorandum of a parol contract, I would go further to say that it does not fall within the terms of the definition of "instrument", since it does not confer, transfer, limit, charge or extinguish any right or title to, or interest in land in Nigeria.

The principal issue to be determined is whether there was a contract between the plaintiff and defendant, the breach of which entitles the plaintiff to claim damages. I have already indicated my general view of the evidence which has led me to the conclusion that both parties acted in accordance with Exhibit B and even relied on it for the purposes of these proceedings; and by their conduct they must be deemed to have entered into a parol contract in the terms of Exhibit B. There is no doubt whatever that the plaintiff relies on the terms of Exhibit B. The defendant, on the other hand, has attempted to evade its obligations under the contract by pleading that the contract was with a firm known as "Affamal". The certificate of registration (Exhibit A) is proof of the fact that Affamal (Nigeria) Limited is the name by which the plaintiff was formerly called and that Affamal (Nigeria) Limited and Advertising Associates (Nigeria) Limited are one and the same "legal person". A company is, of course, permitted to change its name by special resolution, with the approval of the Registrar of Companies under section 10 (4) of the Companies Act, and under section 10 (6) :—

> "The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name."

It was, in fact, Mr Samuel, the defendant's witness who, in his own words, "put Exhibit B up and sent it to Mr Adedamola." Mr Adedamola was the plaintiff's representative from the time the company was called Affamal (Nigeria) Limited. Mr Samuel went on to say that "the idea was to get approval from the plaintiff for a draft agreement." The plaintiff was to have it signed, if approved. The plaintiff did not have the document signed nor was it returned to the defendant. Mr Samuel must, however, have kept a copy of it. However, he continued, the hoarding was erected. He went on to testify about the further implementation

of the terms of the contract evidenced by Exhibit B and marked that "the plaintiff has not paid the rent in advance as stipulated in the *agreement.*"

Under cross-examination, he said that he did not accept Exhibit B as the contract between the defendant and the plaintiff, and that he had always accepted the rent on a personal friendship basis with Mr Adedamola. I certainly do not accept this evidence of Mr Samuel on the point, particularly having regard to Exhibit E, dated 22nd May, 1964, in which he wrote to the plaintiff as follows :—

> "With reference to your present contract for two bulletin boards at Mile 8, Ikorodu Road, carrying Ilford displays, which expires on the 30th June, 1964, we wish to advise you as of 1st, July 1964, the site rental will be increased to £200 per board, per annum for these two hoardings.
>
> If it is your intention to exercise your option on these boards for a further two years at the revised rental, we wish to be advised by you of this intention by Tuesday, 16th June, 1964....."

This is only one of the instances which confirmed me in the view that Mr Samuel is not a witness of truth. Taken on the background of the evidence as a whole, Exhibit E is conclusive proof that Mr Samuel in fact regarded the terms and conditions recorded in Exhibit B which he himself had prepared as a binding contract between the defendant and the plaintiff and his present testimony about not feeling bound by these terms and conditions and accepting the rent on a "personal friendship" basis is merely a further attempt to evade the obligations imposed on the defendant by the contract.

I find that the subject of this action is a contract relating to land at Mile 8, Ikorodu Road, Ikeja, in Western Nigeria, and I shall now deal further with the question of jurisdiction raised by Mr Cole. He cited the case of *Lanleyin v. Rufai*, 4 *F.S.C.*, 184 in which it was held that the High Court of Lagos has no jurisdiction to entertain an action to recover damages for trespass to land in Western Nigeria. The decision here was based on the authority of *The British South Africa Company v. Companhia de Mocambique and others* (1893) *A.C.* 602, in which, incidentally, questions of title to land were raised. I must point out right away that the action with which we are now concerned is not an action of trespass

to land, which is an action in tort. The present action is an action for break of contract. The rules for determining jurisdiction will be, therefore, the rules applicable to contracts. It must be borne in mind, however, that under a Federal system as the one now obtaining in this country, the jurisdiction of each High Court is, in a sense, "foreign" to the jurisdiction of the other High Courts. The principles are set out in *Halsbury's Laws of England, Volume 7, page* 69, *para.* 130 as follows (but for "English Courts" read "Nigerian Courts") :—

> "The English Courts have (with very few exceptions) jurisdiction to entertain an action relating to a contract, wherever made, in all cases where the parties are effectively before the Court.....
>
> The Courts, however, have as a general rule no jurisdiction to entertain an action on a contract involving the determination of the title to foreign immoveables, except where the question of title is only an incidental relevant in the action as on a covenant to pay rent....."

In *St. Pierre v. South American Stores (Gath and Chaves, Ltd.)* (1936) *1 K.B.* 382 *C.A.*, it was held that an action for rent of premises in a foreign country was a personal action which an English court could competently entertain, notwithstanding that incidentally it related to an immoveable out of England.

Having regard to these principles, I hold the view that this action is not an action on a contract involving the determination of title to land in Western Nigeria and, even though it incidentally relates to land outside of the territorial jurisdiction of the High Court of Lagos, this Court has jurisdiction to entertain it.

The following questions must now be resolved. Has there been a breach of contract by the defendant? In other words, has the defendant refused to allow the plaintiff to exercise the option to have the lease renewed for a further period of two years in accordance with the contract?

The defendant averred that the plaintiff got certain benefits under the contract but failed to comply with its terms by paying in advance sums due to the defendant thereunder. It is not disputed that these sums were eventually paid in full and that the defendant did not, either during the currency of the original period of three years, or subsequently, renounce the contract on that ground.

Non-payment in advance was the subject of correspondence which indicated that the defendant was willing to waive the breach if the outstanding amount was paid by a certain date (*see* Exhibit C). The contract was not renounced during the initial period of three years. The facts which led to the eventual renunciation by the defendant are as follows.

The original period of the lease under the contract was for a period beginning 1st July, 1961, and ending 30th June, 1964. However, on the 22nd of May, 1964, Mr Samuel wrote a letter (Exhibit E) on behalf of the defendant advising the plaintiff that the site rental would be increased to £200 per board, per annum, and that if it was the plaintiff's intention to exercise the option, the defendant wished to be advised of this intention by the 16th of June, 1964. It was further stated in Exhibit E that after that date the defendant would "accept" that the plaintiff was no longer interested in the boards, but if the plaintiff wished to continue, payment should be annually in advance and that the first payment should reach the defendant by 7th July, 1964, otherwise the defendant would "consider the business to be null and void."

On the 2nd of June, 1964 Mr Olden replied to Exhibit E by letter (Exhibit F), confirming the plaintiff's intention to exercise the option "but on the same terms and conditions as laid down in the signed copy of your Outdoor Site Contract dated 27th July, 1961, *i.e.*, site rental of £150 per annum for the two hoardings, payable in advance", and insisting that the plaintiff was not prepared to accept any increase in site rental, having regard to the provision in Exhibit B that "no alteration to this contract is accepted, except by mutual consent."

Following the request in Exhibit E that payment of the increased rental should be made annually in advance not later than Tuesday, 7th July, 1964, the plaintiff undertook to forward a cheque for £150 in respect of the period 1st July, 1964 to 30th June, 1965, to reach the defendant by 7th July, 1964.

Mr Samuel replied by letter (Exhibit G) dated 9th June, 1964 giving his layman's interpretation of the law in his own favour, refusing to accept the rental of £150 per annum and reminding the plaintiff of the defendant's new charge of £200 per board per annum. The defendant having unilaterally fixed the 16th of June, 1964 as the time limit for the exercise of the option, unilaterally extended it to the 22nd of June, 1964. Again the defendant required payment in advance by 7th July, 1964.

By letter (Exhibit H) dated 16th June, 1964 Mr Olden disagreed with Mr Samuel's "legal proposition" and re-affirmed the intention of the plaintiff to exercise the option at a rental of £150 per annum and to pay in advance by the 7th July, 1964. Not receiving a reply to Exhibit H, the plaintiff wrote Exhibit J, dated 3rd July, 1964, to the defendant enclosing a cheque for £150 as advance rental and declaring the plaintiff's intention to retain the site also for the period 1st July, 1965 to 30th June, 1966.

The defendant replied by Exhibit K, dated 7th July, 1964, through their solicitors that "when no advance payment came in from you up till the close of business on 30th June, 1964, they" were obliged to make new arrangements for the bulletin boards, and returned the cheque for £150 which "came in just too late".

The plaintiff, at this stage, replied by Exhibit L, dated 8th July, 1964, again disagreeing with the defendant's legal propositions, and pointed out that the plaintiff's cheque for £150 was delivered to the defendant and signed for on the 3rd of July, 1964, well before the date fixed by the defendant, for payment of the rental (although at an increased rate) that is, the 7th of July, 1964. The plaintiff returned the cheque for £150 to the defendant. In my view, the defendant was, by the conduct of its representatives, estopped from relying on the ground that the plaintiff attempted to pay a couple of days after the option period was to have commenced. Further, a delay of two or three days is not at all unreasonable in the circumstances.

The defendant's solicitors replied by Exhibit M, dated 10th July, 1964, attempting to justify the defendant's position in law and returning the cheque for £150 to the plaintiff. This letter is, in my view, the culmination of a course of action by the defendant calculated to evade its obligations under the contract, no doubt because it felt it could do more profitable business with another client.

First of all, as regards the exercise of an option for a future lease, if the lease does not state by whom the option is to be exercisable, it will be exercisable by the tenant only : (*Lewis v. Stephenson* (1898) 67 *L.J. Q.B.* 296). It follows that the same principle applies in the case of an option exercisable under a contract to renew a lease, as in this case. As regards the time at which the option may be

exercised, see *Halsbury's Laws of England. Third Edition, page* 473, *para.* 1095 where the following passage occurs :—

> "If no time is stated in which the option is to be exercised, the right to do so will continue so long as the relationship of landlord and tenant exists, even though the original term has expired....."

The plaintiff, apart from giving notice to the defendant in good time that the option would be exercised, had not given up legal possession of the site at the time when the cheque for £150 was received by the defendant on the 3rd of July, 1964. Again Mr Samuel prevaricated. This is his evidence on the point, under cross-examination :—

> "I did not receive the cheque for £150 at all. I may have received it on the 3rd of July, 1964 and sent it to my lawyer. Yes, I received it."

It is stated in *Halsbury's Laws of England, Third Edition, Volume* 23 *para.* 1095 *at page* 474 *as follows :—*

> "If the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease, so far as those terms arise out of the relationship of landlord and tenant....."

It follows that the same principle applies in the case of an option exercisable under a contract to renew a lease.

Then again, the defendant was not entitled to increase the rent unilaterally since there could be no alteration to the contract, "unless by mutual consent". (Exhibit B). All the defendant was entitled to do under the contract was to call on the plaintiff "to pay an extra tax levied on the site by an Official Authority" (Exhibit B).

Agreement to pay any extra tax levied is, in my view, not the same thing as an increase of rent and it was never represented to the plaintiff that the increase of rent sought by the defendant was intended to reflect any extra tax levied by an Official Authority. This is nowhere indicated in the correspondence between the parties and I do not believe Mr Samuel's testimony that he discussed with Mr Olden the ramifications of the tax increase on the site by the Ikeja Town Planning Authority to £378 (See Exhibit U).

He said he discussed something about the site tax being out of proportion. Although he testified that this meeting took place in

May 1964, and Exhibit U is dated 30th January, 1964, there is no reference to such a meeting or to the increase of tax in Exhibit E which Mr Samuel wrote on the 22nd of May, 1964, or in Exhibit G (written on the 9th June, 1964) where his contention was that the option should be "*at a rent to be agreed*". Nor is there any such reference in the letters written by the defendant's solicitors on its instructions (See Exhibits K and M). Even paragraph 5 of the statement of defence in which the defendant avers that the plaintiff "refused to pay an increased rental of £400 per annum with effect from 1st July, 1964, after it had been informed that the Government of the Western Region had increased fee payable for renewal permit for the sign boards" is an after-thought.

In the circumstances, I reject Mr Samuel's evidence on the point and accept without hesitation Mr Olden's testimony that he was not informed at the time of the correspondence between the defendant and the plaintiff as regards the exercise of the option, that the increase in the rent was due to extra tax imposed by the Ikeja Town Planning Authority. I find as a fact that Mr Olden was not so informed by Mr Samuel or by anyone acting on behalf of the defendant and was not aware of this increase in tax. The defendant by the course of conduct demonstrated in its letters to the plaintiff evinced a desire to be no longer bound by the contract and actually renounced it by the final letter of the series, dated 10th July, 1964 (Exhibit M) written by the defendant's solicitors. The defendant accordingly made it impossible for the plaintiff to exercise the option under the contract and is liable to pay to the plaintiff any damages arising naturally from the breach. (*See Hadley v. Baxendale* (1854), 9 *Ex.* 341).

In *Robinson v. Harman* (1848), 1 *Ex.* 850, 855, it was laid down that :—

> "Where a party sustains a loss by reason of a breach of contract he is, as far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."

A plaintiff is not, however, necessarily entitled to damages in respect of all the loss he may be able to trace to the breach of contract.

The plaintiff, to the knowledge of the defendant, acts as agents for advertisers in arranging for the erecting, painting, illumination and maintenance of advertisement hoardings on sites leased for the

purpose. The hoardings in this action were erected by the defendant (at a cost of £400 for erection and signwriting, less agency fee of £70) and leased by the plaintiff which paid for the erection and signwriting (see Exhibt S) and was also responsible to pay the rent. There is no dispute as to the ownership of the actual hoardings and the plaintiff was always at liberty to remove them, so it cannot be said to have sustained any loss in this respect.

The plaintiff had obtained the agreement of United Nigeria Press Limited (hereinafter referred to as "the Press") in a letter dated 7th July, 1964 (Exhibit N) to take over the hoardings in question "for a period of some two years at an annual cost of some £300. Signwriting to cost us a further £100." The plaintiff contended that the defendant made it impossible for it to exercise the option, and that this agreement therefore went by the board. But, having regard to the provision in Exhibit B requiring the plaintiff to pay any extra tax that may be levied by an Official Authority, the plaintiff would have been obliged to pay the extra tax of £378 per annum levied on the site by the Ikeja Town Planning Authority (by Exhibit U) if and when called upon to do so by the defendant. Mr Olden agreed that he would have been liable to pay any such extra tax according to the terms of the contract.

In the circumstances, the entire cost of the use of the site to the plaintiff for the option period of two years (including rental and tax) would have been £1,056 as against £600 which the plaintiff would have received from the Press. Instead of making a profit, the plaintiff would have suffered a loss of £456, unless the Press could have been persuaded to take on the extra tax liability as well. It is, to say the least, very doubtful whether the plaintiff would have been successful in passing on this extra burden to the Press. There is no evidence to support the inference that the Press would have agreed to take on this extra tax liability. It therefore cannot be said with any degree of certainty that the plaintiff would, in the circumstances, have made any profit from this transaction. This item cannot therefore be entertained.

It must, however, be observed that the defendant's failure to inform the plaintiff of the extra tax and to call upon the plaintiff to pay it was quite extraordinary. If the defendant had only done so in the proper manner, in writing, the position would have been clear to the plaintiff. It seems, however, that the defendant deliberately kept the plaintiff in the dark and purported to increase the rent of the site unilaterally and out of all proportion (as it

appeared to the plaintiff) so as to discourage the plaintiff from pursuing the question of the option, no doubt because a better business deal was in sight.

According to the plaintiff's witness, Mr Olden, he expected a profit of £25 on signwriting out of the proposed transaction with the Press; it is very doubtful, however, whether the agreement with the Press would have been implemented in view of the extra tax liability on the site and this item cannot therefore be entertained.

The plaintiff also installed electrical lighting and made improvements just before the option was due on the basis that it would continue to enjoy the use of the site. It paid £23 for a time clock for the electric lighting and £4-4*s* for electric bulbs and shades. Mr Olden agreed under cross-examination that the hoardings and also the electric bulbs and other equipment at the site belong to the plaintiff. The defendant did not dispute this and it is difficult to see why the plaintiff did not remove its property from the site so as to minimise its loss, even if the equipment had to be sold in the second-hand market. In any event, the equipment would still be of some value to the plaintiff and it is estimated that the loss consequent on the inability of the plaintiff to use it for the immediate purpose for which it was purchased and installed would be in the region of 50 per cent of the cost.

Mr Olden further testified under cross-examination that he did not give to his counsel the particulars contained in paragraph 9 of the statement of claim to the effect that the defendant refused to allow the plaintiff to remove its equipment from the site. He also said he did not think that paragraph 8 of the statement of claim was quite correct. The plaintiff avers in paragraph 8 that it "was unable to get similar hoardings site" for the purpose of granting it to a prospective client "and thereby lost the business and the profit it would have made on the rehiring and thereby suffered damage."

In the result, the loss sustained by the plaintiff arising naturally as a result of the breach of contract is 50 per cent of cost of installing the equipment consisting of a new time switch for £23 and 8 bulbs and 8 bulb protectors for £4-4*s*, a total of £27-4*s*, that is, £13-12*s*.

I accordingly give judgement for the plaintiff against the defendant for £13-12*s* and costs assessed and fixed at £43-15*s*.

HIGH COURT, LAGOS

AMALGAMATED PRESS OF NIGERIA LTD. APPELLANTS

v

A. O. HAASTRUP .. .. RESPONDENT

(APPEAL NO. LD/48A/65)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J. ; 1st March, 1966]

Rent Restriction Act—recovery of premises—Length of notice to tenant at will.

The plaintiffs sued the defendant in the Court below for possession of premises on the grounds that the premises were required by the plaintiffs for their personal use and because the tenancy was determined. The Magistrate dismissed the action on the grounds that (*a*) the determination of tenancy was not a ground on which an order for possession could be made having regard to the Rent Restriction Act, and (*b*) by virtue of section 19 (1) of the Recovery of Premises Act the plaintiffs were expected to establish by evidence the yearly rent of the premises.

HELD : (*i*) that a tenant at will must be given a week's notice to determine the tenancy but that during the hearing of the suit a landlord was not required to prove the yearly rent of the premises. All he would be required to prove was that the tenancy was one at will.

(*ii*) that the moment it was concluded that the premises are such premises to which the Rent Restriction Act applied, then section 12 made it obligatory on the landlord not to eject the tenant save in pursuance of the provisions of the Recovery of Premises Act.

(*iii*) that a tenant at will is within the contemplation of the Rent Restriction Act in as much as emphasis is laid in sections 1 and 3 on premises and not on the nature of tenancy.

Appeal dismissed.

Statutes referred to :

Recovery of Premises Act, Cap. 176 *Laws of Nigeria* (1958 *edition*).

Rent Restriction Act, Cap. 183 *Laws of Nigeria* (1958 *edition*).

Landlord and Tenant Act, (*U.K.*) 1954.

Case referred to :

Wheeler v. Mercer (1956) 3 *All E.R.* 631.

Owodunni for the appellants.

Oshodi (for Okafor) for the respondent.

TAYLOR, C.J. :—The plaintiffs sued the defendant in the Court below for possession of the premises situate and being at 6 Chapel Street, Lagos, on the grounds that the premises were required by the plaintiffs for their personal use and because the tenancy was determined.

The learned Magistrate dismissed the action ; and it is on the following two grounds that his judgement has been attacked :—

1. That determination of tenancy is not a ground on which an order for possession can be made having regard to the Rent Restriction Act.

2. That by virtue of s. 19 (1) of the Recovery of Premises Act the plaintiffs are expected to establish by evidence what is the yearly rent of the premises.

It is more convenient to deal firstly with the second point. Mr Owodunni for the appellants urged that in as much as the premises were let to the defendant as a tenant at will and no rent was taken from him there was no need and in fact it was impossible to give evidence of a fact that did not exist. He further argued that this was another ground for his submission that the Rent Restriction Act did not apply.

There was certainly evidence led that was uncontradicted that the respondent was a tenant at will and that no rent has ever been demanded or accepted from him. The summons described the tenancy as a tenancy at will, as does the notice of the 25th July, 1963.

A "tenant" is described in s. 2 of the Recovery of Premises Act as including :—

> ".....any person occupying premises whether on payment of rent or otherwise but does not include a person occupying premises under a bona fide claim to be the owner of the premises ;"

It is to be noted that the words used are "whether on payment of rent or otherwise", and not "whether on payment of rent or not". The latter would certainly have included a tenant-at-will. S. 6 of the Act goes further to show what is meant by the words "or otherwise". The side note reads thus "Jurisdiction in respect of rent other than in money", and the section itself reads as follows :—

> "Where the rent includes any part of a crop or any value given in kind or in labour or any amount which is not specified as of a precise monetary value proceedings under this Act may be brought in a magistrate's court. Provided that if during the hearing it appears that the amount of the claim is a sum exceeding the rate of two hundred pounds a year the plaintiff may abandon the excess and proceed

and thereupon the magistrate's court shall have jurisdiction to hear and determine the action, so however that—

(*a*) subject to the provisions of any law limiting the jurisdiction of the magistrate hearing the action, the plaintiff shall not recover in any such action a sum greater than two hundred pounds, and

(*b*) the judgement of the court shall be in full discharge of all demands in respect of the particular cause of action."

In s. 8 however which deals with the length of notice required to determine certain types of tenancy it is provided that in the case of a tenancy at will a week's notice is required. In the conflicting result that whereas a tenant at will would not seem to be embraced by s. 2, he was certainly contemplated by the provisions of s. 8 of the Act.

The conclusion I draw from a study of this Act is that a tenant at will must be given a week's notice to determine the tenancy but that during the hearing of the suit the landlord is not required to prove the yearly rent of the premises. He is only required to prove that the tenancy is one at will. Cases in which evidence has to be led to prove the fact contained in s. 19 (1) (*b*) of the Recovery of Premises Act are cases in which there is rent as defined in s. 2, and further illustrated by s. 6 of the said Act. I therefore hold that the learned Magistrate was wrong in his conclusions in this respect and this ground of Appeal must succeed. That is not however an end of the matter for in order to succeed fully in this appeal the appellants must go further and show that the Rent Restriction Act does not apply to tenancies at will.

It is provided in s.12 of the Rent Restriction Act that :—

"No tenant or sub-tenant of any premises to which this Act applies shall be ejected therefrom save in pursuance of an order of the Court obtained under the provisions of the Recovery of Premises Act."

I think it is most important to bear in mind the wording of this provision. It is not a provision purporting to deal with "a tenant or sub-tenant to whom this Act applies" but such a person who occupies "any premises to which this Act applies". The emphasis is therefore on the word "premises" and not the tenant, sub-tenant or nature of tenancy. Premises are defined in section 3 (1) as follows :—

"Unless and until the same be modified or extended by any Order made under the provisions of section 1

> the expression "premises" shall for the purposes of this Act include any dwelling house and any other building in which persons dwell, whether or not a part thereof is used as a shop, and any part of any premises let or sub-let separately....."

It has not been argued, and indeed any argument to that effect would be futile, that the building or premises in question does not come within the definition of "any dwelling house in which persons dwell." The argument of Mr Owodunni laid emphasis on the nature of the tenancy as distinct from the premises in question and it is in this respect that he erred. He drew my attention to the case of *Wheeler v. Mercer* 1956 3 All E.R. 631 at 634 and 635. At the hearing of the appeal I was certainly impressed by the statements of the law of England contained in the judgements of Viscounts Simonds and Lord Morton of Henryton, in which they held that a "tenant at will" was not within the contemplation of the *Landlord and Tenant Act* 1954. It is most important to bear in mind that they were interpreting an Act which has very little in common with either of the two Acts in point in the case before me. I have read the relevant sections 25 (3) (4) and 43 (3) of the said Act and can find no equivalent in either the Rent Restriction Act or the Recovery of Premises Act. In fact the provision to which I have earlier drawn attention in s. 8 of the Recovery of Premises Act for the termination of a tenancy at will by giving one week's notice takes this case completely out of the scope of *Wheeler v. Mercer*. In this respect I would refer to a passage in the judgement of Lord Cohen, to which my attention was not drawn at the hearing, at page 638 which reads thus :—

> "It is, I think, clear, reading subsection (2), subsection (3) and subsection (4) together, that subsection (3) and subsection (4) are intended to comprise all the tenancies to which the Act applies. Subsection (3) deal only with tenancies which could be determined by notice to quit, and it was common ground between the parties that a tenancy at will is not such a tenancy, since a tenancy at will is determined not by a notice to quit but, e.g., by death, bankruptcy or a demand for possession."

Then again there is the fact that as can be seen in s. 2 of the said Act the Act is made to apply to "tenancies" as distinct from our Act which is made to apply not as I have said to types of tenancies but certain types of "dwelling houses". Finally once it is concluded that the premises in question are such premises to which the Rent Restriction Act applies, then s. 12 make it obligatory

on the landlord not to eject the tenant save in pursuance of the provisions of the Recovery of Premises Act. It is to be noted that the section 8 to which I have earlier made mention provides *inter alia* that :—

> "Where there is no express stipulation as to the notice to be given by either party to determine the tenancy the following periods of time shall be given :
>
> (*a*) in the case of a tenancy at will or a weekly tenancy a week's notice....."

I am of the view that though the second question must be answered in the appellant's favour the first and vital question must be answered in favour of the respondent. I therefore hold that a tenant at will is within the contemplation of the Rent Restriction Act in as much as emphasis is laid in sections 1 and 3 on premises and not on the nature of the tenancy. If that is the case then of course by s. 12 the provisions of the Recovery of Premises Act also applies. I am not asked to determine any other question in this appeal and for the reasons already set out above I would dismiss this appeal with costs to the respondent assessed at 10 guineas.

HIGH COURT, LAGOS

BOARD OF CUSTOMS & EXCISE .. .. APPELLANTS

v.

AUDU ILOFA
EMMANUEL OLUSHOLA EWULOMI } .. RESPONDENTS

(APPEAL No. LD/52CA/65)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J. ; 7th March, 1966]

Criminal Appeal—section 58 *of Customs and Excise Management Act,* 1958—*what amounts to "being concerned in the commission of an act".*

In the Court below the respondents were tried on charges under the Customs and Excise Management Act, 1958. At the close of the case for the Board a submission of no case was made and the learned Magistrate discharged the three defendants on the second and third counts and the third defendant alone on the first count. The two appellants then made their defence on the first count at the end of which the learned magistrate found them not guilty and acquitted them. Thereupon the Board lodged an appeal on a point of law as to the interpretation of section 58 of the Act and contended :

(*a*) that "being concerned in exporting" which covered a much order filed *i.e.* every stage through which the goods had to go during the process of exportation, covered a much wider field than a charge which merely alleged "exporting".

(*b*) that a person who filled up export forms which were necessary prerequisites to exportation was as concerned in exporting as the person who took part in the physical handling of the goods.

HELD : (i) that it would be illogical and contrary to the rules of construction to construe "being concerned in the commission of an act" in such a way as to embrace an attempt to commit that act.

(*ii*) (affirming the findings of the lower Court) that a person could not be convicted under section 58 for exporting or being concerned in exporting goods unless such goods had all been loaded in a ship or aircraft and in the case of prohibited goods such as groundnuts, until the ship or aircraft in which they are carried departs from its final position, anchorage or berth within Nigeria.

Appeal dismissed.

Statute referred to :

Customs and Excise Management Act, 1958.

Case referred to :

Attorney-General v. Robson 155 *E.R.* 346.

J. O. Williams for the appellants.

Ajomale for the 1st respondent.

Akisanya for *Cole* for the 2nd respondent.

JUDGEMENT

TAYLOR, C.J. :—In the Court below three defendants were tried on charges under the Customs and Excise Management Act 1958. The present respondents were charged on all those counts dealing with offences punishable under sections 58 (1) (*a*) (*i*); 58 (2) (*c*) and 142 (1) (*a*) respectively of the said Act. The third accused was charged with the appellants only on the first two counts.

At the close of the case for the Board a submission of no case was made and the learned Magistrate discharged the three defendants on counts 2 and 3 and the 3rd defendant alone on count 1, ruling that there was a case for the present respondents to answer on count 1 only. This ruling was delivered on the 14th July, 1965 and there is no appeal against it. The defence was heard and on the 9th August, 1965 the present respondents were found not guilty and discharged.

The appeal is on a point of law as to the interpretation of s. 58 of the Customs and Excise Management Act and there is no need for me to set out all the facts of the case except those that are essential for the interpretation of the said section. There is really no dispute on these in as much as there is no appeal filed on the facts.

Count 1 states that :—

> "That you Audu Ilofa, Emmanuel Olushola Ewulomi and Saubana Akanni Yesufu on or about the 28th day of December, 1964 at Apapa with intent to evade the payment of Custom duty, were concerned in exporting a consignment of 387 bags of groundnuts valued at £1,469-17*s*-4*d* and chargeable with Custom duty of £133-12*s*-6*d*, which has not been paid and thereby committed an offence punishable under section 58 (1) (*a*) (*i*) of the Customs and Excise Management Act, 1958."

Put in the simplest possible form the facts relevant to the interpretation of the Act were that the 1st respondent wanted to export some goods to Ghana by sea. He is illiterate and unable to speak or write English. He was assisted in this respect by the 2nd respondent, an export clerk in the Niger Shipping Company as well as by other persons. Certain forms were filled up which were prerequisites to the exportation of goods from Nigeria. It was later discovered that these forms were false in material particulars and that the goods of the 1st respondent or rather that 387 bags which contained groundnuts were described as 387 bags of

beans. There was also evidence that the sum of £40 was demanded from the 1st respondent by the 2nd respondent as Customs duty etc., and that it was duly paid. Evidence was given that a licence must be obtained before groundnuts were exported and in the words of the 1*st P.W. Josiah Sunday Emonefe* :—

> "Groundnuts are controlled goods and provisionally prohibited."

Finally the evidence is clear that none of the 387 bags of beans had been loaded into the vessel concerned. They were lying on the wharf ready for loading.

The learned Magistrate held *inter alia* that :—

> "It seems to me that a person cannot be convicted under section 58 for exporting or being concerned in exporting goods unless such goods had all been loaded in the ship or aircraft and in the case of prohibited goods such as groundnuts, until the ship or aircraft in which they are carried departs from its final position, anchorage or berth within Nigeria."

A little later on the learned Magistrate went on to say that :—

> "For this reason I hold that the action of the prosecution was a little premature and the defendants were arrested before an offence under section 58 (1) (*a*) was committed."

The arguments adduced at the hearing of this appeal by Counsel on both sides are certainly very attractive. Mr J. O. Williams for the appellants urged that the charge was not one of exporting but of "being concerned in exporting" which covered a much wider field, and in his submission it covered every stage through which the goods have to go during the process of exportation. Counsel further urged that a person who filled up export forms which are necessary prerequisites to exportation was as concerned in exporting as the person who takes part in the physical handling of the goods in question. Mr J. O. Williams further argued that account must be taken of the fact that part of the consignment of the goods of the 1st respondent had been shipped though not the particular 387 bags in question. My attention was drawn by Mr Williams to s. 71 (3) of the Act in question on the interpretation of the word "exportation."

Mr Cole on the other hand argued that there must be actual exportation of the goods before the respondents could be convicted of the offence in question, and drew my attention to various sections of the Act as well as to some text books on the subject of interpretation of statutes. He urged that there was a difference between exporting and being concerned in exporting and assimilated the position of a person concerned in exporting to that of a principal in the 2nd degree.

Section 58 (1) (*a*) (*i*) of the Customs and Excise Management Act provides that :—

> "If any person—
>
> (*a*) except as provided by or under this Act exports or is concerned in exporting—
>
> (*i*) any goods chargeable with a duty which has not been paid then, if he does so with intent to evade any such duty or any prohibition, he shall be liable to a fine of six times the value of the goods or two hundred pounds, whichever is the greater, or to imprisonment for two years, or to both."

Together with this section should be read section 71 (3) which deals with the time of exportation for the purposes of the Act and particularly the proviso which deals with "goods in respect of which any prohibition is for the time being in force." I have already made reference to the evidence of one of the witnesses for the appellant who deposed to the existence of a provisional prohibition in respect of groundnuts. The section reads thus :—

> "The time of exportation of any goods from Nigeria shall be deemed to be
>
> (*a*) where the goods are exported by sea or air, the time of completion of the loading of the goods for exportation :
>
> (*b*) where the goods are exported by land or inland waters, the time when the goods are taken out of Nigeria :
>
> "Provided that in case of goods in respect of which any prohibition is for the time being in force which are exported by sea or air, the time of exportation shall be deemed to be the time when the ship or aircraft in which they are carried departs from its final position, anchorage or berth within Nigeria."

Section 56 of the Customs and Excise Act of 1952 of the United Kingdom uses words of similar meaning to our own s. 58 and it provides that :—

> "If any goods are—
>
> (*a*) exported or shipped as stores or
>
> (*b*) brought to any place in the United Kingdom for the purpose of being exported or shipped as stores
>
> and the exportation or shipment is or would be contrary to any prohibition or restriction for the time being in force with respect to those goods under or by virtue of any enactment, the goods shall be liable to forfeiture and the exporter or intending exporter of the goods and any agent of his concerned in the exportation or shipment or intended exportation or shipment shall then be liable to a penalty of three times the value of the goods or one hundred pounds, whichever is the greater."

The words are similar but this section of the English Act goes further and embraces persons obviously not caught by our s. 58. It embraces not only exporters but also "intending exporters" and deals not only with exportation but "intended exportation" and therein lies the difference between our Act and that of 1952 in force in England. There is I hope no need for me to dwell on the apparent and obvious meaning and differences in stages between "exportation" and "intended exportation," nor is there any need for me to seek any reasons for this omission to include "intended exportation" in our own Act. Suffice it to note that the omission is there and I pass on to the equivalent in the English Act of our own s. 71 (3). This will be found in s. 79 (3) which provides that :—

> "The time of exportation of any goods from the United Kingdom shall be deemed to be—
>
> (*a*) Where the goods are exported by sea or air, the time when they are cleared by the proper officer at the last Custom's Station on their way to the boundary :
>
> Provided that in the case of goods of a class or description with respect to the exportation of which any prohibition or restriction is for the "time being in force under or by virtue of any enactment which are exported by sea or by air, the time of exportation shall be deemed to be the time when the exporting ship or aircraft departs from the last

> port or Customs airport at which it is cleared before departing for a destination outside the United Kingdom."

It is clear that this definition which is identical in meaning without covers and is meant to cover only one phase of s. 56 of the English Act, *i.e.*, exportation which is the only phase envisaged by our own Act. The other phase "intended exportation" needs no interpretation for it is a phase where the actual shipping of the goods has not taken place but is intended and the offenders are caught before the actual shipping takes place. That is the position which was reached in the case now before me. It would be covered by the English Act but is not covered by our own Act.

As I said during the hearing of this Appeal and before I had been able to lay my hands on the English Act there is a vast difference between the commission of an act and the attempt to commit that act. To ask the Court to so construe "being concerned in the commission of an act" in such a way as to embrace an attempt would not only be illogical but would be contrary to the rules of construction and the very meaning of the two words concerned. It seems to me that the English Act has embraced an attempt or something akin to attempt to export by the use of the words "intending exporter" and "intended exportation." "Being concerned in" means no more than the meaning given to it by Pollock C. B. and Alderson B. in the case *The Attorney-General v. Robson* 155 E.R. 346 *at* 347 where the defendant was charged with being concerned in the illegal unshipping of tobacco, the duties for which had not been paid. The evidence showed that the defendant was the owner of the vessel and let it out for the purpose of fetching goods to be landed without payment of duty. Even though the action or deed which constituted the offence was done in the defendant's absence *Alderson B.* said :—

> "Perhaps it might not be said that the defendant "assisted" but he was certainly "concerned" in the unshipping."

and *Pollock C. B.* that :—

> "The words "otherwise concerned" mean having any interest whatever in the matter."

The matter of course is the actual unshipping of the tobacco which has physically taken place, and in the case before me the interest is in the actual exportation. This however has not taken place.

For these reasons I must and do hold that the interpretation put upon the two sections of our Act already discussed by the trial Magistrate was correct and I would dismiss the appeal.

I should also mention that even if I were wrong, and I do not believe I am in this interpretation, the findings of the learned Magistrate to the effect that :—

> "From the evidence as a whole, I find as a fact that it was the 2nd defendant who prompted the 1st defendant to cancel his arrangement with 4th prosecution witness and his associates. It was he who undertook to help him ship his goods to Ghana upon payment of £40 as customs duty and entry and payment of freight in Ghana. It was he, who, taking advantage of the 1st defendant's illiteracy, and his position as the shipping clerk, arranged to have exhibits C and C1 shipped to Ghana without first paying for the customs duty."

and from which there has been no appeal gives the 1st respondent a clean slate in respect of the intention to evade the payment of Customs duty, and he would in my view be also entitled to a verdict of acquittal on the facts. In the case of the 2nd appellant, no specific finding of fact has been made in this respect in view of the learned Magistrate's views of the law which I have upheld.

This appeal is therefore dismissed.

HIGH COURT, LAGOS

EMMANUEL NWOYE OKONGWU — PLAINTIFF/APPLICANT

v.

1. N. ANUNUOBI
2. J. UZOR
3. N. CHUKWURA
4. P. B. OLAREWAJU
5. J. O. ENIGBOKAN
6. B. O. AGBATOR

.. DEFENDANTS/RESPONDENTS

(SUIT No. LD/695/65)

[HIGH COURT, LAGOS : D. A. R. ALEXANDER, J.; 24th March, 1966]

Trade Union—capacity to sue and be sued—legal personality.

At the hearing of an application brought by the plaintiff for an order to amend the writ of summons by joining the Niger Challenge African Staff Association as co-plaintiffs with the applicant the respondents objected to the application on several grounds one of which was that the Niger Challenge African Staff Association being a trade union was not a legal entity liable to sue and be sued under the laws of Nigeria.

HELD : (*i*) (following Taff Vale Railway Co. v. The Amalgamated Society of Railway Servants (1901) A.C. 426 and National Union of General and Municipal Workers v. Gillian (1946) K.B. 81) that a trade union registered in Nigeria under the Trade Unions Act, Cap. 200, could in an appropriate case seek declaration or an injunction or the appointment of a receiver, three of the remedies sought in the writ of summons.

(*ii*) that the reasoning in the Taff Vale Case applied as regards trade unions registered in Nigeria under the Trade Unions Act.

Objection overruled.

Statutes referred to :

Trade Union Acts 1871 *and* 1876 (*U.K.*).

Trade Unions Act, Cap. 200, *Laws of Nigeria* (1958 *edition*).

Trade Disputes Act 1906 (*U.K.*).

Cases referred to :

Taff Vale Railway Company v. The Amalgamated Society of Railway Servants (1901) *A.C.* 426.

National Union of General and Municipal Workers v. Gillian (1946) *K.B.* 81.

Nyong and Asomugha for the applicant

Atilade and Adejumo for the respondents.

RULING

ALEXANDER, J.:—This is an application by the plaintiff for an Order or Orders to effect the following amendments :—

(*a*) to the writ of summons by joining the Niger Challenge African Staff Association as a co-plaintiff with the Applicant ; and consequentially

(*b*) to the Statement of Claim filed by the plaintiff.

Mr Nyong, Solicitor to the plaintiff, deposed in an affidavit in support of the motion that he was given leave to amend the Writ of Summons and to effect all necessary consequential amendments to the proceedings. That is *not* correct. He was merely advised to make a proper application for an order enabling the necessary amendments to be made. However, he has further deposed that the amendments sought would in no way alter the substance and nature of the claim.

Mr Atilade, for the respondents, objected to the application on a number of grounds. He contended that the Niger Challenge African Staff Association (hereinafter referred to as "the Association") being a trade union, is not a legal entity liable to sue and be sued under the laws of Nigeria.

As regards trade unions registered in England under the *Trade Union Acts* 1871 *and* 1876 it was authoritatively laid down by the House of Lords in the case of the *Taff Vale Railway Company v. The Amalgamated Society of Railway Servants* (1901) *A.C.* 426 that such a trade union may be sued in its registered name. The relevant Act in Nigeria is the *Trade Unions Act, Cap.* 200 under which trade unions which fulfil the requirements of that Act may be registered.

Farwell, J. whose decision in the *Taff Vale Case* was reversed by the Court of Appeal but restored by the House of Lords said in his judgement (which is reported at (1901) A. C.) at page 429 :—

> "It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature."

And, in the House of Lords, *Lord Shand* said (at page 440 to 441) :—

> "I agree in thinking there is no express enactment to that effect ; but with great deference, in my opinion, the power of suing and liability to be sued in the society's

name clearly and necessarily implied by the provisions of the statutes."

In my opinion, the reasoning in these passages from the judgements of Farwell J. and Lord Shand equally apply as regards trade unions registered in Nigeria under the *Trade Unions Act, Cap.* 200. Of course, section 8 of that Act prohibits actions of tort against a trade union, alleged to have been committed by or on behalf of the trade union in contemplation of or in furtherance of a trade dispute. This provision corresponds with section 4 (1) of the *Trade Disputes Act* 1906 of the United Kingdom. A trade union may, however, sue in tort: *National Union of General and Municipal Workers v. Gillian* (1946) K.B. 81, C.A. From this it follows that a trade union, may in an appropriate case seek a declaration or an injunction or the appointment of a receiver, which are three of the remedies sought in the writ of summons.

Another point taken by Mr Atilade is that the Applicant and the Association have not got, *jointly*, a ground for instituting the suit as required by Order 4, rule 2 of the High Court of Lagos Rules. After considering the revised statement of claim which is attached to the affidavit as *Exhibit B*, I have no hesitation in holding that the applicant and the Association appear to have a ground jointly for instituting the suit, the ground being the alleged violation of the constitution of the Nigerian Workers' Council. I hold, further, that *Exhibit C* attached to the affidavit in support of the motion is a sufficient consent by the Association to be joined as a co-plaintiff in the suit.

Mr Atilade has also contended that by virtue of Order 4, rule 7 of the High Court of Lagos Rules, the writ of summons is defective and should be set aside for the reason that it states "distinct causes of suit.....by and against the same parties but not in the same rights". It is to be observed that the power given to the Court by that rule of Court is discretionary and not imperative or mandatory. I would have been prepared to exercise my discretion by granting the order for amendment, notwithstanding the joinder on the face of *Exhibit A* of distinct causes of action by two parties who are not claiming in the same right, because the "causes of suit" do in fact arise from the same transaction and it is difficult to see what prejudice, embarrassment, or delay would be caused to the defendants by this joinder. And, generally speaking, common questions of law and fact are to be decided, and it would be convenient to determine all disputes relating to the same subject matter without delay and the expense of separate actions.

In expressing these views, I bear in mind that Order 4 of the High Court of Lagos Rules, should be read together with the provisions of Order 15, rule 6 of the Rules of the Supreme Court of England, pursuant to section 12 of the *High Court of Lagos Act, Cap.* 80.

What I fail to see, however, is how the capacity of the plaintiff Mr E. N. Okongwu is altered in any way by joining the Association as a co-plaintiff, as deposed to in paragraph 3 of the affidavit in support of the motion. I therefore do not, in the context of the affidavit, see the reason or necessity for the joinder of the Association as a co-plaintiff, since this would not in fact alter the capacity in which the plaintiff has brought the proceedings.

Further, paragraph 4 of *Exhibit A* (the revised writ of summons) in which £10,000 damages are claimed :—

> "(*a*) for the unlawful prevention of the first plaintiff from carrying on his duties as the duly elected General Secretary of the Nigerian Workers' Council ;
>
> (*b*) for the unlawful seizure and detention by the defendants of the official motor car plate number LK 3235 from the possession and use of the first plaintiff as the duly elected General Secretary of the Nigerian Workers' Council,"

belies the opening statement to the effect that the *plaintiffs'* claims against the *defendants* are joint and several. *Exhibit B* (the revised statement of claim) repeats the error since, again, at the end thereof "the plaintiffs claim jointly and severally as per amended writ of summons", notwithstanding that in paragraph 19 the plaintiffs aver that "by reason of the above unlawful acts of the defendants, the first plaintiff has been put to great expense, hardship, inconvenience, embarrassment, and public ridicule and has thereby suffered damage". This makes it clear that the proposed second plaintiff is not concerned with the claim for damages.

In the result, this application is refused, without prejudice to a proper application being filed seeking an order enabling any appropriate amendments to be made. The Applicant shall pay costs of one guinea to each of the Respondents in consequence of this abortive application.

HIGH COURT, LAGOS

In the Estate of Arthur William Channon Major (deceased)
INGEBORG LIESELOTTE MAJOR (making application by her Attorney GERALD LAWRENCE IMPEY) .. .. .. APPLICANT

(SUIT NO. M/26/1965)

[HIGH COURT, LAGOS D. A. R. ALEXANDER, J.; 29th March, 1965]

Letters of Administration—"nil" grant—resealing—whether the Court could lawfully grant letters of administration in respect of the estate of a deceased who was domiciled in England but whose estate consists mainly of realty and shares the bulk of which was in Nigeria.

The application was brought under Order 48 of the Rules of the High Court of Lagos for an order directing the Probate Registrar to proceed with an application by the widow of the deceased and the sole beneficiary under his will for a grant of letters of administration with the will annexed in respect of the estate of the deceased whose estate consisted of realty and shares situated in Nigeria, Ghana and Sierra Leone. The acting Probate Registrar had found himself unable to entertain the application for a grant on the ground that the deciding factor in the issue of a grant was the fixed place of abode of the deceased person and not where he had the bulk of the estate and that since the deceased died domiciled in Surrey, England, the applicant should obtain a "nil" grant in Surrey, England and reseal the same at Lagos under section 2 (1) of the Administration of Justice Act 1932.

HELD : that a grant could lawfully be made by the High Court of Lagos and no valid reason had been advanced for rejecting or refusing the application. (Ordered as prayed).

Statutes and Rules referred to :

Administration of Justice Act 1932.

High Court of Lagos Act.

Order 48, *Rules of the High Court of Lagos.*

C. M. Smith for the applicant.

Egbue, State Counsel, for the acting Probate Registrar.

ALEXANDER, J. :—This is an application under Order 48 of the Rules of the High Court of Lagos for an order directing the Probate Registrar to proceed with an application by Ingeborg Lieselotte Major, the widow of the deceased Arthur William Channon Major and the sole beneficiary under his will for a grant of letters of administration with the will annexed in respect of the estate of the said Arthur William Channon Major. It is deposed in the affidavit "that there is no property of the deceased's estate in England and that all assets of the estate are situated in Nigeria, Ghana and Sierra Leone." Learned counsel for the applicant also stated at the bar

that the assets consist of realty mainly and shares and that the bulk of the estate is in Nigeria. The application for the grant is in fact being made by Gerald Impey of 40 Marina, Lagos, Barrister and Solicitor by virtue of a power of attorney dated the 13th of October, 1964.

The Acting Probate Registrar found himself unable to entertain the application for the grant and pointed out in his letter dated 24th November, 1964 to Messrs G. Impey and Co., Exhibit E, "that the deciding factor in the matter of the issue of grants is the fixed place of abode of a deceased person and not where the bulk of his estate is situated." He went on to say that since the deceased died domiciled in Surrey, England he regretted he could not entertain the application.

In his letter dated 1st February, 1965, Exhibit G, again addressed to Messrs G. Impey & Co. the Acting Probate Registrar informed the addressees that "since the deceased died domiciled in Surrey, England, the proper place to apply for and obtain a grant is the District Probate Registry in Surrey, England". He further advised that "even where the deceased has no property in England your clients could still apply for a 'nil' grant in Surrey, England and invoke the provisions of section 2 (1) of the Administration of Justice Act, 1932" and that "the grant when issued could be re-sealed in Lagos, Nigeria".

Part III of the High Court of Lagos Act (Jurisdiction and Law) and, in particular, section 16 of that Act gives the High Court of Lagos jurisdiction in matters relating to probate and administration of the estates of deceased persons, while Order 48 of the High Court of Lagos Rules contains the Rules of Court subject to which this jurisdiction is exercised in conformity with the law and practice for the time being in force in England. In *Tristram and Coote's Probate Practice 21st Edition* at page 88 it is stated that—

> "By the law of England, the will, if valid by the law of a deceased person's domicile, is provable in England;"

In *Cheshire on Private International Law 4th Edition* at page 510 it is stated that—

> "The rule, in fact, for many years has been that an English court can grant administration only if there is property in England, though it now has statutory authority to make a grant, notwithstanding that the deceased left no estate."

(See the Administration of Justice Act, 1932 section 2 (1)).

Again, the following passage occurs in *Halsbury's Laws of England, 3rd Edition*, volume 7, at page 65, paragraph 121—

> "Before anyone may administer the assets situated in England of a deceased person, he must obtain authority so to do under a grant of administration made by a competent English court, and this is so whether or not the deceased died domiciled in England."

If "Nigeria" is substituted for "England" in the above passages in accordance with section 16 of the High Court of Lagos Act, it becomes clear that the applicant in this case is entitled to a grant of letters of administration with the will annexed if she complies with Order 48 of the High Court of Lagos Rules. It will be observed that special statutory authority was necessary before a grant could be made notwithstanding that the deceased left no estate and that a "nil" grant should therefore be the exception rather than the rule. In the circumstances I can see no sufficient reason why this particular application should be exceptionally treated.

Mr Egbue for the Acting Probate Registrar has conceded that this would be the position but for the provisions of Order 48 rule 1 (1) of the High Court of Lagos Rules which provides in part as follows :—

> ".....when any person subject to the jurisdiction of the court dies all petitions for the granting of any probate of the will of, or for letters of administration of, the estate of the deceased person and all applications or other matters connected therewith shall be made to the..... ..Probate Registrar of the court."

He contends that since the deceased died in England he was not a person *subject to the jurisdiction of the court.* The rule quoted above is clearly a procedural rule for the guidance of petitioners and applicants as to the authority to whom petitions and applications should be addressed in the first instance and does not in my opinion in any way impair the jurisdiction conferred on the court by sections 10-16 of the High Court of Lagos Act. In my view this rule of court cannot and could not have been intended to limit the jurisdiction of the court to cases where the deceased died within the jurisdiction of the court and to exclude cases where the deceased died outside the jurisdiction of the court but left property within such jurisdiction. I do not agree that a mere procedural rule can be relied upon to cut down the clear jurisdiction given to the High Court of Lagos. The test to be applied in any event is whether the

deceased was subject to the jurisdiction of the court at the time of his death in the sense that he left property within such jurisdiction.

Although it is appreciated that the Acting Probate Registrar was satisfied that the alternative procedure whereby a grant would be obtained in England and re-sealed here would be preferable from his own point of view, the question to be determined is whether a grant may lawfully be made by this court and whether there is any lawful reason for withholding the grant. In my opinion, a grant may lawfully be made by this court and no valid reason has been advanced to show why the application should be rejected or refused, provided that the legal prerequisites to the making of the grant are fulfilled by the applicant.

I accordingly grant the application now before me and make the order as prayed therein.

HIGH COURT, LAGOS

PRINCE M. I. ADETONA .. .. .. PLAINTIFF

v.

TOTAL OIL PRODUCTS (NIGERIA) LTD. DEFENDANTS

(SUIT NO. LD/87/1965)

[HIGH COURT, LAGOS : B. A. ADEDIPE, J. ; 15th April, 1966]

Contract for lease of land for use as petrol station—Implied term in such contracts.

The plaintiff entered into an agreement with the defendant company whereby the company agreed to take a lease of the plaintiff's land for 40 years. Subsequently the company did not perform and the plaintiff brought an action for specific performance and for damages. At the trial it was shown that the Ministry of Works did not approve the land for a petrol filling station, the purpose for which the company required the land :

HELD : that it was an implied term of the contract as in any contract for the use of any plot of land as a petrol filling station, that the Ministry of Works would grant a right of access to the road from the filling station.

Plaintiff's claim dismissed.

Cases referred to :

The Moorcock (1889) 14 P.D. 64.

Ryan v. Mutual Tontine Association (1893) 1 Ch. 126.

Walsh v. Lonsdale (1882) 21 Ch. 9.

Manchester Brewery Co. v. Coombs (1901) 2 Ch. 608.

Sowemimo for the plaintiff.

Peter Thomas for the defendants.

JUDGEMENT

ADEDIPE, J. :—The plaintiff's claim against the defendant is :—

(*i*) for specific performance of the contract dated the 18th day of May, 1963 whereby the defendant agreed to lease the plaintiff's land situated at and known as No. 36/38 Agege Motor Road, in the Federal Territory, for a term of 40 years at the annual rent of £500, and

(*ii*) for the sum of £5,000-0*s*-0*d* being the 10 years' advance rent due on the aforesaid lease agreed to be payable by the defendant to the plaintiff as per an agreement dated the 18th November, 1963.

On the 18th of May, 1963, the plaintiff entered into an agreement with the defendant company to lease a plot of land known as Nos. 36 to 38 Agege Motor Road to the defendant.

The terms of agreement of the said lease was signed by the plaintiff on the 18th May, 1963. This was tendered and admitted as Exhibit B. Exhibit B shows the situation of the land, the duration of the lease, which is 40 years with 15 years option, that the approval of the L.E.D.B., L.T.C. and P.W.D. must be obtained, the rent to be £500 per annum, that 10 years rent must be paid in advance, and that £10 was paid as earnest, that is to prevent the plaintiff from leasing the land to someone else.

The plaintiff in Exhibit B also undertook to execute the lease promptly subject to good title or make a refund of the earnest if his title is defective. It would appear that as Exhibit B stands it is only binding on the plaintiff. It was not signed by the defendant company.

The original title deed of the plaintiff in respect of the land was deposited with the defendant, and a photostat copy of it was tendered and admitted as Exhibit A.

Another agreement was executed by the plaintiff and the defendant company. The agreement dated 18th November, 1963 was tendered and admitted as Exhibit C. In Exhibit C, it was agreed that should the Public Trustee succeed in his claim to part of the land, the subject of the lease between the plaintiff and the defendant company, the plaintiff would only be paid a proportion of the agreed total rent of £5,000, the rent for 10 years.

It was also agreed that the rent would be paid only after the L.E.D.B.'s approval in principle has been obtained.

The L.E.D.B. gave its approval in a letter addressed to the defendant, a photostat copy of which was tendered and admitted as Exhibit D. In Exhibit C dated 14th December, 1963, the L.E.D.B. also asked that final drawings be submitted for stamping and signature by the Ministry of Works, before approval by the Board.

On the 28th January, 1965, the plaintiff's solicitor wrote a letter to the defendant Company asking that Exhibit B be honoured by the defendant, else he would apply to the court to compel specific performance of the contract. The letter was tendered and admitted as Exhibit E. Exhibit F was the reply received by the plaintiff's solicitors from the defendant's solicitors. In Exhibit F the solicitors stated that their clients were willing to release the plaintiff

from further obligation, and to hand over his land to him, provided that he returned the sum of £800 given to him by the defendant Company.

On the 25th November, 1964, the defendant wrote a letter to the plaintiff's solicitors in which it was stated that the Ministry of Works would not grant direct access to the proposed filling station and therefore the Company could not proceed with the proposition even though, the L.E.D.B. had given its approval, and that the Company would be willing to give a letter of release to the plaintiff if he refunded the sum of £800 advanced to him for the project. This letter was admitted as Exhibit G.

The plan of the filling station was tendered and admitted as Exhibit H. It contains the approvals given by the L.E.D.B., the L.C.C. and the Federal Ministry of Works and Surveys.

In 1963, the plaintiff executed a Deed of Lease in favour of the defendant in respect of the land, for a term of 40 years, at the annual rent of £250, and the sum of £3,750 representing fifteen years rent, was to be paid to him on the execution of the Deed. A photostat copy of the Deed of Lease which is undated, unregistered, and not executed by the defendant Company, was tendered and admitted as Exhibit L. There was no plan annexed.

The plaintiff explained that he executed Exhibit L because the defendant told him that the Public Trustee claimed part of the land, and that if the claim was successful he would be paid £250 per annum as rent, and 15 years rent instead of the 10 years rent previously agreed to. He said also that he was informed by the defendant that if the claim of the Public Trustee failed, they would go back to the original terms in Exhibit B.

He told the court that till now the Administrator-General or Federal Public Trustee has never claimed any part of the land or sued him to court in respect of any portion of it. He said further that since 1962 no one has challenged him on the land.

A letter dated 18th January, 1964, written to the defendant by the plaintiff's solicitor in which a demand for the sum of £5,000 rent for 10 years was made, was tendered and admitted as Exhibit M.

On the 3rd December, 1964 the plaintiff wrote a letter to the Assistant Director (Planning), Federal Ministry of Works, in which he stated that the land in question was approved by the L.E.D.B. for Petrol Filling Station for the Defendant Coy., and

that from all indications the Ministry found it very difficult to give direct access to the main road. He stated further that he had been unable to sign an Agreement with the defendant Company for the fact stated above, and that he wrote to the defendant Company to indicate its stand on the land, but it replied that the land could not be developed because there was no direct access to the main road. A copy of the letter was tendered and admitted as Exhibit N.

As far back as 14th January, 1964, the Director of Federal Public Works had informed the plaintiff that the Ministry could not grant road access to the proposed petrol filling station to be built on the land in question, as road access had already been promised an earlier applicant for another proposed filling station on the adjacent land. He stated also in the letter that the question of the location of bus stop in the area had to be settled before even the road access already promised is granted. A copy of the letter was tendered and admitted as Exhibit O.

A letter from the Oloto Chieftaincy family stating that the plaintiff had the authority of the family to negotiate and deal with the defendant Company in respect of the land in question was tendered and admitted as Exhibit P.

The defendant Company said that the sum of £800 was advanced to the plaintiff to enable him get his title through with the Oloto family, and to get away the squatters who were on the land. The plaintiff entered into an agreement to get out the squatters but till now has not succeeded in doing so. Exhibit Q is the agreement.

The defendant Company said that it had not entered into possession of the land till now ; that the plaintiff has never obtained the approval of the Ministry of Works who controls all Trunk A roads and that the Ministry refused till now to give the necessary approval. Letter dated 12th May, 1964 from the Ministry to the defendant Company was tendered and admitted as Exhibit R. In Exhibit R the Ministry stated that an approval given any proposed road-side development by the L.E.D.B. covers only the general layout of the plot and the design of the buildings, that it could disapprove drawings by the L.E.D.B., that as the body responsible for the civil and traffic engineering aspects of all Trunk A roads, it checks drawings of all proposed road-side developments, to ensure that grant of access to such developments will not subject road users to danger or undue discomfort, and that it is not the policy of the Ministry to approve the siting of two petrol stations on two adjacent plots.

There is no dispute that the land in question was required by the defendant for the purpose of a petrol filling station and that such a place must have the right of access to the road.

It is clear from Exhibit N addressed by the plaintiff to the Ministry of Works on 3rd December, 1964, after the plan Exhibit H had been approved, that he was aware that the Ministry would not grant access from the main road to the proposed filling station. He said that for this reason he had been unable to sign an Agreement with the defendant Company. He even asked the Ministry to entertain any plan drawn by any other commercial house other than Oil Companies. I have no doubt that the plaintiff is aware of the fact that it is an implied term of the contract as in any contract for the use of any plot of land as a petrol filling station, that the Ministry of Works would grant the right of access to the road from the filling station. In construing a contract, a term or condition not expressly stated may, under certain circumstances, be implied by the court, if it is clear from the nature of the transaction that the contracting parties must have intended such a term or condition to be a part of the agreement. Such an implication must in all cases be founded on the presumed intention of the parties and upon reason, per Bowen, L.J. in the *Moorcock* (1889) 14 *P.D.* 64, *C.A. at page* 68.

The defendant stated that if the plaintiff could get the necessary approval now the Company would be ready to execute an agreement, and pay the amount due. The plaintiff is now seeking specific performance.

In the leading case of *Ryan v. Mutual Tontine Association* (1893) 1 *Chancery*, 126, it is stated that the remedy of specific performance was invented to meet cases where the ordinary remedy by an action for damages is not adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary and confined within well known rules.

The plaintiff claimed that he had established sufficient part performance, and that the defendant has gone into possession and paid part of the rent, *i.e.*, the sum of £300. The defendant Company denied this and said that the £300 was to enable the plaintiff to get the squatters who were on the land away, and that the Company had never entered into possession of the land.

The plaintiff's Counsel referred to the case of *Walsh v. Londsdale* 1882, (21) *Ch. page* 9 which is the authority for saying that an agreement for a lease is as good as a lease. It was held in *Manchester Brewery Company v. Coombs* (1901) 2 *Ch. page* 608, that it

must not be concluded that the doctrine of *Walsh v. Londsdale* makes an agreement for a lease as effective in all respects as a lease. If in litigation between the parties, the circumstances would justify a decree for the execution of a sealed lease, then the case must be treated as if such a lease had been granted.

It seems to me on the evidence before the court that this is not a case where the court should order specific performance.

I also find that the plaintiff is not entitled to the sum of £5,000 rent which he is claiming.

I will therefore dismiss the plaintiff's claim with fifty guineas costs.

HIGH COURT, LAGOS

WUSAMOTU DOSUNMU .. .. .. PLAINTIFF

v.

LAGOS CITY COUNCIL .. .. .. DEFENDANTS

(SUIT No. LD/39/66)

[HIGH COURT, LAGOS : CHUBA IKPEAZU, J. ; 16th May, 1966]

Tort—Trespass—Eviction without notice and without compliance with provisions of the Recovery of Premises Act—Compensatory and deterrent damages.

The plaintiff lived with her son who was employed in the Lagos City Council and to whom was allocated quarters by the Council at 2 Panti Street. In August 1965 the plaintiff's son left for the United States on a scholarship awarded by the Council leaving his wife, his brother and his mother living in the house for which he paid rents regularly to the Council up to January 1966.

On 28th January, 1966 the Council's agents proceeded to Panti Street, ordered out the plaintiff's other son and carried out all the belongings of the plaintiff and those of his son (in America) and left them outside for six days before they put them into the boys quarters of the house. In consequence of the eviction the plaintiff claimed damages for trespass. Evidence showed that the eviction was carried out without any previous intimation and without compliance with the law.

HELD : (i) that on the facts the plaintiff was a tenant of the premises at the time she was evicted by the agents of the defendants.

(ii) that the defendants should have proceeded under section 7 of the Recovery of Premises Act and given the plaintiff a notice to quit, at the end of the term, notice of intention to recover possession after a date specified and if necessary should have thereafter issued a writ for recovery against the plaintiff.

(iii) that the manner of eviction humiliated and disgraced the mother of a senior member of the defendants staff; that the eviction was spiteful, high-handed, callous, obnoxious and aggravating and amounted to an outrage not only on the plaintiff but on society. In such a case as this damages should be both compensatory and deterrent.

General damages of £500 awarded.

Statute referred to :

Recovery of Premises Act, Cap. Laws of Nigeria (1958 *edition*).

Cases referred to :

Johnson Akpiri v. W.A.A.C. (1951) 14 W.A.C.A. 195.
Okedare v. Saimua (1955) 15 W.A.C.A. 17.
Harry v. Martins (1949) 19 N.L.R. 42.

Whitham v. Kershaw (1885) 16 Q.B.D. 618.
Cruise v. Terrel (1922) 1 K.B. 670.
Lavender v. Betts (1942) All E.R. 73.

Alli-Balogun for the plaintiff.

Victor Munis for the defendants.

JUDGEMENT

IKPEAZU, J. :—The plaintiff is a housewife whose husband was at the time material to this case residing in England on national duty. By her first husband who is now dead she has a son, Dr G. A. Williams who is a health officer in the service of the defendants and who has been away to the United States on a scholarship awarded to him by the defendants. He left this country on the 26th of August 1965, and was joined by his wife the following month. The latter delivered a baby here in August 1965 and the plaintiff who was at that time invited to look after her and the new born baby lived with them in the house until she left for America. Both Dr G. A. Williams and his wife were occupying a house at 2 Panti Street allocated to him by the defendants since his appointment. Apart from the doctor himself and his wife living there his junior brother was also living with them and attending Igbobi College as a day student. When Dr Williams left in September 1965 the plaintiff was staying in the house as already stated and it is her case that when her son was leaving he asked her to stay on and look after the house and his things as he has been permitted by the defendants to retain the house.

When Mrs Williams left the country in September 1965, the plaintiff took charge of the premises having with her in the house her younger son, the doctor's driver and some servants. The keys were handed to her when the doctor's wife was leaving and she was left in absolute charge of the house and of all the occupants and the doctor's entire belongings which he left behind. The doctor was paying a rent of £9-17*s*-6*d* a month and this amount was being deducted every month from his salary when he was in the country and continued to be deducted after he left in August 1965 during each succeeding month until the end of January 1966 when the defendants stopped the deduction and paid back the sums deducted from the time he left till January 1966.

On the 28th of January, 1966 the defendants' agents proceeded to 2 Panti Street and ordered out of the buildings the plaintiff's student son who was in the house at that moment and carried out

all the belongings of the plaintiff, and those of Dr Williams and his wife which were left in the house. The plaintiff was sent for and on her arrival after a brief altercation with the agents, she invited a photographer who took photographs of the articles as they lay outside. These articles remained for six days until they were packed away by the defendants into the boys' quarters where they still remain. In consequence of this eviction, the plaintiff has instituted this action in which she is claiming the sum of £5,000 (five thousand pounds) being general damages for trespass committed by the defendants in the premises. Pleadings were directed, entered, and delivered. The statement of claim is a brief summary of the facts outlined above. The defendants denied that the plaintiff was residing in the premises either alone or with her children and servants or that she had her things there or that they ejected her and averred that after due warning, explanations and reasonable offers the council took possession of the premises peacefully.

The plaintiff gave evidence and called three witnesses and the defence called one witness on their behalf. The plaintiff's case was not at all resisted on the facts. She testified that she came to reside in the premises on the invitation of her son, Dr Williams, and that with her in the premises was her student son, Afolabi Williams who testified as P.W. 4 together with Dr Willaims' driver and others. She said that her belongings and those of Dr Williams were in the building when the defendants' agents came on the 28th of January, 1966 and threw them outside without any previous notice or warning whatever from the defendants. The photograph showing the belongings lying outside was admitted and marked Exhibit D 1. Her evidence was supported by her son Afolabi Williams who said that he was in the house when the defendants' servants and agents came and ordered him out of the house and began to throw their belongings and those of the doctor outside, and collected those keys which were stuck to the door. He sent for the plaintiff and on her arrival she challenged the defendants' agents who hushed her and brushed her aside. The plaintiff tendered the pay slip for Dr Williams for the month of January 1966 and this showed the deduction of the rent of £9-17*s*-6*d* for that month. This slip was admitted and marked as Exhibit E. A bank clerk from Barclays Bank who testified as P.W. 1 tendered two payslips for payments into the plaintiff's account in January and February 1966 and these were marked Exhibits A & A1. The statement of account card in respect of Dr Williams was also put in by this witness and admitted as

Exhibit B. Also admitted through him and marked Exhibit C was an A.C.B. cheque which represented the refund of the rent for three months. The cheque was dated 31-1-66 but was paid into the Bank on 2-2-66. The plaintiff also said that after this action had been instituted, she received the defendants' payment voucher admitted as Exhibit F which reflected the refund of the rents for the months of November, December 1965 and January 1966 at £9-17*s*-6*d* per month.

The Establishment Officer of the defendants was called as the witness on their behalf. He stated that the rents of £9-17*s*-6*d* a month was payable by Dr Williams for the quarters allocated to him at 2 Panti Street and that after Dr Williams left the rent continued to be deducted until the end of January 1966 when the last deduction was made. At the end of that month they paid back the sum of £29-12*s*-6*d* being refund of rent for November 1965, December 1965 and January 1966. He said that the deduction should have stopped when Dr Williams left but as the Finance Section omitted to inform the Establishment Section of Dr Williams' departure the deduction continued to be made in error until the end of January 1966 when the fact of his departure was communicated to the Establishment.

He said that there was no arrangement between the defendants and Dr Williams by which the defendants agreed to allow him to retain the quarters allocated to him. He said that he knew nothing about the eviction of the plaintiff from the house and did not know whether Doctor Williams' wife and relations remained in the premises after he left in August 1965. He also testified that allocation or retention of quarters is governed by the General Orders and that quarters are retained by only Heads of Departments when they are on leave and that Dr Williams not being a head of Department is not entitled to retain his quarters while he is away. The defendants did not call any evidence to show that the plaintiff was not residing in the premises in question at the time and did not seriously resist her own evidence that she was. Equally they did not dispute the evidence that she was ejected from the building in the manner complained of or at all.

I am satisfied on the evidence that the plaintiff was residing in the premises before Dr Williams left for the United States and that she has been in possession thereof since the departure of Mrs Williams in September 1965 when she took absolute charge of the premises and the belongings therein.

I accept it as firmly established that she move into the premises and settled there with her children and intended to remain there until the return of Dr Williams who had given her to understand that he had been permitted by the defendants to retain the premises until his return. I believe the evidence of Afolabi Williams that on the afternoon of 28-1-66 the defendants' Chief Executive commissioned two police officers and about fifteen labourers who intruded into the building, collected the keys from the doors, ordered P.W.4 out, packed the goods in the building and carried them outside where they were left in the open for several days. The photograph Exhibit D1 confirm the state of the loads as they lay outside in the premises at 2 Panti Street. Although the defendants averred in paragraph 6 of their Statement of Defence that they took possession after due warning, explanations and reasonable offers, no evidence of such warning, explanations and offers was given at all. The same statement was made at paragraph 8 of affidavit of Mr Victor Olabode Munis, the defendants' solicitor in his counter affidavit against the plaintiff's motion for an interim injunction when he deposed as follows :—

> "That the defendants after due warning and reasonable action ejected the applicant who has no right, title, or interest in the subject matter".

I accept the plaintiff's evidence that she was never questioned by the defendants on her occupation of the premises and that no one ever said anything to her about it and no hint or warning was ever given to her by the defendants that they were opposed to her occupation or that they intended to enter into possession of the premises. It is common ground that Dr Williams was since the allocation of the quarters paying a monthly rent of £9-17*s*-6*d* which was deducted from his salary every month until and including January 1966 when his mother was evicted. The defendants' witness explained the failure to stop the deduction after Dr Williams' departure as due to an oversight but it seems to me that any such excuse is immaterial. The implication of the deduction of rent after Dr Williams had left and during the occupation of the premises by the plaintiff is to ratify the arrangement between Dr Williams and the plaintiff and to make the latter a tenant of the premises in the eye of the law. To hold otherwise will make the law both illogical and repugnant to common sense.

The defence has conceded that the plaintiff will succeed if she shows that her possession at the time of eviction was lawful, either by showing that a tenancy exists between the Council and herself, or

subtenancy between her and her son, Dr Williams, or that she is a licensee of Dr Williams. Mr Munis then contended that there must be privity of estate between the plaintiff and the defendants. That the plaintiff was occupying the premises known in this action as 2 Panti Street is not open to dispute. It is also not open to question that she was ejected without any warning, discussion, notice or any instruction whatever. In such circumstances it seems to me that the relevant thing to resolve in determining the defendants liability or otherwise is whether the plaintiff is a trespasser or a tenant. It is also not open to argument that the plaintiff's son who put her in possession of the premises had paid his rent up to and including the 31st of January 1966 and that such rent was accepted by the defendants who are the landlord. Dr Williams tenancy was lawful and subsisting on the 28th January 1966 and so was that of the plaintiff who was Dr Williams' sub-tenant.

A tenant is defined in section 2 (1) of the Recovery of Premises Act, Cap. 176 as including any person occupying premises whether on payment of rent or otherwise but does not include a person occupying premises under a *bona fide* claim to be the owner of the premises. That would include the plaintiff despite the fact that she was not paying rent either to her son or to the defendants.

In the case of *Johnson Akpiri v. W.A.A.C.* 14 *WACA p.* 195, the Corporation allowed Akpiri free use of the premises to operate a canteen. Later they wrote him to vacate but he failed. In his action against the Corporation for ejectment his action failed because there was no demise but on appeal he was awarded damages on the ground that although no rent was paid he was a tenant within the definition of section 2 (1) of the Recovery of Premises Act.

By section 12 of the Rent Restriction Act, Cap. 183 it is provided as follows :—

> "No tenant or sub-tenant of any premises to which this Ordinance applies shall be ejected therefrom save in pursuance of an order of Court obtained under the provisions of the Recovery of Premises Act."

Both the Rent Restriction Act and the Recovery of Premises Act apply to Lagos and accordingly to the premises in dispute. The steps to be followed in order to recover the premises from a person in the position of the plaintiff are laid down by sections 7 and 8 of the Recovery of Premises Act pertaining to notice to quit, notice of intention to recover possession and obtaining an order for ejectment from the court.

It is again provided by section 4 of the Rent Restriction Act Cap. 183, that :—

> "Where a landlord has let whether before or after the coming into force of this ordinance in respect of the place or area in which the premises are situate, any premises and his tenant not being expressly prohibited in writing from sub-letting, sub-lets such premises or any part thereof, the sub-tenants of such premises or any part thereof shall be deemed for the purpose of this Ordinance to be tenants of the landlord."

Subject to any express prohibition to Dr Williams against sub-letting, the plaintiff would be a tenant of the defendant. There is no evidence that Dr Williams was expressly prohibited in writing from sub-letting. Mr Munis has cited clause 14105 of the General Orders which says that an officer provided with quarters will not sub-let or take in paying guests and if he does so he is guilty of serious misconduct but this does not provide an answer.

In the case of *Okedare v. Saimua* 15 *W.A.C.A. p.* 17 the landlord leased the premises to the tenant with a covenant against sub-letting. The tenant sub-let and the landlord succeeded in an action for forfeiture and obtained an order for possession and the sub-tenant who was not joined was evicted by the bailiff.

An action by the latter against the landlord and the plaintiff succeeded. It was held that although the power of the tenant to grant a sub-lease was restrained, the underlease which he made to the sub-tenant was effective to vest an estate but defeasible by the landlord's exercise of his right of re-entry after notice to the sub-tenant.

Again in the case of *Harry v. Martins*, 19 *N.L.R. p.* 42 the defendant who was leasee of crown land built a shop thereon and let it to the plaintiff in breach of covenant not to sub-let as provided by section 6 of the Crown Lands Ordinance. The defendant re-entered wrongfully and the plaintiff, the tenant successfully sued him claiming damages for unlawful ejectment. The leasee appealed on the ground that the sub-lease was illegal, being in breach of the covenant against sub-letting without consent of the crown.

In dismissing the appeal the Court held that the sub-letting without consent was not an illegal contract; that being so the tenant was in lawful occupation and the leasee was not entitled

to eject the sub-leasee except in conformity with the law for recovery of possession.

On the facts and the authorities I am convinced that the plaintiff was occupying No. 2 Panti Street and was a tenant of that premises at the time when she was evicted by the agents of the defendant. The eviction was carried out without any previous intimation and without compliance with the law. The defendant should have proceeded under section 7 of the Recovery of Premises Act to give the plaintiff a notice to quit, at the end of the term, notice of intention to recover possession after a date specified, and if necessary should have thereafter issued a writ for recovery against the plaintiff. All these the defendant failed to do and having failed to do so I find the defendant liable in trespass to the plaintiff.

I have been asked to take into account the manner of the eviction in the assessment of damages. This is but right. The learned author of Clerk and Lindsell on Torts, 12th edition at page 200 states that the manner of the commission of the tort may give rise to matter of aggravation of damages. In *Whitham v. Kershaw* (1885) 16 *Q.B.D.* in discussing the assessment of damages in a case of conversion Bowen L.J. at p. 618 stated in the following words :—

> "But I wish to add that nothing we have said must be understood as in any way derogating from the principle, when a wrongful act is done by a trespasser or by a tenant to the property of his reversion or under circumstances which call for vindictive damages, the jury may give vindictive damages."

Much the same view was expressed by *Lord Sterndale M.R.* when he said in the case of *Cruise v. Terrel* (1922) *I.K.B. page* 670 that damage can be given if a high handed outrage has been perpetuated. It is not necessary to multiply authorities but I may also mention the case of *Lavender v. Betts* (1942) *of all E.R. p.* 73 where *Atkinson, J.* said as follows :—

> "Normally, plaintiffs are only entitled to such damages as they prove ; but there are torts in respect of which the law permits a jury or a court to give what are called punitive damages where the Court is not limited to giving merely damages in respect of what we call special damages."

In our present case I lament the way and manner in which a public authority in the position of the defendant saw fit to humiliate

and disgrace the mother of a senior member of their staff. The eviction was spiteful, high handed, callous obnoxious, and aggravating and I consider it an outrage not only on the plaintiff but on society. In such a case as this one damages should be both compensatory and deterent and I will award to the plaintiff against the defendant the sum of £500 as general damages with costs which I assess at 150 guineas.

HIGH COURT, LAGOS

U.A.C. (TECH.) LIMITED .. .. PLAINTIFFS

v.

ANGLO CANADIAN CEMENT LIMITED DEFENDANTS

(SUIT No. LD/125/65)

[HIGH COURT, LAGOS : CHUBA IKPEAZU, J. ; 16th May, 1966]

Judgement obtained in default of appearance—undefended cause—no power in court to set aside its judgement on ground that the judgement is irregular.

The plaintiffs claimed the sum of £864-15*s*-11*d* as balance of prices of goods sold and delivered to the defendants. The case was placed on the undefended list and it came up for hearing. The defendants were served and were represented at the hearing by counsel. Counsel stated orally that the defendants proposed to defend the action and his attention was drawn to the Rules and to the fact that there was no notice of intention to defend in the file. There was no application made for extension of time to do anything. The Court gave judgement, and the defendants applied by motion for an order setting aside or varying the judgement by the plaintiffs against them.

HELD : (*i*) that the only kind of judgement governed by Order XL rule 5 or the High Court (Civil Procedure) Rules was a default judgement, that is, a judgement obtained against a defendant who failed to attend and whose absence was not sufficiently excused. The word ANY in the Rule was only preferrable to a judgement obtained in default of appearance on the part of the defendant.

(*ii*) that proceedings in a case placed on the undefended list are governed by Order III rules 9 and 14. In such proceedings a defendant might be present but might not have been let in to defend and judgement entered without adducing evidence as provided for under the rules would be judgement on the merits and not a default judgement.

(*iii*) that in our Rules there is no power similar to that conferred by Order II of the English Rules of the Supreme Court enabling a court of first instance to set aside its own judgement on the ground that such judgement was irregular.

Motion dismissed.

Rules referred to :

Order XL rule 5, *High Court* (*Civil Procedure*) *Rules.*
Order II rule 1. *Rules of the Supreme Court* (*England*).

Cases referred to :

Odeh v. Ojikutu (1954) 14 *W.A.C.A.* 640.
Collins v. Vestry of Paddington (1880) 5 *Q.B.* 308.
Anlady v. Practorius (1888) 20 *Q.B.D.* 264.

RULING AND MOTION

IKPEAZU, J. :—This is an application by the defendant company to set aside or vary the judgement obtained by the plaintiff against it and to make any further or other order as to the Court may seem just. The plaintiffs' case in which he claimed for the sum of £864-15*s*-11*d* as balance of price of goods sold and delivered to the defendant was placed on the undefended list and it came up for hearing on the 18th of April last. The defendant which on the face of the writ is a limited liability company was served and was on that day represented by counsel.

The latter stated orally that they proposed to defend the action. I drew his attention to the rules and told him that there was no notice of intention to defend in the file, and proceeded to give judgement.

This application to set aside the judgement is based on Order XL rule 5 of the Supreme Court Rules of Nigeria and Order XXVI rule 15 of the Supreme Court Rules of England. Under the Nigerian Ruler rule it is provided as follows :—

> "Any judgement obtained against any party in the absence of such party may on sufficient cause shown be set aside by the Court upon such terms as may seem fit".

Order XL on the whole deals with non-attendance of parties at the hearing. Where the plaintiff fails to attend, the case is to be struck out except there is good reason to the contrary. Where both parties are absent the case is to be struck out and where the defendant fails to attend and the plaintiff appears, the case is to proceed except the defendant's absence is sufficiently excused. Such judgement in the absence of the defendant is a default judgement and is to my mind the only kind of judgement which is governed by rule 5. The word ANY in that rule is only referable to a judgement obtained in default of appearance on the part of the defendant. The hearing of a case on the undefended list belongs to a different category. Proceedings in a case that is placed on the undefended list are governed by Order III rules 9 to rule 14, and the procedure differs from that governing default proceeding. In cases on the undefended list the defendant may be present but may not have been let in to defend under the rules. If the case is placed on the undefended list and if leave to defend is not granted or is not asked for then in that case judgement may be entered without adducing evidence as provided for under the rules. Such a judgement is judgement on the merits and is not a default judgement at all.

Counsel also relies on Order 19 rule 9, of the English rules which provides for setting aside any judgement entered in default of defence to the counter claim. I need scarcely add that this cannot afford any assistance in our present case. In the case of *Odey v. Ojikutu* 14 *W.A.C.A.* cited by counsel and which is a case listed on the undefended list, the defendant filed his notice of intention to defend only two days before the case instead of five days required by the rules. At the hearing the defence counsel admitted the lateness as due to his ignorance and unsuccessfully pleaded for extension of time to put matters right. The Court declined to grant extra time and proceeded to judgement. On appeal against the judgement Foster-Sutton, P., in allowing the appeal stated as follows :—

> "I entirely agree with the learned trial judge as to the necessity for observing strictly the provisions of the rules, but in this case the neglect to do so was explained to the Court by the solicitor appearing on behalf of the defendant and I am of the opinion that, in the circumstances here, the trial judge ought to have given the defendant permission to file affidavit explaining the neglect".

He then outlined the principles upon which the Courts should act in matters of extension of time as enunciated by *Thesiger LJ. in the case of Collins v. Vesrty of Paddington* (1880) 5 *Q.B. p.* 308 *at p.* 381 in the following terms :—

> "I agree that until a judgement has been arrived at upon the merits an extension of time may be allowed for rectifying a mistake or oversight; up to that time both parties may be considered as standing upon an equal footing: the questions between them are still open and it is doubtful which of their opposing contentions is correct: each party has a right to have the dispute determined upon the merits, and Courts should do everything to favour the fair trial of the questions between them. Blunders must take place from time to time and it is unjust to hold that because a blunder during interlocutory proceedings has been committed, the party blundering is to incur the penalty of not having the dispute between him, and his adversary determined upon the merits. All such cases of blunder may be remedied by payment of costs or the imposition of terms and conditions".

The appeal was allowed and the case was remitted to that Court to let the defendant in to defend upon such terms as that Court will deem just. This judgement emphasis the principles for

enlargement of time and it shows also that failure to apply them properly will be a sufficient ground to set aside the judgement and enable the case to be heard on the merits.

At the hearing of our present case there was no application for extension of time to do anything. It was just that no notice of intention to defend was before the Court and no motion for leave to file it or do anything else. The case was stood down at counsel's request to enable him collect the original or copies of whatever he might have submitted to the registrar. I sent the clerk of Court with him. Both returned without anything. There was no affidavit disclosing a defence on the merits and explaining failure or neglect to file a notice and there was no alternative but to proceed with the hearing.

In this application the judgement of this Court on the 18th April, was attacked as being irregular and premature on the ground that there were three days left between the date of service of the Court on the defendant and the date of hearing and the case *of Anlaby v. Practorius* (1888) 20 *Q.B.D. p.* 264 was relied upon. In that case the writ was specially endorsed and defendant was allowed 10 days within which to file his defence. After 7 days of service and before the time to file the defence expired, judgement was entered. Such a judgement was held to be irregular and premature and could be set aside on application to the Court that gave the judgement under Order 2 rule 1, of the Supreme Court Rules of England, which provide as follows :—

> "Subject to Rule 2 non-compliance with any of these rules or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court so directs, but the proceedings may be set aside either wholly or in parts as irregular, or amended, or otherwise dealt with, in such terms as the Court thinks fit".

In the first place I am not of the opinion that events in this case are similar to those in the case cited.

Secondly even if it were, I am of the opinion that no power similar to Order 2 of the English rules is given to our Court of first instance to set aside its own judgement on the ground that it is irregular. It seems to me that this will be the province of the Court of appeal. Even if I am persuaded to agree that the circumstances of our case made it desirable that the hearing should be postponed until such a time the defendant will be able to face the case on the merits, I feel quite convinced that I cannot do

anything now. My hands are tied and the applicant has to seek for that order from the appeal court. I am strongly of the opinion that this Court can set aside its own judgement only when it is a default judgement under Order XL rule 5.

Learned counsel has also cited a number of other English authorities all of which I have read. These deal on the main with default judgements which I accept can be set aside by the Court of first instance under our own rules. But this is not the case here.

In the result, this application is refused and the motion is dismissed with costs assessed at 10 guineas.

HIGH COURT, LAGOS

IMAM KELANI & OTHERS .. .. APPELLANTS

v.

D. A. JONES .. .. RESPONDENT

(APPEAL NO. LD/16A/66)

[HIGH COURT, LAGOS: G. S. SOWEMIMO, AG. C.J.; 31st May, 1966]

Civil Appeal—Claim of possession—Statutory notice and writ not disclosing fully the names of the parties claiming—statutory notice and writ must show the names of all the persons claiming against the respondent.

A writ was filed on behalf of the appellant and others whose names were not disclosed, claiming possession as joint landlords. At the hearing it was contended on behalf of the respondent that the claim should be struck out since neither the writ of summons nor the statutory notice served on the respondent fully disclosed the parties instituting the claim. The Magistrate held that the notices and writ were bad. On appeal,

HELD : that in order to succeed in a case for possession the statutory notice as well as the writ must dislcose all the names of the parties who claim to be landlord.

Case referred to :

Ashimawu Adubiaran v. Alhadji Rufai Etti & ors. (1962) *L.L.R.* 105.

L. V. Davis for the respondent.

SOWEMIMO, AG. C.J. :—This is an appeal against a ruling by the learned Magistrate, Mr Bamgboye, delivered on the 4th day of December, 1965.

There was a writ of summons filed before the lower Court in which the appellant and others, whose names were not disclosed, were claiming possession of an apartment at 146 Bamgbose Street, Lagos, from the defendant, on two grounds, arrears of rent and personal use.

When the case came before the Court for hearing, Mr L. V. Davis took a preliminary objection that neither the writ of summons nor the statutory notice served on the defendant disclosed fully the parties taking action against the respondent. In reply Mr Ojikutu, who appeared for the appellant in the lower Court and in this Court, conceded the fact that the names of the plaintiffs in the case ought to be fully disclosed and therefore sought leave to amend the writ. He however maintained that it was unnecessary to disclose the names of all who claimed to be the landlords in serving statutory notices to quit on a tenant.

The ground of appeal, and there is only one ground which has been argued, is that the learned Magistrate erred in law in holding that the names of all joint landlords must appear on statutory notices served on a tenant, otherwise those notices are bad. In support of this contention Mr Ojikutu has referred me to the judgement of Sir Clement de Lestang, Chief Justice, reported in 1962 Law Reports of the High Court, of Lagos entitled *Ashimawu Adubiaran v. Alhadji Rufai Etti and others* and it was held as indicated in the headnote of that case :—

(1) That any one of several joint landlords or his agent, as defined by the Recovery of Premises Act, may give a valid notice to quit to a tenant ;

(2) that the proper service of a valid notice to quit is a prerequisite of an order for possession.

The learned Chief Justice at page 105 of the judgement under reference said *inter alia* in considering the contention that the notice served was not valid :—

> "I think the definition of landlord in the Recovery of Premises Act is a complete answer to both these contentions. Landlord is defined to mean 'the person entitled to the immediate reversion of the premises or if the property therein is held in joint tenancy or tenancy in common, any of the persons entitled to the immediate reversion, and includes the attorney or agent of any such landlord.' The effect of this definition is in my view that any one of several joint landlords or his agent, as defined by the Act, may give the notice. Moreover at common law a notice to quit by one joint lessor was sufficient to put an end to periodic tenancy (*Doe d. Aslin v. Summersett*, 1 *B and Ad.* 135 which was applied in *Leek and Moorlands Building Society v. Clark* (1952) 2 *Q.B.* 788). These contentions accordingly fail."

On the face of the notice which was filed along with the writ of summons and which are at pages 4 and 5 of the record of appeal, it is not indicated who are the others who claim jointly with one Imam Kelani to be either the landlords or owners of the premises which is the subject matter of this suit.

As the learned Magistrate rightly drew attention at page 11 of the record, the other ground shown on the particulars of claim is that of personal use and it is absolutely necessary in serving

statutory notices for the names of the persons to be shown who are entitled to the recovery of the premises under the ground which was stated on the writ of summons.

The case which Mr Ojikutu cited shows that the agent showed the names of four out of the five people who were entitled to the property and the contention of the learned Chief Justice was that since it was a joint tenancy as between the owners, any one of them could have claimed recovery of the premises and could have validly served the notice required by law. In this case the names of the people were not disclosed in the statutory notice at all. These notices could not be amended during the proceedings and it was therefore necessary in any case that until evidence is taken could it be determined what was the interest, of the different persons claiming as landlords, in the property but at least the names of such persons ought to have been stated. If one adopts Form C as was done by the solicitor who served the notices on the defendant, then he is bound to comply with that form by stating the names of all those who claim to be the landlords of the defendant. I therefore agree with the learned Magistrate that in order to succeed in this case, whilst the Counsel for the appellant himself has conceded that his writ of summons must be amended to show the names of all the plaintiffs who are claiming possession, I hold that this concession also extends to statutory notices to be served. In the circumstances therefore, I dismiss the appeal with costs assessed at six guineas.

HIGH COURT, LAGOS

B. K. FANIYI.. .. .. .. CLAIMANT/RESPONDENT

v.

NORTHERN ASSURANCE CO. LTD. .. .. RESPONDENTS/APPLICANTS

(SUIT No. M/81/66)

[HIGH COURT, LAGOS : J. A. ADEFARASIN, J. ; 21st June, 1966]

Arbitration—setting aside award—grounds for setting aside an award made by an arbitrator.

The applicants applied under the Arbitration Act, Chapter 13, Laws of Nigeria for an order setting aside an award made between the parties on two grounds, namely : that the arbitrator erred in law and on the facts by making an award in favour of the claimant when the policy of insurance and the claim were taken out in the name of a non-existent person and that the award was bad on the face of it because the principle therein stated as the principle of law upon which the award was based was erroneously stated or applied.

The facts giving rise to the first contention were that two persons Tanimowo Bamosu and Kafaru Faniyi subscribed money with which they purchased a vehicle and insured it in the names : Bamimosu Kafaru Faniyi *i.e.*, the surname of the claimant and the other names of his partner.

HELD : (*i*) that if a specific question of law was submitted to the arbitrator for his decision, the fact that he made an erroneous decision would not make the award bad on its face so as to permit of its being set aside, particularly if the question submitted was that of construction.

(*ii*) that there was no dispute that the applicants insured B. K. Faniyi.

Application dismissed.

Adegbite (holding *Sofola's* brief) for the applicants.

DECISION

ADEFARASIN, J. :—This is an application in pursuance of the Arbitration Act, Chapter 13 of the Laws of Nigeria for an order that the award made between the parties by the Arbitrator, Chief D. O. Coker on 24th March, 1966 be set aside.

The grounds upon which the award is sought to be set aside are :—

1. That the Arbitrator erred in law and in fact by making an award in favour of the claimant when the Policy of Insurance and the claim are taken out in the name of a non-existing person or when the Claimant is not an insured of the Respondents.

2. That the award is bad on the face of it because the principle therein stated as the principle of law according to which the said arbitrator professed to make his award is erroneously stated or applied in that he made the award in favour of the claimant when he has disbelieved his evidence and those of his witnesses and believed the evidence of the Respondents and their witnesses.

The facts put very briefly are that a dispute arose between the applicant in this application (Northern Assurance Co. Ltd.) and the Respondent who gave the name B. K. Faniyi in respect of a commercial vehicle, Ford Taunus No. LH8189 which was subject matter of an insurance policy No. MB827201/L of 30th November, 1963 between the parties. The vehicle in question had been destroyed by fire on 1st July, 1964 while being driven by one Jimoh Salawu from Lagos to Ikorodu.

The dispute was accordingly referred to Chief Coker for Arbitration. On 24th March, 1966, the Arbitrator published his award which is annexed to the motion paper and called Exhibit B. The matter referred to Chief Coker for arbitration was whether the Claimant/Respondent was entitled to claim from the Insurance Co., (the present applicants) under the policy of Insurance for the loss by fire of the vehicle LH8189 and if so, what amount of compensation was payable. The Claimant/Respondent put the value of the vehicle at £900 but the Arbitrator awarded a sum of £350.

There can be no doubt under s. 12 (2) of the Arbitration Act that the Court may set aside an award where the arbitrator has misconducted himself.

An error in law apparent on the face of the award may amount to misconduct on account of which the award may be set aside by the High Court. (*See* Halsburg's Laws of England, 3rd Edition, Vol. 2 p. 60 paragraph 127).

I would deal first with the second ground of the applicants for setting aside the award—that the award is bad on the face of it because it was made not withstanding that the Arbitrator disbelieved the evidence of the claimant. The Arbitrator had said that he disbelieved one of the witnesses for the claimant as to how the fire began. The Arbitrator nevertheless found as a fact that the fire which destroyed the vehicle in question was accidental, although it did not emanate from the carburrator. I find no weight in the argument put forward on behalf of the applicant on this ground and I dismiss it.

I must confess that the 1st ground upon which the setting aside of the award is sought is not free from considerable difficulty. The background to the argument of the learned Counsel for the applicants (which argument I find ingenious) arose in this way. Mr Tanimowo Bamosu and Mr Kafaru Faniyi subscribed money with which they bought the vehicle in question. They then decided to insure it in the name of Bamimosu Kafaru Faniyi. In other words the claimant gave his own surname plus the first name and the second name of his partner and took the policy of Insurance in the name of Bamimosu Kafaru Faniyi. His own real name is Tanimowo Bamimosu. The argument of learned Counsel is that the names Bamimosu Kafaru Faniyi are false and that when they were written on the application forms they amounted to untrue disclosure. The view which I take of this is that it was never disputed by the applicants that B. K. Faniyi was insured with them under a Policy of Insurance No. MB827201/L of 30th November, 1963.

Tanimowo Bamosu and Kafaru Faniyi were a sort of partners who agreed to take the policy in their joint names. The specific question which was referred to the Arbitrator was whether the claimant was entitled to claim from the Respondents under the policy to which I have referred and the Arbitrator has found that he was. If a specific question of law is submitted to the Arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside and where the question referred is a question of construction. The decision of the Arbitrator cannot be set aside only because the Court would itself have come to a different conclusion. (*See* Halsbury's Law of England, 3rd edition Vol. 2 paragraph 127; *see* also *Re King and Dureen* 1913 2 *KB p.* 32). I do not consider that there is sufficient cause to set aside the award. I would therefore dismiss the application with costs assessed at £3-3*s*-0*d*.

HIGH COURT, LAGOS

ANDRE SABBE .. .. APPLICANT

v.

1. DIRECTOR OF FEDERAL PRISONS
2. INSPECTOR-GENERAL OF POLICE .. RESPONDENTS

(SUIT NO. M/93/1966)

[HIGH COURT, LAGOS : G. S. SOWEMIMO, Acting C.J. ; 23rd June, 1966]

Habeas Corpus—letter of a Minister of foreign country not amounting to an order of extradition can have no effect—jurisdiction in habeas corpus.

The applicant, a Belgian national, arrived in Nigeria from Congo Leopoldville (now Kinshasa) accompanied by some Congolese officials. The applicant was arrested and was kept in the custody of the first respondent pending formalities for extraditing him to Liberia. *Habeas Corpus* proceedings were filed on his behalf and at the hearing of the application a letter addressed by the Foreign Minister of Congo Leopoldville to an official of that country to the effect that the Minister would be pleased if the applicant were extradited to Liberia and hoped that the Liberian authorities in the Congo would take the necessary steps was produced and tendered in court as authority for the imprisonment.

HELD : (*i*) that in whatever way one considered the letter of the Foreign Minister of Congo Leopoldville it could not be referred to as a warrant. It was not issued by a Court in Congo Leopoldville nor was it an order of the Foreign Minister that the applicant should be extradited from Congo Leopoldville.

(*ii*) that if it was established that the applicant was lawfully in Nigeria, then the Court had jurisdiction to entertain an application for *habeas corpus*.

(*iii*) that whatever convention existed among Interpol countries such conventions could not override the laws of each individual country.

Ordered as prayed : applicant ordered to be released forthwith.

Statutes referred to :

Immigration Act, Cap. 84 *Laws of Nigeria* (1958 *edition*).

Extradition Act, Cap. 65 *Laws of Nigeria* (1958 *edition*).

Habeas Corpus Act.

Nigerian Constitution, 1963.

Case referred to :

R. v. Buxton Prison (*Governor*) *exparte Soblen* (1962) 3 *All E.R.* 641.

Adeniran for the applicant.

Obiamiwe for the respondents.

JUDGEMENT

SOWEMIMO, Ag. C.J. :—This is an application for a writ of *habeas corpus* to issue against the Director of Prisons and the Inspector-General of Police. I do not know why it was thought necessary to join the Inspector-General of Police since the applicant was not in the custody of the Police. Be that as it may, however, it will not affect the result of the application. The facts on which the application is based are that the applicant who is a Belgian subject arrived in this country from Congo Leopoldville. He was accompanied I presume by some Congolese officials. A document was produced in this court which I am informed could be considered as an Extradiction Warrant for the applicant to be moved from Congo Leopoldville to Liberia. I am sure that if this has been established as provided by our Evidence Act, that may have put stop to the proceedings before me. That unfortunately has not been done. The extradiction warrant if it existed did not permit the detention of the applicant in the Republic of Nigeria.

It is not in dispute that what purports to be a warrant is a letter addressed by the Foreign Minister of Congo Leopoldville to an official in that country to the effect that the Minister would be favourably disposed for the extradiction of the applicant to Liberia and that the Liberian authorities in the Congo should take the necessary steps. There is no evidence on the documents which had been submitted and the affidavit sworn to, to the effect that any step was taken by the Liberian authorities to get the applicant extradicted from Congo Leopoldville. It is my view therefore that in whatever way one considers the letter of the Foreign Minister of Congo Leopoldville it cannot be called or referred to as a warrant. I have only dealt with this matter because the contentions of the respondents are that once that letter had been produced to examine the authority or to question its validity would amount to a Nigeria court sitting as an appeal court over a decision of a court in Congo Leopoldville. As I have indicated earlier on the letter was never issued by any court in Congo Leopoldville neither was it an order of the Foreign Minister that the applicant be extradicted from Congo Leopoldville.

I have been informed by the Police under affidavit that the applicant whilst under detention in this country committed some offences. That may be good reason for detaining him in this country once it has been established before me that a court of competent jurisdiction had so ordered. Whatever the position, it is not one which I can deal with on the application before me.

The Deputy Director of Public Prosecutions had informed me that if the application is granted then the Government may have to deport this Belgian citizen. That again is not a matter I can interfere with until such an action has been taken and any application had been brought before me on the order so made. May I say that the Government of this country and of any other country for that matter has the right, if it considered it fit so to do, to refuse to admit aliens within its jurisdiction. For reasons best known to those who admitted the applicant into this country it must however be presumed as the contrary has not been shown that the Government had not refused his stay in this country. Once therefore it has been established before me that the applicant is lawfully in this country, then this court has jurisdiction to entertain this application.

The question is why has the applicant been detained in the prisons at Ikoyi. I have been informed of certain conventions amongst Interpol to assist countries associated with that organisation and who have subscribed to certain conventions in the execution of certain matters within their competence. It is my view, however, that whatever the conventions are amongst these Interpol countries they could not override the law of each individual country. For example, whilst Interpol may assist to apprehend a wanted person within the jurisdiction of that particular country, in order to get him out there must be some due process of law whether of an administrative nature or judicial. I have not been shown any authority which gives Interpol the right not only to admit aliens into this country but to act as guardian of some aliens who are being transported through this country.

It has been alleged and from the circumstances in this case these allegations appear to me to be true that the applicant was kidnapped from Congo Leopoldville and forced into an aeroplane. As the applicant alleged, and this was not disputed by the respondents there are direct flights between Congo Leopoldville and Monrovia in Liberia. The question which poses itself is that if the letter tendered before me is an authority to take the applicant to Liberia why should he not have been conveyed in one of the direct flights from Congo Leopoldville to Liberia? It is in this light that I accept that the applicant's allegation that he was kidnapped and not taken out as a result of any due process of law is true.

The applicant has also alleged that when he was put on the plane he was told that he was being taken to Brussels in Belgium. That also may be true because the plane that made a stop in Lagos

was a flight between Congo Leopoldville via Lagos to Brussels. The applicant was only brought down in Lagos for the purpose of putting him into another plane which was meant for Monrovia in Liberia. It was during this period of interchange of planes that the Nigerian Police took the applicant into their custody.

I have been referred to several sections of our law, the Immigration Act, the Extradition Act, the Habeas Corpus Act, the Constitution of 1963 as approved by the recent decrees and some legal authorities in England dealing with either deportation or extradition of some individuals from the United Kingdom to places where they were wanted. There is none of the cases cited which relates to the peculiar circumstances of this case. There need be no precedents, however, once an application is brought up under a law that is applicable in this country. It was Lord Denning who in one of the cases cited and before whom the contention was raised that there was no precedent that replied that the laws are locked in the breasts of judges and that they will unlock such laws when so required on the application of the facts before the court even if there be no precedent.

The nearest case cited to the application is the case of *R. v. Brixton Prison* (*Governor*) ex parte Soblen 1962, 3 *A.E.R.* page 641. But as was decided in that case the question of deportation must be distinguished from extradition. Soblen was refused admission into the United Kingdom and the Home Secretary made the necessary order for his deportation. It was decided that it was within the competence of the Home Secretary so to do and that it could not be questioned, although it was stated that whilst the Home Secretary of the United Kingdom could deport an individual he could not insist that he should go to a particular place. All that he must be satisfied with is that a particular country is willing to receive the person to be deported. These powers are vested in the Government of the Republic of Nigeria and no court can question the exercise of such powers provided they have been exercised within the laws of Nigeria. The respondents in this case are not alleging that the applicant is either being extradited from Nigeria to Liberia as provided by own Extradition Act or that he is being deported as provided by our Immigration Act. It is even strange that a person who has no passport whatsoever was allowed to enter into this country by the interference of the Interpol. This would amount, with respect, to the flouting of the laws of this country especially the Immigration Act.

I am not unaware as I have been told during the address in this case that the Republic of Nigeria, Congo Leopoldville and Liberia have some forms of friendly treaties between them but whatever those treaties are they could be enforced only in each of those countries by the process of law because the treaties would be regarded in each case as being part of the law of that country.

The Nigerian branch of Interpol in my opinion cannot detain the applicant in prison without a valid warrant or authority recognised as such in this country. There may be some ways in which the Interpol could assist other countries but surely flouting laws of the Republic of Nigeria could not be regarded as one of assistance by the Interpol in Nigeria in favour of another country.

I hold that the respondents have not shown any cause why this application should not be granted and I hereby order that the applicant be released forthwith. I have earlier on stated that whatever order I make on this application would not affect the case, I am informed, is pending in the Magistrate Court. The application for an order *nisi* is made absolute and the applicant's prayer is hereby granted and his release ordered forthwith. I make no order as to costs.

HIGH COURT, LAGOS

FEDERAL BOARD OF INLAND REVENUE .. .. PLAINTIFF

v.

THE NIGERIAN GENERAL INSURANCE CO. LTD. .. .. .. DEFENDANTS

(SUIT NO. LD/578/65)

[HIGH COURT, LAGOS : O. O. OMOLOLU, J. ; 27th June, 1966]

Companies Income Tax Act, 1961—*service of notice at registered office of company could be defective service if previous notices had been served at another place.*

The plaintiff claimed the sum of £3,740 being arrears of income tax and penalties for the years of assessment 1963-64 and 1964-65. Notices requiring the defendants to make tax returns were sent to the defendants' registered office and there being no returns the plaintiff raised an assessment under section 49 of the Act and claimed accordingly. It was contended on behalf of the defendants that in previous years the plaintiff had sent notices intended for the defendants to the defendants' accountant at a different address and that though the notices which the plaintiff addressed and sent to the defendants at their registered office arrived there they were not properly served.

HELD : that in spite of the provision of section 16 (3) (*a*) of the Companies Income Tax Act, 1961 requiring service at the registered office of the company, the plaintiff was in the practice of sending notices to other addresses as instructed by taxpayers, the notices did not in effect reach the defendant in good time and that the plaintiff knew or ought to know that the notices were being addressed to a place which through their experience and previous practice was not the normal place.

Assessment raised set aside.

Obi, State Counsel, for the plaintiff.

Gomez for the defendants.

JUDGEMENT

OMOLOLU, J. :—In this case the plaintiff is the Board, established under section 3 of the Companies Income Tax Act 1961, charged *inter alia* with due administration of the said Act, and the tax imposed thereunder. The defendant is a Nigerian Company registered under the Companies Act carrying on business as insurance brokers at their registered office at 1 Nnamdi Azikiwe Street, within the jurisdiction of this court, and is a person liable to tax under the Companies Income Tax Act 1961.

The plaintiff's claim against the Defendant is for the sum of £3,740 (Three thousand seven hundred and forty pounds) being arrears of income tax and penalties for the years of assessment 1963-64 and 1964-65, which sum (the particulars of which are set out below) has become a debt due from the Defendant to the Government of the Federal Republic of Nigeria under the provisions of the Companies Income Tax Act 1961.

PARTICULARS OF CLAIM

	£	s	d
1963-64			
Income Tax for 1963-64	2,400	0	0
Sum added thereto by way of penalty (section 62)	240	0	0
1964-65			
Income Tax for 1964-65	1,000	0	0
Sum added thereto by way of penalty (section 62)	100	0	0
Income Tax and Penalties	£3,740	0	0

Three witnesses who gave evidence for the plaintiff testified to the fact that in respect of each of the two years for which taxes are claimed, notices requiring the defendant to make the return of his income were sent under section 44 of the Act, and there being no returns made, the plaintiff raised an assessment to the best of his judgement under section 49 of the Act in the amount of £6,000 for the year 1963-64 and £3,000 for the year 1964-65. These figures were duly approved by the Scrutineer Committee under section 10 of the Act and the appropriate notices of assessment were sent in respect of each year to the defendant's registered place of business that is No. 1 Nnamdi Azikiwe Street, Lagos.

The defendant lodged no objection to either of the assessments which thereby in due course became final and conclusive under section 35 of the Act. In due course when the tax remained unpaid the plaintiff levied a penalty in pursuance of section 62 of the Act. Since the tax still remains unpaid the plaintiff has now come to court to claim the total amount of £3,740 as tax debt due to the Government under section 63 of the Act.

The General Manager cum Secretary of the defendant Company (Mr Ademola Debayo) gave evidence. He said his company always respected the tax authorities and produced the receipts of previous years of tax paid. He raised two points in form of defence.

The first is that the relevant notices were sent to the address of his registered company instead of to the address of the company's tax consultant, Mr Owoaje at 51 Docemo Street. This had been the practice in previous years and he tendered notices of assessments for the tax year 1959-60, 1961-62 and 1962-63 (Exhibits V, K and S) which were all addressed by the plaintiff to Mr Owoaje. His evidence on this point was indeed corroborated by two of the officials of the plaintiff who said they knew that Mr Owoaje had been handling the defendant's tax affairs since 1959. Mr Debayo said that the effect of not sending notices in respect of the two tax years now being claimed to Mr Owoaje was responsible for his not attending to them. He would have exercised his right to take objections as the tax for the two years were unusually high but the time the notices were brought to his knowledge, it was too late to make any objection.

The second main point of defence was that the so-called "bets of judgement" assessment raised by the plaintiff was too high and out of proportion to the financial position of the defendant for the tax years under review. He produced balance sheets for the two years and showed that the defendant made a net loss of £2,977-14*s*-7*d* in 1963-64 and the net loss of £1,826-3*s*-11*d* for the tax year 1962-63 (Exhibits R and R1). These were partly due to the fact that the treaties which the defendant had enjoyed as part of their business of insurance had been withdrawn in January 1962. Another reason was that the other main source of defendant's income, that is, investment in the National Bank of Nigeria had yielded no profits in the two years because no dividends were distributed by the National Bank during the two years. He also disputed a third source of income alleged by the plaintiff, that is, a money lending business which had been shown in the defendant's tax returns in an earlier year. Although Mr Debayo himself signed the relevant form he swore that he did so inadvertently and that the entry was made by one of his junior clerks.

Learned Counsel for the defendant Mr F. O. Gomez, cross-examined the plaintiff's witness very closely to develop the two main points of the defence and addressed me at length submitting finally that :

(1) It was the fault of the plaintiff for not sending the notices to the normal place, that is, c/o Mr Owoaje as they had done in the previous three years and that when the notices ultimately came to the attention of the defendant it was too late for him to object ;

(2) That the assessment of profits of £6,000 for 1962-63 and £3,000 for 1963-64 were arbitrary and unrealistic and that if the plaintiff's officials had used reasonable diligence they would have arrived at a more reasonable figure which the defendant would have willingly paid.

Learned State Counsel for the plaintiff (Mr Obi) submitted that the notices were properly prepared and served and that under section 16 (3*a*) of the Act the registered office of the defendant to which the notices were addressed was the correct place. Secondly that the plaintiff had exercised his discretion under section 49 to raise the assessment when the plaintiff defaulted in furnishing returns and that the assessments were reasonable and thirdly, that under section 63 (3) the assessments were now final and conclusive at least as to quantum.

Dealing first with the point, I accept Mr Obi's submission that in the evidence before me, all the relevant notices were properly served by being addressed to the defendant's registered place of business as provided by section 16 (3*a*). I must say, however, that although the plaintiff is correct in strictly complying with the law, the effect of a notice afterall is that it should reach the addressee in good time particularly where time is the essence. It has been proved to my satisfaction that in the previous three years, that is 1959-60, 1961-62 and 1962-63, notices were addressed by the plaintiff not to the defendant's registered place of business but to the address of his Income Tax Consultant who apparently had defendant's instruction to deal with them. This fact was well known to the plaintiff and two of his officials corroborated Mr Debayo's evidence. When I asked Mr Atinmo, the Chief Inspector of Tax (3rd Plaintiff's witness) what the practice was, he explained to me :

> "in some cases the company will direct that notices of assessment should be sent through its Accountant"

The position therefore is that in spite of the provision of section 16 (3*a*) requiring service at the registered office of the company, the plaintiff itself was in the practice of sending notices to other addresses as instructed by tax payers. In this case it is quite obvious that the plaintiff knew very well from past experience that Mr Owoaje was dealing with the defendant's tax affairs but instead of sending the notices for the two tax years now being claimed to Mr Owoaje's address he sent them to a place, which though legal had the consequence of not reaching the defendant's

attention in good time. In fact it reached the defendant so late that he could not send any returns before time had run against him. I must observe that in respect of the year 1962-63 when the notice for that year reached him at last he returned it with a note that his accounts would be forwarded later.

My finding in respect of Mr Gomez's first submission is that although the plaintiff correctly addressed and served the notices on the defendant as provided by the law, the notices did not in effect reach the defendant in good time and the plaintiff did know or ought to have known that the notices were being addressed to a place which through their experience and previous practice was not the normal place.

Mr Gomez's second submission was that the assessment raised in respect of the two years were too high. He referred to the evidence of Mr Debayo to the effect that the company had made losses in its two sources of income. He said the assessment was inconsistent and unjustifiable having regard to the evidence of the 2nd plaintiff's witness, Mr Uchei, Senior Inspector of Taxes who said he based his 'best of judgement' assessment on the total income from the different sources known to the plaintiff.

The following is an extract from his evidence :

"The basis of assessment for 1963-64 is the total from different sources known to us. No accounts were submitted for that year. On the basis of my best of judgement in arriving at the best of assessment I refer to previous years and the profits of income from all sources. The same basis was followed to the 1963-64 ..... We know the defendant had three sources of income :

1. They were moneylenders and the interest accrued is their income

2. They also transact insurance business

3. They have an investment from National Bank for interest.

I had these in mind when making the assessments".

This witness further said he did not allow the defendant any capital allowances in respect of 1962-63 but in respect of 1963-64 he allowed Capital Allowances of £500 per annum.

Learned state counsel, Mr Obi, for the plaintiff submitted that the assessments were conclusive as to quantum. He relied on the case of *Board of Inland Revenue v. Joseph Rezcallah and Sons*

Ltd. reported in 1962 *Vol.* 1 *of All Nigerian Law Reports.* In my view this case is an authority that the High Court has jurisdiction to examine the validity of assessment.

The substantial difference between section 63 of the 1948 Act which was the subject of interpretation in the Supreme Court and section 60 which is the relevant section under the 1961 Act is that the former spoke of assessments being "final and conclusive for all the purposes of the Act as regards the amount of such chargeable income" while the latter spoke of assessments being "final and conclusive for all the purposes of the Act as regards the amount of such *total profits*". Section 31 of the Act defines total profits as "the amount of its total assessible profits from all sources". I do not think this difference affects the gravamen of the decision as it applies to this case.

Now the tax laws of this country provide an elaborate machinery whereby the subject can make objections to assessments raised and also appeal in certain cases to commissioners set up by the Board of Inland Revenue. I think it is because of this that the learned state counsel Mr Obi submitted to me that this court's jurisdiction was excluded as far as the amount of tax under section 63 (3) was concerned. I have already expressed that in my view the High Court has jurisdiction to enquire into the validity of the assessment itself. In addition to my interpretation of this Supreme Court decision, I am fortified in this view by the peculiar circumstances of this case and I only need to mention two :

Firstly, it has been proved to my satisfaction that because the notices were sent to an unusual though legal address, the defendant did not receive them in time to enable him to make objections.

Secondly, the defendant being an insurance company requires a special treatment as to the ascertainment of its profits. This is recognised by the Legislature itself which accordingly made special provisions for this subject in section 21 of the Act. If the peculiar nature of the defendant's case was so recognised it seems to me the more reason why the plaintiff should exercise more diligence and care in raising the assessment.

Now what does one find on examining the evidence relevant to the disputed assessment ? In other words if the defendant had received their notices in time and had raised objections what would have been the position before the tribunal set up by the plaintiff ? The defendant would have contended as he did before

me, that firstly, he did not operate a money-lending business as alleged by the tax assessor and that any entry to that effect in the return for an earlier years was inadvertent. In this case the plaintiff could with some diligence have checked the correctness or otherwise of this entry.

Secondly the defendant would have contended that his second source of income, that is, the investment in the National Bank produced no profits. This also could have been checked by the plaintiff from the returns of the National Bank.

Thirdly, the defendant would have contended that he incurred a net loss of over £4,000 in the two years under review as shown in his balance sheet for those years (Exhibits R and R1). All these would have made a considerable difference to the assessment.

I am fully aware that the officials of the Revenue are human beings and are very able and efficient. They have a hard task because no subject wishes to pay tax and indeed it has been held that "every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be". *See* the speech of Lord Tomlin in the case of *Inland Revenue Commissioners v. Westminster* (*Duke*) 1936 *A.C.* 1 *at page* 19.

No doubt one of the reasons which prompted the Legislature to provide the machinery whereby the Revenue can raise the best of judgement assessment was to compel the defaulting tax payer who would otherwise never make a return of his profits to do so.

If, considered the Legislature, the tax payer is faced with a high tax bill and if he knows that no reliefs will be granted to him (as he would otherwise be entitled to under section 46) he would hurry up and makes his returns. As Lord Green Master of the Rolls said in the case of *Howard de Walden* (*Lord*) *v. Inland Revenue Commissioners* 1942 1 *King Bench* 389 *at* 397 :

> "for years a battle of manouvre has been waged by the Legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. In that battle the Legislature has often been worsted by the skill, determination and resourcefulness of its opponents.....It would not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the tax payer who plays with fire to complain of burnt fingers".

Yet this Court's duty is to adjudicate fairly between the Revenue and the subject. It is an important canon of construction of our Tax Laws that they are constructed strictly and in favour of the subject. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. In the case of reasonable doubt the construction most beneficial to the subject is to be adopted, see *Maxwell on Statutes* 10*th edition page* 288.

In the present case perhaps if the Senior Inspector of Taxes had not given the basis of his assessment the court would not be in a position to interfere. But having given it in evidence before me and hearing the defendant's evidence in reply it appears to me that the figures raised could not be correct. Although Capital Allowances had been allowed in previous years none was allowed from year 1962-63. Learned state counsel Mr Obi explained that this was because defendant had made no return. But why was it allowed for the following year 1963-64 ? It is true that under paragraph 22 on the 3rd Schedule to the Act, claims for allowances are not to be made to the company unless claimed by it for that year but the paragraph goes on to provide that such allowances should be made "where the Board is of the opinion that it would be reasonable and just so to do".

In considering the whole circumstances of the case the court does not feel able to say that the amount of £3,740 claimed has been proved as debt due to the plaintiff for the reasons which I have given.

The order of this court shall be that the assessment for 1963-64 made on the 14th day of September, 1963, and that for 1964-65 made on the 15th day of October, 1964 are hereby set aside and that fresh assessments in respect of the two years be made on the defendant forthwith. I am grateful to both Mr Obi and Mr Gomez for their able conduct of this case. There will be no order as to costs.

HIGH COURT, LAGOS

1. J. A. O. UBIKU—PRESIDENT
2. A. E. OTTU—GENERAL SECRETARY
3. H. H. S. CHINWO—TREASURER
(for themselves and as trustees of NIGERIA OIL, CHEMICAL & ALLIED WORKERS' UNION) } PLAINTIFFS

v.

1. THE REGISTRAR OF TRADE UNIONS
2. SHELL BP PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED
3. MESSRS (1) C. A. IGWE
(2) M. G. DABIRI
(3) C. M. I. EGOLE
(as representatives of Shell BP and Allied Workers' Union) } DEFENDANTS

(SUIT NO. LD/264/1966)

[HIGH COURT, LAGOS: O. O. OMOLOLU, J.; 4th July, 1966]

Trade Union—amalgamation—rights of constituent unions—jurisdiction of court—section 9 of Trade Union Act, Cap. 200.

Originally there were four petroleum workers' unions in Nigeria. In October 1962 the unions agreed to amalgamate and were thenceforth to be known as the Nigerian Oil, Chemical and Allied Workers Union (NOCAWU). This agreement was duly executed in accordance with sections 23 and 24 of the Trade Union Act, Cap. 200 and was registered with the Registrar of Trade Unions on 14th April, 1963 from which time the NOCAWU had been representing petroleum workers throughout Nigeria. In 1964 certain elements in one of the constituent unions attempted to revive their union and sought to register themselves as the Shell BP and Associated Workers' Union. The Acting Registrar of Trade Unions was of the view that there was no point in forming a new union which was still an existing trade union. Acting upon this the third defendants called a meeting at which it was resolved that with effect from 8th February, 1966 the Shell BP and allied Workers' Union be restored and should henceforth function as a legal registered trade union.

The plaintiffs thereupon applied for an interim injunction to restrain a plebiscite which was scheduled for 3rd June, 1966 and also to restrain the third defendants from representing themselves as a Trade Union entitled to act and speak for the workers of the second defendant company. On the second prayer it was contended on behalf of the plaintiffs that having amalgamated, none of the original trade unions could be revived. On behalf of the third defendants it contended that the effect of section 9 (1) (*d*) of the Trade Union Act, Cap. 200, was to oust the jurisdiction of the court from entertaining the action.

HELD : that if the Act provides for amalgamation of more than one registered union the Act must have contemplated an agreement between the trade unions before such an amalgamation could be effected. The prohibition contained in section 9 could not apply to an agreement made with a view to amalgamation.

Application for injunction refused.

Statutes referred to :

Trade Union Act, Cap. 200, *Laws of Nigeria* (1958 *edition*).

Trade Union Act 1871 (*U.K.*).

Case referred to :

Adegbite v. Lawal, 12 *W.A.C.A.* 398.

Lardner for the 2nd defendants

Oyero for the 3rd defendants.

RULING

OMOLOLU, J. :—This is an application by the plaintiffs seeking an interim injunction.

1. to restrain the above named defendants/respondents from holding the plebiscite scheduled to be held among them on the 3rd of June, 1966 or from holding any meeting at all.

2. to restrain the 3rd defendants from representing themselves as a Trade Union entitled to act and speak for and on behalf of the workers of the 2nd defendant, and for such further and/or other order or orders as this Honourable Court may deem fit to make in the circumstances of this case.

The plebiscite had been held before the date of hearing of this application and so the learned counsel for the applicants Mr Adeniji argued the motion in respect of the second prayer only. In brief the case for the applicants appears to be that originally four unions existed in representing Petroleum Workers throughout Nigeria. By an agreement dated 14th October, 1962 and registered with the Registrar of Trade Unions on the 14th of April, 1963, the four unions agreed to amalgamate and to be known as Nigerian Oil Chemical and Allied Workers Union (NOCAWU). This agreement was duly executed in accordance with sections 23 and 24 of the Trade Unions Act Cap. 200. Since then the NOCAWU had been representing the Petroleum Workers throughout Nigeria.

Sometime in 1964, certain elements in one of the four unions which have amalgamated attempted to revive one of these unions and sought to register themselves as the Shell BP and Associated

Workers Union. The Acting Registrar of Trade Unions at that date, that is 4th of March, 1966, (Mr D. S. Coker) formed the view that there was no point in forming a new union but that these persons (the third defendants) could revive their old union which in his view was still an existing Trade Union known as the Shell BP and Allied Workers Union. The third defendants acting on this advice duly called a meeting and resolved that with effect from 8th day of February, 1966 the Shell BP and Allied Workers Union be restored and should henceforth function as a legal registered Trade Union.

The plaintiffs maintained that having amalgamated together in accordance with the law the view of Mr Coker, the then Acting Registrar, was wrong and that none of the original Trade Unions which had amalgamated could be revived. They have therefore brought this application asking the court to restrain the third defendants from representing themselves as a Trade Union etc.

The contention of the applicants is supported by the present Registrar of the Trade Union (Mr J. A. Ogun) who in a counter-affidavit and during his argument before me disagreed with the opinion of Mr Coker. Mr Ogun's view is that the four original Unions having amalgamated since 1963 are by law regarded as dissolved and that the Shell BP and Allied Workers Union which the third defendants purported to have revived had, with effect from the date of registration of the amalgamation ceased to perform all the statutory obligations which the Trade Union Act imposed on all Registered Trade Unions. In fact, Mr Ogun had sought to recover a certificate which Mr Coker had purported to issue to the third defendants registering their Union.

The applicants' exhibit certified true copies of two judgements given in the Port Harcourt High Court by Betuel J., in November 1964 and the other by Nkemena, Acting J, in November 1964, Suit No. P/128/64 and Suit No. P/136/64 respectively. The two decisions support the contention of the applicants.

Learned Counsel for the second respondent the Shell BP Petroleum Company of Nigeria (Mr Lardner), merely submitted that the application was premature and that the proper course for the court to take was to order pleadings and give an early date for the hearing of the suit. It would not be fair he submitted. to ask his clients to hold their hands and not to recognise anyone as representing the workers as this would likely precipitate industrial strife. He referred to the affidavit of one of the Senior Officers of

the company to the effect that the plebiscite held on the 3rd of June had shown an overwhelming majority of workers being in favour of a new union which the third defendants had purported to revive. The voting, to be exact, was 1,682 in favour of the third respondents' action and only 13 in favour of the applicants.

Learned Counsel for the third defendants, Mr Oyero, made the following main submissions :

1. First that the effect of section 9 (1*d*) of the Trade Union Act, Cap. 200 was to oust the jurisdiction of this court from entertaining this action. This provision reads as follows :

> "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements :
>
> (*a*) not applicable
>
> (*b*) not applicable
>
> (*c*) not applicable
>
> (*d*) any agreement made between one registered Trade Union and another
>
> (*e*) not applicable

2. Nothing in this section shall be deemed to constitute any of the above mentioned agreements unlawful."

I will deal with this submission first since, if upheld, it would have the effect of disposing of the whole action. I have considered the section and I have had the advantage of consulting Citrine on *Trade Union Law, 2nd edition,* particularly *pages* 90-122 which contain detailed consideration of section 4 of the English Trade Union Act 1871 (which is identical to section 9 of Cap 200). As I told Mr Oyero when he was arguing the point, I still maintain that this section would be inconsistent with section 23 of the Act if the interpretation he has given it was correct. If the Act provides for amalgamation of more than one registered Trade Unions, the Act must have contemplated an agreement between the Trade Unions before such an amalgamation could be effected. How then could the Act in one section contemplate agreement to amalgamate and in another section prohibit the enforcement of the agreement ? The proper interpretation in my view is that the prohibition contained in section 9 could not apply to agreement made with a view to amalgamation.

I am fortified in this view by the text contained at page 92 of Citrine where, after a review of all the cases, it is stated that the classes of agreements within the intendment of the prohibition were :

(1) "property" cases, *e.g.*, a member's right to share in the assets of his Union or to vote in the affairs of the Union ; and

(2) "expulsion" cases, that is, the right of a member for protection from expulsion in breach of the contract contained in the Union's Rules.

I can find nothing in the lengthy list of authorities and cases decided under the section to support Mr Oyero's contention that the prohibition applies to agreement to amalgamate.

Secondly, going back to the position at Common Law where all Unions which had for their purposes the restraint of trade were unlawful, the onus of proof lies always on the person alleging unreasonableness in the restraint of trade. In other words Mr Oyero would have the difficult task of satisfying me that the amalgamated unions would have been unlawful at Common Law in that its purpose would be unreasonably in restraint of trade. He has not discharged this burden.

Mr Oyero's second submission is that the plaintiffs have no "*locus standi*" in that they sued as trustees in action which is not a property-recovering action. In my view the applicants are properly before the court having complied with Order 4, rule 3 of the Rules of this Court as explained in the case of *Adegbite v. Lawal* 12 *WACA at page* 398. This decision distinguished the Nigerian Rule from the English Rule contained in Order 16, rule 9 of the White Book and the court held that the Rule

> "means that the authority for a person to sue on behalf of others must be given by persons interested in suing, and the authority for a person to defend on behalf of others must be given by the persons interested in defending"

In this case the applicants' affidavit in paragraph 2 gives them the necessary authority.

The third submission made by Mr Oyero was that NOCAWU was not registered and that the amalgamation was not complete. As I could see from the applicants' affidavit and the exhibits

particularly Exhibit B being a notice of amalgamation of Trade Unions given to the Registrar under section 24, I consider that the registration was complete.

Having disposed of Mr Oyero's main submissions, it only remains to consider whether a *prima facie* case had been made before me to warrant an order for an interim injunction. The principles on which an injunction is granted are well known and have often been stated in this court; I have already expressed my view on the status of the applicants and their case. An injunction is, however, an equitable remedy and I have to look at all the circumstances of the case in particular the points raised by learned Counsel for the 2nd respondent, Mr Lardner. *Paragraph* 766 *of Halsbury's Laws of England, Third Edition Volume* 21 can be conveniently quoted here as being relevant to the consideration which the court is applying to this matter:

> "*Balance of Convenience considered.* Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, take into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff."

This is a case in which a doubt exists in my mind and on the balance of convenience the application for injunction will be refused. Pleadings will be ordered and all efforts will be made to give the case an expedited hearing during the vacation, if necessary.

In the circumstances of this application I will make no order as to costs because I believe that the applicants have a good cause in bringing the application.

HIGH COURT, LAGOS

M. M. SHITTU .. .. APPELLANT

v.

LAGOS EXECUTIVE DEVELOPMENT BOARD .. .. RESPONDENT

(APPEAL NO. LD/30A/66)

[HIGH COURT, LAGOS : S. O. LAMBO, J. ; 18th July, 1966]

Recovery of premises—Notice given by one Solicitor and signed by another—a sub-tenant who occupies premises through a tenant who is expressly forbidden to let without written consent cannot become a tenant of the landlord.

The appellant and another were defendants in the court below. The first defendant became the tenant of the respondents in respect of two rooms at Surulere with a covenant against sub-letting. In breach of the covenant he sublet the premises to the appellant at a rent of £5 a month, as against £2-10*s*-0*d* which he himself paid to the respondents. Following default on the part of the tenant in paying the rents which had accumulated, the respondents successfully sued him and the appellant for arrears of rent and possession. On appeal,

HELD : (*i*) that the statutory notice in Form E (of intention to recover premises under section 7 of the Recovery of Premises Act, Cap. 176) which described one Solicitor as "agent" of the landlord and was signed by another Solicitor employed by the landlord was inconsistent and therefore invalid ;

(*ii*) that where in a tenancy agreement it is stipulated that the tenant should not sub-let or under-let or part with the possession of the premises without the written consent or approval of the landlord and no consent or approval to sub-let was sought or given before premises were sub-let, such sub-tenant was not, and could not be deemed to be, a tenant of the landlord.

Statute referred to :

Recovery of Premises Act, Cap. 176 *Laws of Nigeria* (1958 *edition*).

JUDGEMENT

LAMBO, J. :—This is an appeal against the judgement of the Acting Senior Magistrate in which he gave judgement for £15-4*s*-6*d* arrears of rent and ordered the appellant to deliver up to the Respondent possession of 2 rooms at the premises known as 163c Akerele Street, Surulere.

The facts of the case briefly are that the 1st Defendant in the Court below became a tenant of the L.E.D.B. in respect of the said premises with a covenant against sub-letting. In breach of

the covenant he sub-let the premises to the Appellant at a rent of £5 per month, as against £2-10*s*-0*d* which he himself paid to his landlord, the L.E.D.B. The Appellant paid the 1st Defendant £30 representing 6 months' rent for the period November 1963 to April 1964 and continued to pay the rents afterwards. Later when the Appellant realised that the 1st Defendant was not paying the rents regularly to the L.E.D.B. he (the Appellant) decided to pay directly to the Board. Payments in this connection were made by the Appellant in the name of the tenant. Following default on the part of the tenant in paying the rents, which had then accumulated, the Respondent successfully sued him and the Appellant.

The judgement is attacked on a number of grounds, but chiefly on the ground that the Respondent's written notice of intention to recover possession under section 7 of the Recovery of Premises Act Cap. 176 was invalid. Although the notice in form E at page 3 of the Record of Proceedings described one "Alexander Oladipo Sanyaolu" as "agent" of the Respondent/landlord giving notice of his intention to proceed to recover possession, the notice was in fact signed not by Sanyaolu—but by a Solicitor of the name of "A. Agunbiade" who also described himself as "Agent to the above-named", that is to say the "Lagos Executive Development Board". According to Exhibit A it was Mr A. Agunbiade who was instructed in writing and he it was who, as Agent of the Landlord, should have given the statutory notice. Page 3 of the Record of proceedings shows an apparent inconsistency in which one man describes himself as "agent" of the landlord with authority to serve the statutory notice and another officer signed the notice as Agent of the same landlord ! S. 7 of the Recovery of Premises Act does not contemplate such absurdity in which a landlord would give two written instructions to two separate Solicitors in respect of an intention to proceed to recover possession of a single premises. Nor can it be said that the absurdity thus created was cleared by the evidence of Francis Obisesan Ogundare a clerk of the landlord when he said, without mentioning name, that :—

> "The Board instructed its Solicitor to issue out statutory notices against the 1st and 2nd Defendants".

It should be noted that the witness speaks of one Solicitor only. I take judicial notice of the fact that both Sanyaolu and Agunbiade whose names appear at page 3 of the "Record" are Solicitors employed in the services of the Lagos Executive Development Board. I have, therefore, with regret, come to the conclusion

that the statutory notice which appears at page 3 of the Record of proceedings is inconsistent and therefore invalid. The order for arrears of rent which the learned trial Magistrate made against the Appellant in consequence thereof will be set aside. He would appear to have based his finding on an obvious misconception of the provisions of section 4 of the Rent Restriction Act which states that :—

> "Where a landlord has let, whether before or after the coming into operation of this Ordinance in respect of the place or area in which the premises situate, any premises and his tenant not being expressly prohibited in writing from sub-letting, sub-lets such premises or any part thereof shall be deemed for the purpose of this Ordinance to be tenants of the landlord."

There was evidence before the learned trial Magistrate that the tenant was expressly prohibited in writing from sub-letting—vide clause 2 of the Terms of Tenancy in Exhibit D. There is also, in addition, the evidence of the 1st Plaintiff's witness to this effect when he said :

> "No tenant is allowed to sub-let or under-let or part with the possession of the premises without a written consent or approval from the Plaintiffs".

I hold in the circumstances that the Appellant was not a tenant of the Respondents and could not be so deemed.

In the circumstances the appeal is allowed. The judgement and order of the learned trial Magistrate are set aside. There will be no order as to costs.

HIGH COURT, LAGOS

S. A. OKUSI .. .. PLAINTIFF

v.

ABIODUN JOSEPH .. .. DEFENDANT

(SUIT NO. LD/621/65)

[HIGH COURT, LAGOS : O. R. I. GEORGE, AG. J. ; 21st July, 1966]

Jurisdiction—specific performance—land in Western Group of Provinces—residence.

In an action for specific performance of an oral agreement for the sale of a piece of land at mile 19 on the Lagos-Abeokuta Road, the defendant in his statement of defence averred that the Lagos High Court had not jurisdiction to try the case as the land was situated at Ikeja in the Western Group of Provinces outside the jurisdiction of the Lagos High Court.

HELD : (*i*) that jurisdiction in an action for specific performance was founded on residence and it was not open to the defendant to say that because the land was situated outside the jurisdiction of the court, the court had no jurisdiction. An action for specific performance being an equitable remedy, equity would act on the conscience of the parties irrespective of where the land was.

(*ii*) that in an action for specific performance the plaintiff must prove with certainty what was the nature of the contract between him and the defendant.

(*iii*) that the Court would not stultify itself by granting a decree for specific performance of a contract which was incapable of being enforced.

Plaintiff's action dismissed.

Sobodu for the plaintiff.

Tunde Oyero (holding *Odufalu's* brief) for the defendant.

JUDGEMENT

GEORGE, AG. J. :—The Plaintiff's claim is for Specific Performance on an oral agreement made between him and the Defendant for the sale of a piece of land to him at mile 19 on the Lagos-Abeokuta Road. The plaintiff also seeks an order of court that the defendant be ordered to execute a Deed of Conveyance in respect of the land.

The plaintiff's claims arose out of the following circumstances :—

The plaintiff bought a piece of land about 5 acres in area from one Adeogun and entered into possession. The defendant on the other hand, bought a large area of land about 34.7 acres in area from one Akintonde. The defendant while under the

erroneous belief that he was the owner of the land occupied by the plaintiff sought to eject him from his land. It transpired that the defendant in actual fact had no title to the land occupied by the plaintiff. However a dispute arose between them as to the ownership of the land as a result of which both the plaintiff and the defendant went to the Police Station. After the investigation of the Police, the defendant and the plaintiff entered into negotiation for the sale of the land, the upshot of which was that the defendant succeeded in convincing the plaintiff that the 5 acres of land which the plaintiff bought from Adeogun in actual fact belonged to the defendant. An agreement was therefore made between them by which the defendant agreed to sell the 5 acres of land to the plaintiff.

In the meantime one Tokosi who also bought 5 acres of land adjacent to the plaintiff's land, instituted an action against the defendant for trespass and obtained judgement against him. The findings of the learned Judge are to the effect that the defendant was not the owner of the 5 acres of land which Tokosi bought from Adeogun and further that the Conveyance produced by the defendant was a forgery in so far as it purported to include the 10 acres of land to the North of Exhibit H1 in the Deed of Conveyance.

Pleadings were ordered and filed.

The Plaintiff in his statement of claim averred *inter alia* :—

(1) "The Plaintiff and the Defendant made an oral agreement sometimes in 1963 whereby the defendant agreed to sell and the plaintiff agreed to buy from the defendant, two plots of land measuring 2½ acres each at Alagbado Village for £55 per plot.

(2) The Plaintiff got a deed of conveyance ready and presented it for the defendant's signature but the defendant refused to execute it, his reasons being that there was a court case pending between himself and another party in respect of part of his land at Alagbado Village."

The Defendant denied these two averrments in the Plaintiff's statement of claim and put him to strict proof thereof.

It is common ground between the plaintiff and the defendant that Tokosi obtained judgement against the defendant for trespass. The plaintiff in giving evidence in chief said that after the judgement in Ikeja Court, his 5 acres of land "reverted to the previous vendor" that is to Adeogun from whom the plaintiff originally bought the land. These facts are not in dispute. The plaintiff now gave

evidence to the effect that the defendant drove him out of 2½ acres of land which he purchased from Adeogun and promised to sell another 2½ acres of land to him in return. It is in respect of this 2½ acres of land that the plaintiff seeks a Decree for Specific Performance.

I say at once that the plaintiff's case does not make any sense. In cross-examination the plaintiff said :—

> "After the judgement the defendant promised to convey another 2½ acres of land (belonging to him) to me. The 5 acres of land I bought from Adeogun is the same as the 5 acres of land I bought from the defendant."

He went further to say :—

> "I now say that I bought the portions marked X and Y in Exhibit B from Adeogun. When the defendant came in he asked me to give up the portion marked Y in Exhibit B and he gave me the portion marked Z in Exhibit B. After the judgement in Ikeja Court, the portion X became vested in me, it is the portion marked Z that I now want the defendant to convey to me."

These are two contradictory statements. In the first, the plaintiff said it was after the judgement in Ikeja Court that the defendant promised to sell 2½ acres of land to him. In the second, he said it was when the defendant came in that he asked him to give up the portion marked Y in Exhibit B and he gave him the portion marked Z. He had earlier said that the 5 acres of land he bought from Adeogun was the same as the one he bought from the defendant.

The effect of these prevarications of the plaintiff is to make it impossible to determine with practical certainty what was the actual agreement between him and the defendant.

The defendant on the other hand testified that after the judgement in the Ikeja Court he told the plaintiff that he was no longer in a position to sell the land to him as he had no title. He therefore offered to refund the purchase price of £110 to him. The defendant denied that he ever sold a portion of the plaintiff's land to one Amusa. The defendant went further to say that in actual fact he has sold the entire 34.7 acres of land to different purchasers.

I am of the view that the evidence of the defendant is sensible and it is one which I believe.

I do not accept the evidence of the plaintiff's surveyor that the defendant pointed out the land in the plan attached to Exhibit D to him.

The whole of the plaintiff's claim is ridiculous. Assuming that the defendant ejected the plaintiff from 2½ acres of the land before judgement was delivered in the action between him and Tokosi, surely it is still open to the plaintiff to obtain possession of the land and to sue whoever is in possession of the land. His position is stronger than that of Tokosi before the judgement because he has the advantage of the judgement against the defendant by which it was adjudged that the defendant had no title to the land sold by Adeogun to Tokosi. As Adeogun also sold the portion of the same land to the plaintiff, I am of the view that if the plaintiff is honest he would have no hesitation in sueing the occupier if there is any, and obtaining judgement against him.

The defendant in his statement of defence averred that this court has no jurisdiction to try this case as the land is situated in Ikeja in the Western Group of Provinces. The learned counsel for the defendant at the opening of the trial of the action stated that he would abandon paragraph 16 of the statement of defence. I may mention in passing that it is an elementary principle that jurisdiction in an action for specific performance is founded on residence and it is not open to the defendant to say that because the land is situated outside the jurisdiction of this court, this court has got no jurisdiction. An action for specific performance is an equitable remedy and equity acts upon the conscience of the parties irrespective of where, in cases as this, the land is situated.

I shall not dwell much on this point as counsel did not raise it although it is in the statement of defence.

As stated earlier, I am not impressed by the evidence of the plaintiff. In an action for specific performance, the plaintiff must prove with certainty what was the nature of the contract between him and the defendant. The plaintiff quibbled in cross-examination as to the actual plot of land in respect of which he paid the plaintiff the sum of £110. The plaintiff repeatedly stated that the land he bought from Adeogun is the land he bought from the defendant. The defendant himself stated that the plaintiff bought 5 acres of land from him and he has since discovered that he had no title to the land and that he lost the action in the Ikeja Court.

I am impressed by his evidence in the witness box and I find as a fact, that the land which the defendant sold to the plaintiff for the sum of £110 is the same as the land which the plaintiff bought from Adeogun. As the defendant has no title to convey in respect of the land, the plaintiff's action must fail.

The Court will not stultify itself by granting a decree for specific performance of a contract which is incapable of being enforced.

The plaintiff's action is therefore dismissed.

HIGH COURT, LAGOS

CHIEF J. M. JOHNSON .. .. .. PLAINTIFF

v.

THE DAILY TIMES OF NIGERIA LTD.
PETER C. OSUGO .. .. } DEFENDANTS

(SUIT NO. LD/487/65)

[HIGH COURT, LAGOS : O. R. I. GEORGE, Ag. J. ; 22nd July, 1966]

Defamation—libel—plea of innuendo in an action for libel—burden of proof.

The plaintiff was a minister of cabinet rank between December 1959 and December 1964 before Parliament dissolved. His ministry was responsible for sports and the national stadium was under his portfolio. He ceased to be a minister in January 1965. He was a building contractor by profession. The second defendant as acting editor of the first defendants' newspaper published in the "Sunday Times" an article captioned "Who got the Stadium Contract ?" implying that a contract to rebuild the national stadium was awarded to "Modupe Johnson & Co." The plaintiff complained that the publication in its plain and ordinary meaning was defamatory of him and also pleaded an innuendo.

HELD : (i) that the particulars referred to in Order 82 rule 3 (R.S.C. Revision 1962, U.K.) must be allegations of facts extrinsic to the publication and not mere expressions of opinion or inferences to be drawn from the publication. A party filing particulars of an innuendo would not be allowed to include in the particulars inferences which could be drawn from the publication itself.

(ii) (after referring to the cases of Lewis *v.* Daily Telegraph (1963) 1 *Q.B.* and Grubb *v.* Bristol United Press (1963) 1 *Q.B.* 309) that a plaintiff relying on the natural and ordinary meaning of the words complained of need not plead an innuendo and whatever inferences could be drawn from the publication would be taken as part of the natural and ordinary meaning of the words. A plaintiff desiring to prove an extended meaning of the publication must not only allege but prove facts, not in the publication itself, but which are known to some people by which reasonable persons with knowledge of these facts might impute to the publication the defamatory meaning ascribed to them in the innuendo.

(iii) that what the plaintiff is required to allege in the particulars are merely facts and not expressions of opinion or inferences.

(iv) that on the authorities, the provisions of the old Order 19 (2) now Order 83 rule 3 (1) are mandatory and must be complied with.

(v) that a true innuendo gives a plaintiff a distinct cause of action from the ordinary defamatory words used in the natural and ordinary meaning.

(vi) that the burden on a plaintiff alleging an innuendo is to prove special facts or special circumstances known to persons to whom the publication was made which would lead reasonable persons (with knowledge of those facts and circumstances) to infer that the words were understood in a defamatory meaning.

(vii) that there is no rule of law or code of ethics which prevents a minister of state from carrying on his profession after leaving office.

Plaintiff's claim dismissed.

Rule referred to :

Order 82 *R.S.C.* (*Revision* 1962 *U.K.*).

Cases referred to :

Lewis v. Daily Telegraph (1964) *A.C.* 234.
Grubb v. Bristol United Press (1963) 1 *Q.B.* 309.
Tolly v. Fry & Sons Ltd. (1930) 1 *K.B.* 480.
Obafemi Awolowo v. Zik Enterprises Ltd. Privy Council Appeal No. 19 *of* 1956.
Haugh v. London Express Newspaper Ltd. (1940) 2 *K.B.* 507.

Agbetor (holding Lardner's brief) for the plaintiff.

Mrs Balogun (holding Chief F. R. A. Williams' brief) for the defendants.

JUDGEMENT

GEORGE, Ag. J. :—The Plaintiff a man of considerable social standing, was a Minister of Cabinet Rank between December 1959 and December 1964 before Parliament was dissolved. His Ministry was responsible for Sports, and the National Stadium was also within his portfolio. After January 1965 he ceased to be a Minister. By profession, he is a Building Contractor although he stated in evidence that he no longer carries on business as a building contractor. He now claims from the defendants the sum of £50,000 damages jointly and severally or in the alternative for Libel. The first defendant is a Limited Liability Company and the Publishers of a Newspaper called the Sunday Times. The Plaintiff alleged that the second defendant was at all material times, the Acting Editor of the Newspaper.

The Plaintiff complains of a publication in the issue of the 22nd of August, 1965 at page 16 of the Sunday Times of an article under the caption "WHO GOT THE STADIUM CONTRACT ?" There is a sub-heading "Has the Ministry of Works Awarded a Contract to Rebuild the Dismantled National Stadium at Surulere to a New Firm of Building Contractors ?"

The Plaintiff in his Statement of Claim has quoted the whole of the article as being defamatory of him. In the said publication the article continues :—

> "This is a question to which an answer is being sought from the Minister of Labour, Prince Adeleke Adedoyin who is charged with the responsibility for Sports and

from Members of the National Stadium Board. It is understood that a contract for the rebuilding of the Stadium has been signed by the firm known as "Modupe Johnson & Co."

"The Contract, our sources revealed was signed sometimes last month and it bears No. 748. The Lagos Works Organisation of the Ministry of Works is handling the matter.

"The sources also disclosed that the contract is worth £1.2m.

"Both the Minister and Members of the Stadium Board have denied any knowledge of the contract.

"Expressing surprise at the story, Prince Adeleke Adedoyin said 'I don't believe the contract has been signed'.

JURISDICTION

"This is a matter within the jurisdiction of my Ministry and I do not believe the contract for the rebuilding of the National Stadium could be signed without my knowledge.....

"He said 'The National Stadium contract as far as I know is FINAL CONTRACT. In other words, the Contractor is to find the money to carry out the work.....

"Our sources revealed yesterday that a firm has agreed to finance the project but the only hitch now is that there is no provision made for this project in the Estimate.

"Chief Modupe Johnson maintained sealed lips when contacted at Ibadan where he is having a short rest.....

"Two members of the Stadium Board also commented on the award of the said contract.....

"Chief Makanjuola said he was not aware of it adding 'In any case the forum to discuss such a contract should be the Board meeting'."

Beside the publication was the photograph of the Plaintiff with the words "J. M. JOHNSON".

In his statement of claim, the plaintiff in paragraph 10 averred :—

> "In the issue of the Sunday Times Newspaper dated the 22nd of August, 1965 at page 16, the 1st defendant falsely and maliciously printed and published and the 2nd defendant on the same date, falsely and maliciously published of and concerning the plaintiff, the libel hereinafter set out namely :—(The plaintiff quoted the whole of the article at page 16 of the Sunday Times of the 22nd of August, 1965).

In paragraphs 12 and 13 plaintiff averred as follows :—

> "The said publication taken as a whole in its plain and ordinary meaning is defamatory of him".

Alternatively the plaintiff says that by the said publication the defendants meant and were understood to mean that :—

(*i*) The Firm Modupe Johnson & Co. of which the Plaintiff is the Proprietor or a Partner or otherwise closely connected, has secured the award and has signed a contract worth £1.2m. for the rebuilding of the National Stadium at Surulere by grossly, irregular and under-hand means whereby the present holder of the office of the Federal Minister of Labour and Members of the Stadium Board who should be aware of the award and signing of the said contract were not so aware and that the plaintiff is therefore a man of dubious character, lacking in probity, candour and uprightness and capable of and in fact resorting to under-hand and irregular methods for obtaining the award of a major government contract.

(*ii*) He had so abused and so exploited his aforesaid position and the confidential and other information committed to him by reason of his aforesaid position as and when the Federal Minister of Labour and Social Welfare and has resorted to grossly irregular and under-hand method in securing the award and signing of a major contract worth £1.2m. by the firm Modupe Johnson & Co. of which the plaintiff is proprietor, partner or otherwise closely connected as aforesaid without even his successor in office being aware of the award and signing of the contract and that he, the plaintiff is a man unworthy of being trusted with confidential information and had for the purpose of private gains, abused the office of a Federal Minister.

By paragraph 13 of the plaintiff's statement of claim he has pleaded two innuendos which must be proved. At the trial of the action, witnesses were called, and the two extended meanings of the publication were canvassed. The learned Counsel for the plaintiff realising that he was bound to give particulars of the alleged innuendo in the statement of claim, applied to the court for leave to amend the statement of claim by adding at the end of paragraph 13 particulars of the alleged innuendo. The learned counsel for the defendants did not object to the application and the statement of claim was accordingly amended by including the particulars submitted by the counsel for the plaintiff. The particulars of the innuendo submitted are as follows :—

"(*a*) The plaintiff who was until December 1964 Federal Minister of Labour and Social Welfare voluntarily quitted politics in that month and publicly announced that fact.

(*b*) Tenders for the rebuilding of the National Stadium had been invited when the plaintiff was Minister but no award had been made up to the time the plaintiff quitted office.

(*c*) There was at all material times a widespread public demand for the rebuilding of the National Stadium.

(*d*) The plaintiff by reason of his position as Minister of Labour and Social Welfare knew all the facts and details confidential and otherwise for the rebuilding of the Stadium.

(*e*) The plaintiff deliberately quit office so that he could or quit office after he had arranged or so that he could use and grossly exploit or did use and grossly exploit his confidential knowledge of the National Stadium derived when he was Minister, in clandestinely arranging and did so arrange and effectuate the contract worth £1.2m. for a new firm of which he was owner or a partner and did so, so irregularly that the Minister and Members of the Stadium Board who should know of the award and signing the contract did not know of the award and signing of the contract.

(*f*) The plaintiff therefore was the man who bears the reputation imputed to him herein above."

On the strength of the publication and the evidence of the witnesses called by the plaintiff I am asked to find that the plaintiff has been defamed.

At the close of the case for the plaintiff the learned Counsel for the defendants informed the court that he did not intend to call evidence. He addressed the court with great cogency and impressed upon the court that the innuendo alleged by the plaintiff had not been proved and further that the publication itself in its true and natural meaning is not defamatory. Numerous authorities were cited by the learned counsel for the defendants, but before I proceed to examine these authorities I shall first deal with that part of the Counsel's address which refers to the necessity for stating particulars of the facts relied upon by the plaintiff in an action for libel where an innuendo is pleaded. Both Counsel agreed that before 1949 it was not necessary for particulars of an innuendo to be filed but Order 82 Rule 3 (1) R.S.C. (Revision 1962 U.K.) is as follows :—

> "Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning he must give particulars of the fact and matters on which he relies in support of such sense."

The particulars referred to in Order 82 Rule 3 are not mere expressions of opinion or inferences to be drawn from the publication itself, they must of necessity be allegations of FACTS extrinsic to the publication itself. It is not open to a party filing particulars of an innuendo to include in the particulars inferences which could be drawn from the publication itself. It appears that there has been a great deal of confusion in the past and a great deal of conflict of learned judicial opinions as to the meaning of the word 'Innuendo'. This however has been clarified by recent decisions of the Court of Appeal (U.K.) and House of Lords in the leading cases of *Lewis v. Daily Telegraph* 1963 1 *Q.B. and Grubb v. Bristol Limited Press* 1963 1 *Q.B.* 309. It is now clear that if a plaintiff is relying on the natural and ordinary meaning of the words he complains of, he need not plead an innuendo and whatever inferences may be drawn from the publication are part of the natural and ordinary meaning of the words. But if the plaintiff intends to prove an extended meaning of the publication he must not only allege but prove facts, not in the publication itself, but which are known to some people by which reasonable persons with knowledge of these facts may impute to the publication the defamatory meaning ascribed to them in the innuendo.

I shall deal with this aspect of the case later in my judgement but at the moment, I am concerned only with the necessity for including

particulars in the statement of claim. The nature of the particulars required has also given rise to some difficulties. Again the leading Cases referred to above have clarified the position. What the plaintiff is required to allege in the particulars are merely Facts and not Expressions of opinion or inferences.

In the case of *Grubb v. Bristol United Press Holroyd-Pearce L.J. At page* 364 *said* :—

> "Extrinsic facts for the present purpose mean facts outside the libel and the plaintiff cannot plead part of a document as a libel and use another part for the sole support for an innuendo."

The Learned author of Annual Practice 1966 Edition at page 1982 referring to Particulars of Innuendo said :—

> "An innuendo is pleaded as a separate paragraph in the statement of claim usually beginning : 'the said words mean and were understood to mean.....'
>
> If the plaintiff expressly said in such paragraphs that he is only relying for the alleged meaning, on the natural and ordinary meaning of the words, the paragraphs will stand without particulars as causing no embarrassment ; otherwise particulars will be ordered under Rule 3 (1) and in default of compliance, the paragraphs would be struck out as embarrassing to the defendants and the court."

It will be observed from the above and especially from the decision of the Court of Appeal in Grubb's case that the provisions of the old Order 19 (2) now Order 82 (3) (1) are mandatory and must be complied with.

In the course of his address the learned counsel for the defendants laid great stress on this aspect of the case, and it is one which I consider of considerable importance having regard to the distinction drawn between what is called a "false innuendo" and a "true innuendo". A true innuendo gives a plaintiff a distinct cause of action from the defamatory words used in its natural and ordinary meaning. In order therefore to prove an innuendo it is imperative that the plaintiff should prove that there are certain facts outside the publication itself known to certain people and that these people with that knowledge might infer or ascribe the defamatory meaning to the publication. If therefore there are no facts extrinsic to the libel itself from which any reasonable person can read the publication in a defamatory sense, then the alleged innuendo goes by the board.

In the leading case of *Grubb v. Bristol Limited Press* 1963 1 *Q.B.D. page* 309 *at page* 328 *Holroyd-Pearce L.J.* said :—

> "But the genuine innuendo which provides the separate cause of action is that which alleges an extension of the meaning of the words used and must be supported by the evidence of Facts extrinsic to the words themselves."

In the case of *Tolly B. Fry & Sons Ltd.* 1930 (1) *K.B. at page* 480, *Greer L.J. said :*

> "The evidence required is evidence of special facts causing the words to have a meaning revealed to those who knew the facts but not revealed by the words used in the absence of such knowledge."

This statement of the Law was quoted with approval by the Privy Council in the case of *Honourable Obafemi Awolowo v. Zik Enterprises Limited and another Privy Council Appeal No.* 19 *of* 1956.

I have gone into details of the facts required to be proved in an innuendo because the learned counsel for the defendants has submitted that paragraphs E and F of the particulars filed in support of the innuendo cannot be regarded as extrinsic facts and should therefore be struck out.

What the plaintiff is saying in paragraph E is that people reading the publication understand it to mean that the plaintiff deliberately quit politics so that he could or quit office after he had arranged or so that he could use and grossly exploit his confidential knowledge to effectuate the contract worth £1.2 million.

This is not what I can call a statement of fact extrinsic to the publication. It is an inference which some persons may draw (in the opinion of the plaintiff) from the publication.

Paragraph F which says that the plaintiff was "the man who bears the reputation imputed to him" is also not a statement of extrinsic fact. If however, I am wrong in my views and paragraphs E and F are regarded as statements of facts, what effect has it on the plaintiff's claim ? If a plaintiff in an action for libel can prove the "FACTS" in Paragraph F through his own witnesses, then he is in effect saying that there is no libel. Viewed at from all angles, these two paragraphs are wholly irrelevant to what are called particulars of extrinsic facts to an innuendo. They are therefore struck out. If these two paragraphs are disregarded, I am left with paragraphs A, B, C and D.

Having ruled that paragraphs E and F of the particulars of the Innuendo not being "facts" within the meaning of Order 82, rule 3 (1) of the R.S.C. (U.K.) are irrelevant, I now have to consider whether the plaintiff has proved the extrinsic facts pleaded in paragraphs (*a*), (*b*), (*c*) and (*d*) and if so whether reasonable persons with knowledge of these facts to whom the publication has been made might impute a defamatory meaning to the publication. I shall pause and examine some authorities on this subject.

In the case of *Lewis v. Daily Telegraph Ltd.* 1964 *AC. p.* 234 *at p.* 264 *Lord Morris* explained the Procedure in these words :—

> "A defamatory meaning which derives no support from extrinsic facts but what is said to be implied from the words which are used is not a true innuendo. If there are some special extrinsic facts the result may be that to those who know them these words may convey a meaning which the words taken by themselves do not convey."

That in order to support an innuendo the extrinsic facts required must be facts outside the libel itself, authorities are unlimited. In this regard mention must be made of the case of *Haugh v. London Express Newspaper Ltd.* 1940 2 *K.B. page* 507. That case is important in the present context because it decides what is the nature of the facts required to be proved by the person alleging an innuendo. The headnote reads :—

> "In an action for libel in respect of words which are not defamatory in their primary meaning, but are capable of being understood in a secondary and defamatory sense by persons having knowledge of certain special facts, in order to support an innuendo that the words bear the secondary and defamatory meaning it is sufficient for the plaintiff to *allege and to prove that there are persons who knew the special facts and so might understand the words in that secondary and defamatory sense* without proving that any person did in fact understand them in that sense."

The authorities show that the burden on a plaintiff alleging an innuendo is to prove special facts or special circumstances known to persons to whom the publication was made which would lead reasonable persons (with knowledge of those facts and circumstances) to infer that the words were understood in a defamatory meaning.

I now come to deal with the particulars filed. There is evidence in support of the facts contained in paragraphs (*a*), (*b*) and (*c*). (*d*) merely states what the plaintiff knows. But granted that a person who had knowledge of the facts that the plaintiff was until December 1964 Federal Minister of Labour : that Tenders had been invited for the re-building of National Stadium when the plaintiff was Minister : that there was widespread demand for the re-building of the Stadium and that the plaintiff knew all the confidential facts and details ; would he by reason of that knowledge ascribe to the publication the meaning contained in the innuendo :—

> "That the plaintiff had secured the award and had signed a contract by grossly irregular and underhand means....."

A man of low mentality or morbid mind might, but certainly not a reasonable man. I am also of the view that no reasonable man would ascribe to the publication the meaning contained in the second innuendo. I think they are far fetched.

In my view the plaintiff has failed to prove the innuendoes alleged. The particulars filed are incapable of leading any person with knowledge of those facts to ascribe the meaning in the innuendoes to the publication.

I shall now consider whether the words complained of, in their natural and ordinary sense are capable of a defamatory meaning. The test has been laid down by several authorities. The learned Author of the *5th Edition of Gatley on Libel and Slander at page* 120 has stated the test in these words :—

> "In determining whether the words are capable of a defamatory meaning, the judge will construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence and would not consider what persons setting themselves to work to deduce some unusual meaning might succeed in extracting from them.
>
> "That clearly is not the test. The test according to the authorities said Lord Selbourne 'is whether under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense' ".

The author goes on to say that in applying the test :—

> "the judge ought not to take into account any mere conjectures which a person reading the document might possibly (though unreasonably) form. He should 'consider what might be conveyed by the letter to a reasonable fair-minded man and not what might be inferred from it by a man with a morbid or suspicious mind' ".

The test is therefore that of a reasonable fair-minded man.

Looking at the article as a whole, it poses a question "WHO GOT THE STADIUM CONTRACT ?" and in effect asks another question "Did Modupe Johnson get the contract ?" A man with a suspicious mind might say, "Yes, Modupe Johnson was a Minister. He made what in local popular parlance is called a "deal" and got a contract worth £1.2 million. He has made money out of public funds." A fair-minded man would say, "The writer of this article does not seem to be sure that Modupe Johnson got the contract. But if Modupe Johnson got the contract, worth £1.2 million and he is going to finance the contract himself ; he must be a man of considerable reputation to be able to raise a loan for £1.2 million. Will he make a profit out of the project ?"

I have read the article complained of over and over again and the more I read, the more I am convinced, that the publication itself is incapable of a defamatory meaning and I am firmly of the view that no reasonable fair-minded person can read a defamatory meaning to it.

Assuming that the article reads :—

> "Modupe Johnson, the Former Minister of Labour and Social Welfare got the Stadium Contract"

I do not see anything defamatory in it. There is no rule of law, or code of ethics, which prevents a Minister from carrying on his profession after leaving office. The plaintiff according to his own evidence was known to his friends as a Building Contractor. Is it defamatory of a Building Contractor to say that he got a contract worth £1.2 million ? I do not think so.

In my view, the words complained of in their natural and ordinary sense are not capable of a defamatory meaning.

The plaintiff's claim is therefore dismissed.

Mrs Balogun addresses the Court on costs.

The defendants published an explanation saying that the plaintiff was not connected with the company called Modupe Johnson.

COURT : I assess costs at 100 guineas to the defendants.

HIGH COURT, LAGOS

ALHAJI LAWAL BALOGUN
(Trading under the style of Alhaji Lawal Balogun Trading Company) .. .. .. PLAINTIFF

v.

BANK OF WEST AFRICA LIMITED .. DEFENDANTS

(SUIT NO. LD/130/65)

[HIGH COURT, LAGOS : OLUMIDE OMOLOLU, J.; 25th July, 1966]

Banking—departmental instructions of bank—special arrangement with a customer may override departmental instructions.

By special arrangement between the plaintiff and the defendants the defendants had on several occasions for valuable consideration cleared goods from the Customs on behalf of the plaintiff and stored the goods at the request of the plaintiff. In order to get this done the plaintiff had to write letters to the defendants to inform them of the anticipated arrival of the goods. The defendants while agreeing that they had done this in the past contended that in ordinary circumstances they would not act on the instructions of a customer to collect and store goods unless the drawers or their London office had instructed them to do so or the customer himself made the payment or a substantial deposit, and that it was not their practice to accept instructions in the manner alleged by the plaintiff which was not in accord with the General Instructions Book issued to Bank staff.

HELD : that the Court would give effect to some special arrangement between a customer and his bankers even though the arrangement would be contrary to the procedure laid down in the bank's instruction book.

Judgement entered for the plaintiff

Case referred to :

Smith v. Hughes, 6 *Q.B.* 597.

JUDGEMENT

OMOLOLU, J :—The plaintiff is a trader and shoes manufacturer trading under the name and style of Alhaji Lawal Balogun Trading Company and carrying on his business in Lagos. The defendants are bankers carrying on their business in Lagos.

Evidence was given by the plaintiff that he has been a customer of the defendants for many years and that by some agreement between two parties the defendants had, on occasions before the present case for valuable consideration, helped the plaintiff to clear

his goods from Customs on arrival in Nigeria, and stored them at the request of the plaintiff. All the plaintiff had to do was to write to the defendants to inform them of the anticipated arrival of goods from overseas and the defendants would do the necessary. Usually within a short time afterwards the plaintiff would approach the defendants and pay all the necessary charges, interests and commissions and would collect his goods.

In accordance with this practice the plaintiff said he wrote a letter to the defendants on the 20th December, 1963 requesting them to clear and store two different sets of goods which were arriving on the s.s. *Shomron* on the 1st January, 1964 and on the s.s. *Tidra* on the 15th of January, 1964. I quote the letter as follows :

Exhibit B

"*Re.* Bills Nos. 71/22, 71/23, 71/24, 71/25 and 71/26. Each Bill amounting to £993-2*s*-9*d* respectively. Consignments shipped per s/s *Shomron*.....

Re. Bill No. 71/424 for £305-12*s*-0*d*.

Re. Bill No. 71/425 for £305-12*s*-0*d*.

Re. Bill No. 71/426 for £303-16*s*-1*d*.

Consignments shipped per s/s *Tidra*.

"Owing to the present dullness of the market manipulation, we find it very difficult for us to clear the above-mentioned goods.

"Under this circumstances, we shall be very grateful therefore if you would arrange to clear and store the relative goods as above in your Bank Store, the settlement of which will soon be effected.

"Thanking you in advance for your kind and immediate action.

Yours faithfully,
ALHAJI LAWAL BALOGUN TRADING CO.
(Sgd.)
Managing Director"

The goods ultimately arrived, the defendants cleared and stored the goods which arrived on the s.s. *Tidra* but failed to clear and store the goods which arrived on the s.s. *Shomron*.

On the 17th February the plaintiff sent his clerk to the defendants company's office with the sum of £1,300 to collect part of the goods which arrived on the s.s. *Shomron* and this clerk was told by the Manager of the defendants company that the goods were still in Customs and had not been cleared. When the plaintiff got this message he himself went to the Manager and expressed surprise at the defendants' negligence in not clearing the goods in view of his letter dated 20th December which had given the defendants ample notice of the arrival of the goods. According to the plaintiff's evidence the defendants' Manager expressed regret at his oversight and promised to make an immediate collection of the goods.

The goods were ultimately collected on the 2nd of March by which time they had incurred Nigeria Ports Authority's rent of £2,451-10*s*-10*d*.

When the plaintiff called on the defendants again to collect the goods the defendants refused to deliver the same unless the plaintiff would also pay the Ports Authority's rent. The plaintiff refused to pay this rent as he said it was incurred as a result of the negligence of the defendants. He wrote letters to the defendants' Head Office in Lagos and in London but all to no avail. The market value of the said goods is £9,399-15*s*-0*d*.

Plaintiff further testified that as a result of the defendants refusal to release the goods he had to suspend work in his shoe factory and continued to pay salary of his workers for a whole year as a result of which he suffered damages amounting to £4,325-6*s*-8*d*.

The goods were rubber sponge sheets which the plaintiff ordered for the purpose of manufacturing shoes.

Whereupon:

1. The plaintiff's claim against the defendants is for the delivery of the plaintiff's cartons of Rubber Sponge Sheets Nos. 71/22; 71/23; 71/24; 71/25 and 71/26 in the custody of the defendants which the defendants have refused to deliver.

2. OR in the alternative the plaintiff claims the sum of £13,725-1*s*-8*d* being general and special damages for the unlawful detention of the said goods since the 25th February, 1964.

The plaintiff was quite clear in his evidence that at no time was it necessary for him to have to make a deposit with the defendants before they carried out his instructions. He had mortgaged the

property to the defendants and he also kept his current account with them. He tendered documents to show that this had been the practice between him and the defendants in the past. When the two sets of goods arrived by the two ships in January his business, he said, was dull and he could not afford to pay to collect the documents. The Manager of the defendant-company whom he saw on the 17th February, 1964 was one Mr Enerburg. There was also a shipping clerk known as Joseph present at the interview. After his visit he wrote a letter (Exhibit C) confirming the interview. I quote the letter in full :—

Exhibit C

"*Re.* Bills Nos. 71/22, 71/23, 71/24, 71/25 & 71/26. Each Bill amounting to £993-2*s*-9*d* respectively. 560 Cartons Rubber Sponge Sheets shipped per s.s. *Shomron.*

Drawer—Messrs Khusal (London) Limited.....

"We beg to refer to the above-mentioned Bills/Goods drawn on us which we requested you on the 20th December, 1963 to clear and store for us due to the dullness of the market. (Our letter ref : ALBTC/SG/63 dated 20th December, 1963 refers).

"Upon our calling to your office on Monday the 17th January, 1964 to pay part of these goods, we are made known by you that these goods are not yet stored despite the fact that you are in a position to store goods of which payment are delayed, and despite the fact that we have instructed you on the 20th December last to store these goods for us.

"As all these goods have been in the Customs, (if not Government Warehouse now), for the past 50 days—(Carrying vessel arrived on the 1st January, 1964), the N.P.A. rent on these goods must be around £200 or less we predict. (Goods due rent from the 8th January, 1964).

"As we are not prepared to pay any proportion of the rent on these goods in view of the fact that we have given you the instruction to store these goods ever before the arrival of the carrying vessel, we are of the fullest opinion that you will make provisions in settling the incurred rents on these goods without delay so as to give us the opportunity of paying for these goods, otherwise we are not prepared to start paying for these Bills until the N.P.A. rent incurred on these goods is settled by you.

"Your prompt and earliest reply to this matter will be highly appreciated.

Yours faithfully,
ALHAJI LAWAL BALOGUN TRADING CO.
Managing Director

c.c. Messrs Khushal (London) (Limited)
c.c. Messrs Khushal (Nigeria) (Limited)
} Your kind attentions to the above is highly solicited."

This letter was received by the defendant company on the 21st February, 1964.

The plaintiff said the consignment of goods were in five bales and each bale cost £993-2*s*-9*d* and the total amount of the five bales were approximately £6,000 including insurance and other charges. The market value, however, would be £9,399-15*s*-0*d* because he expected to make a profit of about £3,500 on the consignment. He said if the defendants had carried out his instructions as usual by clearing and storing the goods on arrival he would have had to pay no rent to the Ports Authority and so would have been in a position to collect the goods and make the expected profits for his business.

Since the defendants' negligence had caused the goods to attract such an exorbitant rent he could not afford to clear them and so he not only lost the goods but also he had to keep his Shoe Factory open for a whole year on which he made a loss of £4,325-6*s*-8*d* in wages. He could not dismiss the workers because they were trained men and hard to get and in any case he was hoping all along that the defendants would agree to let him have the goods until it was too late. He said the defendants knew very well what he used the goods for as, on one occasion, the Manager had asked him and he had presented Mr Enerburg with some pairs of shoes made from the rubber sheets.

Under cross-examination by learned Counsel, Mr Bentley for the defendants, he said he could only trade in 1964 because of some special financial accommodation granted to him by one L. Nicot, a London Finance Company which came to his aid.

The plaintiff's evidence was supported by that of his clerk.

Mr Jeffrey Ozigbe who is an Associate of the Institute of Bankers and is now employed in the African Continental Bank gave evidence for the plaintiff. He said until his present appointment he worked in defendants' Broad Street branch for about seven years from 1957 to September 1963. He knew the plaintiff as a customer of the

bank and he confirmed that the bank always cleared and stored all his goods for him on receipt of a letter instructing the bank to do so. I quote from his evidence :

> "He (the plaintiff) usually wrote the bank a letter asking for clearance of his goods. On receipt of his letter we used to send documents to our Ports Section Apapa who would arrange the clearance. The plaintiff had been doing this for three or four years. Throughout the period the bank had never refused his request. The bank would charge fees for storage and clearance. As far as I can remember plaintiff never failed to collect his goods although at times he might be a little late."

Under cross-examination by learned counsel for the defendant, Mr Bentley, this witness tendered a page from the General Instruction Book issued to the staff (Exhibit N). The contents of this document makes it clear that clearance of goods :

> "in connection with bills received is not permitted unless the bank received specific instruction from the Remitting Office or Correspondent Bank or unless the drawee deposits the full amount necessary to cover the custom duties, clearance expenses and any other expenses which may be incurred."

Mr Ozigbe said that he knew that the custom and practice between the plaintiff and the defendants was contrary to the instructions in the book but as far as he could remember plaintiff's letter was always sufficient authority for his goods to be cleared and stored for him.

Plaintiff's evidence as to this custom and practice of clearing his goods on the strength of a letter from him was also supported by another trader who he called as a witness Mr Awotoye who is a regular importer of goods from Japan. He said that whenever he was expecting goods which he could not afford to clear he would merely go to the defendants, tell them about the goods and the shipping particulars of their arrival and the bank would help him to clear and store until he was able to collect the goods. In consideration of this he kept a credit account with the defendants and all his daily sales were paid into the account at the end of each day. In addition the bank imposed charges, commission and other interests. He had been in the trade for over eight years and throughout this period the bank had never refused to honour his instructions. In his own case his instructions to the bank were only verbal.

Under cross-examination by learned counsel Mr Bentley, witness said he could not believe that the defendants were acting in accordance with the instructions of his shippers and not his own instructions. He believed that the action usually taken by the bank was in accordance with his own instructions.

The first witness for the defence was Mr Anthony Raymon, Branch Training Officer of the defendant's Broad Street Office which is the branch connected with this case. He has been in the bank service for 12 years. He explained different kinds of bills in use in the bank and the procedure for processing them. The effect of his evidence is that the defendants would not act on the instructions of a customer to collect and store his goods unless :

(1) the drawers or their London Office had instructed them to do so ; or

(2) the customer himself made the payment or a substantial deposit.

He testified that it was not the practice of the bank to accept instructions in the manner which the plaintiff had alleged. I quote from his evidence :

> "B.W.A. may accept his instructions if he is very well known to them and if at the time of the request he offered substantial consideration towards the payment of all Custom Duties and other Port Charges and in many cases he contributed towards bills himself."

Under cross-examination by learned counsel for the plaintiff Mr Shodipo, this witness said he was not working in the Bills Section himself. He believed that the plaintiff had been a customer of the bank for many years. He was not aware that the plaintiff ever made a default towards the collection of his goods from the bank. When Mr Shodipo suggested to the witness that at all material times the defendants had been clearing the plaintiff's goods without plaintiff having to deposit, witness said "I cannot tell".

The second witness for the defendants was Mr Allen, the Manager of the United Bank for Africa and a Fellow of the Institute of Bankers. He had formerly worked for the defendants in Nigeria but for the past eleven years he had been with the United Bank for Africa. He gave evidence about the procedure and normal banking practice about clearing of goods. The principle is that the bank acts on the instructions of the drawers of the bill. When he was shown the plaintiff's letter dated 20-12-63 (Exhibit B)

by which the plaintiff instructed the defendants to clear the goods on the s.s. "Shomson", Mr Allen said he also usually received such letters from his customers. I quote from his evidence :

> "I get such letters from my customers. It depends on the customer. If you act on such a letter it would amount to granting customer an overdraft unless the instructions are from the shippers."

When told of the arrangement and practice which the plaintiff alleged existed between him and the defendants about the clearance of his goods Mr Allen said he had no such arrangements with any of his own customers. He said the extract from the General Instructions Book to the Bank Staff (Exhibit N) was similar to the instructions in use among his own staff.

Under cross-examination by learned counsel for the plaintiff Mr Shodipo, he agreed that facilities accorded in a bank to customers depended on the customers' credit worthiness. If he had been the recipient of Exhibit B he would rather give the plaintiff overdraft to pay the bill.

Mr Olfus Joseph shipping clerk in the defendants' employment who has been in their service for five years gave evidence to corroborate the procedure and internal arrangement of the bank about Bills of Exchange. He said it was not the practice to clear customer's goods on the instructions of the drawees. He said he did not know of any special arrangement with Alhaji Balogun, the plaintiff. This witness admitted that plaintiff's letter of instruction (Exhibit B) had reached his desk before the arrival of the s.s. "Shomron". He could not remember that the plaintiff and his clerk called at the defendants' office to enquire about his goods. He denied that it was in his presence that the Bank Manager Mr Enerburg apologised to the plaintiff for the bank's failure to collect the goods and that the manager promised to collect them immediately.

Asked why the bank cleared the goods on the "Tidra" and not those on the "Shomron" in view of the fact that the plaintiff's instructions to the defendants were contained in the same letter, this witness said that in respect of the "Tidra" the shippers had instructed them to collect but they had no such instructions in respect of goods arriving on the "Shomron" (*see* Exhibit T.15 and Exhibit R1). This witness said the goods on the "Shomron" were ultimately cleared on the written instructions of their London Office which he said he saw.

The last witness for the defendants was Mr Azukwo Enerburg who was the Branch Manager of the defendant-company at the time of this transaction. He corroborated the defence story in that the defendants had no special arrangement with the plaintiff for clearing his goods. He knew the plaintiff very well as a customer of the bank but he said plaintiff always paid for documents. He said the goods on the "Shomron" were ultimately collected by the defendants on the 2nd March, 1964. He did not think it was an oversight on the part of the defendants that the goods were not collected from Customs; it was because they had no instructions from the shippers. He later received *oral* instruction from his headquarters by telephone to clear the goods. By that time the goods had attracted heavy duties and other charges. He said he did not know the time that the bank eventually sold the goods because he had by then proceeded on leave.

This closed the case of the defendants. Learned counsel for both parties addressed me.

I have carefully examined the evidence and I must say at once that formidable as the witnesses for the defence are, none of them was categorical in telling me that there was no room for the practice alleged by the plaintiff. Mr Allen, Fellow of the institute of Bankers who I understand is one of only three of such Fellows in the whole of the country impressed me by his evidence which in effect indicated that such a practice could not be ruled out. His own way of dealing with a customer like the plaintiff was to give him an overdraft and pay the bill.

I believe the evidence of the plaintiff and his witnesses that there was a custom and practice in the way the plaintiff had alleged. He had mortgaged a property to the bank, maintained a current account with the bank and all the witnesses for the defendants who knew the plaintiff admitted that he was a good customer. I do not see anything wrong or unusual in bankers varying their practice and, as Mr Allen said facilities given by bank would depend on the credit worthiness of the customer.

I have examined Exhibit Q, the Bank's statement of account of the plaintiff and I have not been impressed with the argument of learned counsel Mr Bentley when he relied so much on the fact that the plaintiff was 'heavily overdrawn' with the defendants in January 1964. The fact was that for the first four days of January he was in funds but from the 4th of January he was overdrawn; but the overdraft was not more than £600. This was nothing in an

account of which shows some heavy payments upwards of £1,500 sometimes and in any case within two months of January the plaintiff again was in funds.

I find sufficient evidence to substantiate the special arrangement alleged by the plaintiff. He produced evidence Exhibits A and A1 to show that other goods had been supplied to him in May and August 1962 on the strength of letters similar to Exhibit B. I find as a fact that Exhibit B was written on the 20th of December and received by the defendants on the 24th of December, that is a clear week before the ship "Shomron" arrived in Nigeria. I find as a fact that the plaintiff was under the impression that the defendants had acted on his instructions and had cleared and stored the goods for him. I believe that the plaintiff in company of his clerk saw Mr Enerburg the Manager and Joseph the shipping clerk on the 17th February when for the first time they learnt that the goods had not been cleared. On that day they had come with the sum of £1,300 to pay for and to clear a portion of the goods. I believe that the Manager apologised to the plaintiff for what he called an oversight and I believe that the Manager left the plaintiff with the impression that the goods would be cleared as soon as possible.

I do not believe the evidence of Mr Enerburg the Manager of the defendants branch which was involved in this case nor do I think the shipping clerk, Joseph was telling the truth. They are both employees of the defendants and I think their evidence was made up to suit the defendants' case. They did not impress me as witnesses of truth. For instance when I asked on whose instructions the goods were ultimately cleared, Mr Enerburg said he received oral instructions from the Headquarters office in Lagos while Joseph said the instructions were written and that he saw the letter !

The custom and practice alleged by the plaintiff does not appear to me to be an unusual facility to be accorded by a bank to its customer. As Mr Allen said it all depends on the customer's credit worthiness. In fact it seems to me that it would be good business for the bank to do so with a good and tested customer such as the plaintiff. The bank at all times had absolute possession of the goods which could only be released to the customer against payment. The bank did not lose a penny and on the other hand they would recoup themselves for all the expenses incurred and would also charge bank interests and their commission. I should have thought that this was a normal incident of banking business. There was sufficient mutuality and also sufficient consideration.

In any case if the bank did not intend to honour the plaintiff's instructions contained in Exhibit B why did the bank not say so when they received his letter ? Why did they keep his letter from 24th December, 1963 without taking any action on it until he called personally at the bank's office on the 17th of February, 1964 when, according to the bank they informed him that the goods had not been collected ? I could not have believed that a reputable bank like the defendants could come to court to plead a situation of this sort.

I consider that the action of the defendants was the result of some bungling in their branch office because this action was contrary to their previous practice with the plaintiff. Whatever their Instruction Book said about clearance of goods I believe that there was a special arrangement between the defendants and the plaintiff and that the defendants did not usually insist on the instructions of shippers before clearing customer's goods. Plaintiff was indeed surprised to hear that when the defendants cleared his goods in the past they were acting in accordance with the shipper's instruction and not his own. At no time did the defendants inform the plaintiff of this position.

In this connection the rule of law is that stated in *Freeman v. Cook* 2 *Epstica at page* 663 and referred to with approval in the speech of Blackburn J, in the case of *Smith & Hughes reported in Volume* 6 *Queens Bench Division* 597 *at page* 607 and I quote :

> "If, whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

I find that, relying on this custom and practice with the defendants, plaintiff was entitled to refuse to pay the extra costs incurred by the negligence of the defendants and consequently he lost the goods of which the market price was £9,399-15*s*-0*d*. The defendants are liable for this loss.

I have examined the evidence relating to the plaintiff's claim for damages in the amount of £4,325-6*s*-8*d* but I cannot find sufficient evidence to justify this claim. On the contrary the defendants tendered documents which show that throughout the year 1964, when the plaintiff alleged he closed down his factory for a year, had received lots of supplies which must have kept his

factory busy. Plaintiff explained that this was because of some financial accommodation given to him by one L. Nicot from London. If this was so he had no right to claim for any loss. In the alternative, I do not believe that he closed down his factory for a whole year and kept paying his workmen throughout this period. His claim for damages under this head fails.

The order of this court is that judgement be entered in favour of the plaintiff in the amount of £9,399-15*s*-0*d*. Plaintiff is also entitled to the costs of this action which I will now proceed to assess.

HIGH COURT, LAGOS

NGOZI OKORIE .. .. APPELLANT

v.

INSPECTOR-GENERAL OF POLICE .. RESPONDENT

(APPEAL NO. LD/20CA/66)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J. ; 26th July, 1966]

Criminal Appeal—assault—section 200 *Criminal Procedure Act—Magistrate recalling witness where prosecution did not apply to recall.*

HELD : the court of its own volition recalled the witness, not to examine or re-examine him because his evidence appears to the court to be essential to the just decision of the case but purely and simply to tender a statement made by another person. This was not the object of section 200 of the Criminal Procedure Act, Cap. 43 ; the Magistrate's duty was to sit as an adjudicator allowing both parties to conduct their respective cases in the light in which they saw it without the adjudicator entering the arena ; and in interposing only for the purposes of clarification and when the interests of justice demand it.

Appeal allowed.

Statutes referred to :

Criminal Code, Cap. 42, *Laws of Nigeria* (1958 *edition*).

Criminal Procedure Act, Cap. 43, *Laws of Nigeria* (1958 *edition*).

Evidence Act, Cap. 62, *Laws of Nigeria* (1958 *edition*).

Case referred to :

R. v. John McKenna 40 *Cr. App. R.* 65.

Aka-Bashorun for the appellant.

Miss Agusto for the respondent.

JUDGEMENT

TAYLOR, C.J. :—The appellant was charged with and convicted of assault occasioning harm contra s.355 of the Criminal Code. An appeal was filed on her behalf to this Court supported by two grounds of appeal. The first ground, and to my mind the substantial ground, had it complied with the rules of Court reads thus :—

> "That inadmissible evidence has been admitted by the Court below and that there is not sufficient admissible evidence to sustain the decision after rejecting such inadmissible evidence."

The other ground is the omnibus ground. I struck out the first ground of appeal because it was vague and failed to supply the necessary particulars of the inadmissible evidence received. Counsel who appeared in the Court below also appeared for the appellant on appeal. Judgement in the Court below was delivered on the 31st January, 1966 and though his brief was held by another Counsel on that day, he had a period of over 5 months within which to apply for a copy of the Judgement which took no more than two and a half pages, and file the particulars of the inadmissible evidence. The grounds of appeal referred to above were filed on the 4th February, 1966 and contained the usual statement to the effect that further grounds of appeal will be filed on receipt of the record which as often as not is mere embellishment. Nothing, however, was done. I have over and over again had occasion to draw Counsel's attention to the unsatisfactory manner in which the appeal is prepared with particular reference to grounds of appeal. I did, however, in the interests of justice and in order that the law on the subject may be brought home to the Court below decide to hear the State Counsel on the issue of the receipt by the Magistrate of inadmissible evidence and its effect.

The facts were that the complainant suffered head injuries as a result of an assault which took place on the 4th September, 1965 at 21 Morris St., Abule Ijesha, Yaba, where both the accused and complainant lived. That the complainant was so injured was not disputed and the sole question was who committed the act of assault. On the evidence of the complainant, whoever hit her did so from behind and the former never saw her assailant in the act of doing so though she gave evidence that when she turned round she saw the appellant holding a pestle, but the appellant was not the only one present at the time. The only eye witness to the actual act of assault was one Mrs Segun who made a statement to the Police but was out of Nigeria at the time evidence was heard in the Court below. The record of the proceedings on this point reads thus after Prosecution Witness 5, Vincent Onuoha, P. C. 13715 had given evidence and been cross-examined :—

> "Re-examined.....None. At this stage Inspector Aharanwa informs Court that Mrs Segun is out of the Country. She is in United Kingdom. She would have been a witness."

I shall stop there for a moment to comment that I can see no application made by the prosecutor or contained in this quotation from the record of the trial Magistrate. The record then continues in these words :—

> "Court : In the interest of justice I rule that the last witness be recalled under section 200 Criminal Procedure Act to tender the statement made to him by Mrs Segun."

I am aware that section 200 of the Criminal Procedure Act provides that :—

> "The Court at any stage of any trial, inquiry or other proceedings under this Act may call any person as a witness or recall and re-examine any person already examined and the Court shall examine or recall and re-examine any such person if his evidence appears to the Court to be essential to the just decision of the case."

The witness concerned had under cross-examination stated that he took a statement from Mrs Segun and as the record shows no attempt was made by the prosecution to tender the statement either under re-examination or on application to the Court. The Court of its own volition recalled the said witness not to examine or re-examine him because his evidence "appears to the Court to be essential to the just decision of the case" but purely and simply to tender a statement made by another person. In my judgement this was not the object of section 200 of the Criminal Procedure Act. In the present case as I have said no application was made by the prosecution to tender the statement of Mrs Segun. It is the duty of a Judge or a Magistrate to sit as an adjudicator allowing both parties to conduct their respective cases in the light in which they see it, without the adjudicator entering the arena and interposing only for the purposes of clarification and when the interests of justice demand it. The law as to when a Court of Appeal will interfere with a decision by a Judge or Magistrate to recall a witness is aptly stated by Byrne, J. in the case of *John McKenna* 40 *C.A.R.* 65 at 67 in these words

> "It is only necessary to refer to Sullivan (1922) 16 CAR 121 ; (1923) 1 KB 47, where it is at once to be seen that a Judge, in the circumstances in which the learned Commissioner acted in this case, has complete discretion whether a witness shall be recalled, and this Court will not interfere with the exercise of his discretion unless it appears that thereby an injustice has resulted."

I have to ask myself whether an injustice resulted in the case before me. Miss Agusto for the respondent was unable to support the conviction. She stated that Mrs Segun was the only eye witness ; that without her written statement to the Police there would be insufficient evidence to convict the appellant and finally that in

her submission there was insufficient evidence adduced to warrant the admission of Exhibit "F".

The Learned Magistrate admitted Mrs Segun's statement to the Police in evidence as Exhibit "F" under the exercise of a purported power vested in the Court by s.191 of the Evidence Act which states that :—

> "Any person, whether a party or not, in a cause may be summoned to produce a document without being summoned to give evidence, and if he causes such document to be produced in Court the Court may dispense with his personal attendance."

Perhaps if the Learned Magistrate had read the side note which says "Production of documents without giving evidence" as well as the provisions of s.192 he would have seen the patent inapplicability of s.191. Section 192 states thus :—

> "A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness."

How easy it would be for the prosecution to discharge the onus placed on them if this section were in fact applicable, by merely tendering a witness to produce all statements relevant to the case without the makers of the statements being produced and being liable to cross-examination. That the Trial Magistrate based his conviction on the statement of Mrs Segun can be seen from this quotation from his Judgement that :—

> "As Mrs Segun is a disinterested witness I recalled the 5th Prosecution Witness under section 200 Criminal Procedure Act and through him by virtue of the provision of section 191 Evidence Act, I admitted Mrs Segun's statement in evidence as Exhibit "F" in order to find out where the truth lies and do justice between the parties."

Our Evidence Act provides in s.33 under the heading "Statement by Persons who cannot be called as witnesses" the occasions in which statements like Exhibit "F" may be receivable in evidence. S.35 also provides for circumstances in which statements may be used in evidence in accordance with the provisions, in cases of summary trial, of s.290 and 291 of the Criminal Procedure Act. The present case does not come under that.

The judgement is unsatisfactory on the law and the facts for the reasons given and in my view the interests of justice were not served. I would allow this appeal and do quash the conviction and sentence passed on the accused/appellant by the Magistrate.

I therefore enter a verdict of acquittal and discharge the accused.

HIGH COURT, LAGOS

THE REPUBLIC .. .. COMPLAINANT

v.

EMMANUEL SAM AKPAN .. .. .. DEFENDANT

(CHARGE NO. LA/110/1966)

[HIGH COURT, LAGOS : C. IKPEAZU, J. ; 1st August, 1966]

Criminal charge—charge of cultivating Indian hemp—ingredients of the offence to be proved by the prosecutor—meaning of "cultivate".

HELD : that in order to succeed on a charge alleging that the defendant knowingly cultivated Indian hemp, being a plant of the genus canabis, contrary to section 2 (1) of the Indian Hemp Decree, 1966, the prosecution must prove :—

(*a*) that the accused cultivated the plant

(*b*) that the plant is of the genus canabis

(*c*) that the accused cultivated the plant knowing it to be of the genus canabis.

HELD also : that the word "cultivate" must be given its natural meaning and must include, caring for, watering, nurturing, and does not only mean "plant".

Balogun (with him *Ojomo*) for the Republic.

Oyefeso (with him *Ntia* and *Nkpanam*) for the defendant.

DIRECTION TO THE JURY

IKPEAZU, J. :—Gentlemen of the Jury, the case against the accused is that he knowingly cultivated Indian Hemp being a plant of the Genus Canabis contrary to section 2 (1) of the Indian Hemp Decree of 1966. You have all listened to the evidence adduced by the prosecution in support of the charge. This evidence is to the effect that two Constables, Napoleon Oputa, the P.W.1 along with some police officers went to No. 5 Lander Close, Apapa where the accused was working as a Gardener and saw a plant suspected to be Indian Hemp and uprooted it from where it was growing. This plant was tendered as Exhibit A. When asked whether he planted it, the accused denied but admitted watering it on request by Sufuyanu Abiri, P.W. 3 who denied this. The accused was taken to the Police Station where he made the statement, Exhibit C and was later charged.

The specimen of the plant was enclosed in an envelope and sealed by Israel Kushimo, the P.W. 5 who said that he handed it to the Government Analyst whose report was tendered as Exhibit D. This is the evidence summarised.

In order to succeed on this charge the prosecution must prove firstly that the accused cultivated the plant, secondly, that the plant is of the Genus Canabis and that the accused cultivated this plant knowing it to be of the Genus Canabis that is to be Indian Hemp. According to the law, words must be given their natural meaning and the word cultivate in this section must include, caring for, watering, nurturing and does not only mean to plant. Accordingly, the accused is proved to have cultivated this plant on his own admission in Exhibit C. The other essential is to show that the plant is Indian Hemp, and in this respect the evidence must be that of an expert.

In this connection the report of the Government Analyst has been tendered and under our law of evidence, this report suffices and oral evidence is unnecessary. Thus if this report shows that the specimen of Exhibit A was shown to be Indian Hemp this element would have been proved. If Exhibit D is examined it will be seen that the specimen reported upon was not the one handed to the Analyst by the witness, Israel Kushimo, the P.W. 5 but that which was handed to the Analyst by one Jaleoso. This certainly does not support this case. No further evidence has been adduced to prove that Exhibit A or a specimen of it is Indian Hemp and nothing in the evidence can lead to any such inference. I will direct the Jury to consider the evidence and decide whether a case has been made out against the accused to answer and if this is so he will be required to make his defence. If on the other hand you reach the conclusion that he has no case to answer you will then return a verdict of not guilty.

HIGH COURT, LAGOS

FEDERAL PUBLIC TRUSTEE .. .. APPLICANT

v.

AMUDATU OJIKUTU & 10 OTHERS .. RESPONDENTS

(SUIT NO. M/45/66)

[HIGH COURT, LAGOS: E. A. CAXTON-MARTINS, J.; 5th August, 1966]

Rules of Court cannot over-ride decisions of the West African Court of Appeal.

A number of applicants sought by motion to vary a previous order made by another Judge directing the sale of a house by substituting another house in place of the one directed to be sold. Objection was raised on behalf of some of the respondents, on the ground that variation could only be made by the Judge who made the order sought to be varied.

HELD : that the court was bound by the decision of the West African Court of Appeal in Davies *v.* Davies, (W.A.C.A. cyclostyled report of October 1949 page 24) in which it was held that in the absence of statutory authority that court could not subscribe to the opinion that one judge had power to vary the order of another judge; that Order L. 11 Rule 2 of the High Court (Civil Procedure) Rules could not over-ride the decision in Davies and Davies.

Motion adjourned for determination by Sowemimo, J.

Gbajumo (for Shyngle) for the applicant.

Esho for the Public Trustee.

Coker for 5th, 8th and 10th respondents.

RULING

CAXTON-MARTINS, J. :—In this motion, Mr Shyngle on behalf of certain number of the Applicants sought an order for the variation of a previous order made by Sowemimo, J. upon 16th May, 1966, directing the sale of the property at 22 Idumagbo Avenue, Lagos, and Mr Shyngle asked that the property at 58 Jebba Street, Ebute Metta be substituted for 22 Idumagbo Avenue, Lagos.

Unfortunately, the parties interested in this matter are not all agreed as Mr Coker for Respondents Nos. 5, 8 and 10 opposed the application now made by Mr Shyngle.

Mr Coker raised a number of preliminary objections but it is only necessary to decide upon one point which disposes of the matter. Mr Coker contended that the application for variation now sought could only be made by Sowemimo, J. who upon

16th May, 1966, made the order now sought to be varied. He relied on the decision in *Davies and Davies, W.A.C.A. October* 1949 *Sessions, page* 24. In that case His Lordship, *Lucie-Smith, then Chief Justice, Sierra-Leone*, giving the judgement of the then West African Court of Appeal, stated as follows :—

> "In the absence of Statutory Authority, I cannot subscribe to the theory that one Judge has any power to vary the order of another Judge".

This Court is bound by that decision as there is no Statutory Authority yet brought to my notice by means of which one judge is enabled to vary an order made by a brother judge. Mr Shyngle relied on *Order* L. 11 *Rule* 2 of the *Old Supreme Court Rules* but I am of the opinion that Order L. 11, Rule 11 restricted as it is in its terms, cannot override the decision in *Davies and Davies.*

On the circumstances, the motion stands adjourned for determination by Sowemimo, J. upon his Lordship's resumption of duty.

Adjourned 17th October, 1966.

Mr Coker—I ask for 10 guineas costs.

Mr Balogun—No order for costs should be made.

Court—5 guineas costs to be paid to the Respondents Nos. 5, 8, 10 jointly and severally out of the Estate.

HIGH COURT, LAGOS

BOARD OF CUSTOMS AND EXCISE .. APPELLANT

v.

AYINDE ABDUL .. .. RESPONDENT

(APPEAL No. LD/18CA/66)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J. ; 8th August, 1966]

Criminal appeal—acquiring possession of goods chargeable with duty—duty not paid—onus of proof—duty of magistrate is to interpret the law without regard to considerations of hardship.

The Chief Magistrate in a charge under section 145 (*a*) of the Customs and Excise Management Act, No. 55 of 1958, of acquiring possession of 107 quart bottles of Capstan Schnapps and 48 bottles Martell Brandy valued at £283-16*s*-8*d* being goods chargeable with customs duty of £27-5*s*-0*d* which had not been paid discharged the respondent on the ground that even though the appellant was required by law to prove only that the goods were found with the defendant, that they were the type chargeable with customs duty, that such duty had not been paid and that the appellant had discharged the duty, it was not enough to say that duty had not been paid and so shift the onus of proof on the respondent. The assertion that duty had not been paid must be made on reasonable grounds, otherwise it would be oppressive to the respondent and would be contrary to the spirit of the law.

HELD : (1) that the learned Chief Magistrate allowed himself to be guided by consideration of hardship that would be caused by convicting the respondent rather than an interpretation of the law as it stood; that a court's primary duty in a case of this nature was to interpret the law as it was and not as the court would like to see it.

OBITER : If any hardship arises from an application of the law its amendment is a matter for the legislators and not for the courts.

Case remitted to lower Court.

Statute referred to :

Custom and Excise Management Act, No. 55, 1958

Case referred to :

R. v. Cohen (1951) 1 *All E.R.* 203

J. O. Williams for the appellant.

Aka-Bashorun for the respondent.

JUDGEMENT

TAYLOR, C.J. :—The respondent was brought before the Chief Magistrate's Court, Lagos for an offence under s. 145 (*a*) of the Customs and Excise Management Act, No. 55 of 1958 of "acquiring

possession of 107 quart bottles Capstan Schnapps and 48 bottles Martell Brandy valued at £283-16*s*-8*d* being goods chargeable with customs duty of £27-5*s*-0*d* which has not been paid.

Evidence was led by the prosecution that on the 27th May, 1965, on information received, the house of the respondent was searched and 107 quart bottles of Capstan Schnapps were found, and on a search of his car the 48 bottles of Martell Brandy were found at the back of the car. It was also shown that these goods were dutiable and on enquiry, the defendant admitted he had no receipt for customs bill of entry. The explanation he gave to the Customs Preventive Officer was that one Dofi gave him the exhibits but he does not know the whereabouts of Dofi. In his statement made to the Police, Exhibit "F" he said on this point that :—

> "The bottles of the Schnapps were kept there by me, for a friend of mine I knew at Cotonou. He is by name Dovis.....The brandy bottles belong to the same friend, Mr Dovis."

Finally, Exhibit "E" his travel certificate shows that he is a constant traveller through the Customs at Idiroko and that on the particular day in question he had passed through the Immigration post at Idiroko into Nigeria.

The defence on the other hand was that this friend Dofi gave the exhibits to the respondent as a pledge for a loan of £200 received from the respondent. In examination-in-chief the respondent further said that :—

> "Exhibit "D" (*i.e.*, the brandy bottles) was in my car because I wanted to take the goods to him (Dofi) and collect my money."

On the evidence the learned Trial Chief Magistrate discharged the respondent, holding inter alia that :—

> "It is true that the Customs were required to prove only that the goods were found with the defendant and that they were of the type chargeable with customs duty not paid, and this has been done in this case. But it is not enough to say that duty has not been paid and so the onus has been shifted on to the defendant. The assertion that duty has not been paid must be made on reasonable grounds, otherwise anybody found possessing a bottle of Schnapps or brandy would be required to produce customs duty receipt. This would certainly be oppressive which is not the spirit of the law."

Against this Judgement the appellants have appealed and have urged two grounds of appeal in support. Shortly put Mr J. O. Williams' argument is that the learned Chief Magistrate erred in disregarding the provision of ss. 166 (2) (*a*) and 168 of the Act aforesaid and by so doing wrongly placed the onus of proving that duty had not been paid on the appellant Board.

Mr Aka-Bashorun's main argument reiterates the Judgement or reasoning of the learned Chief Magistrate that it was not sufficient for the Board to allege that duty had not been paid on any goods, for anyone in the street who cannot prove that duty has been paid on goods found in his possession would otherwise be liable to arrest. He went on to make much of the evidence that on some of the bottles of Schnapps were found these words—"made exclusively for the United Africa Company". On this particular point Mr Williams however pointed out that it was not shown for which particular branch of the United Africa Company these goods were made and that on the evidence of Prosecution Witness 1, Ezekiel Akinola there is a branch of the United Africa Company at Cotonou Custom.

S. 166 (2) (*a*) provides that :—

> "Where in any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not
>
> > (*a*) any duty has been paid or secured in respect of any goods ..... then, where those proceedings are brought by or against the Attorney-General of the Federation, the Board or an officer, the burden of proof shall lie upon the other party to the proceedings."

I must confess I can see no difficulty in the interpretation of this section. It means exactly what it says. The first point to determine is whether there is a question or issue as to whether any duty has or has not been paid, and the simple answer to this is of course there is such a question. It is the very basis of the charge that customs duty of £27-5*s*-0*d* was not paid and the evidence was that such goods were dutiable. This section then goes on to say in effect that in such cases the onus of proof that duty was paid shall lie on the defendant. What the learned Chief Magistrate should then have gone on to consider is the extent of the onus placed on the defendant in these proceedings.

Mr Williams for the appellant has argued that such an onus is not as heavy as that placed on the prosecution in criminal prosecutions and that it is discharged if the defendant gives an explanation which may reasonably be true even if in fact it is untrue.

This principle is stated in the case to which the Learned Chief Magistrate's attention was drawn but no reference to it appears in his Judgement. The case is that of *R. v. Chohen* 1951, 1 *A.E.R.* 203. The same difficulties felt by the Learned Chief Magistrate were experienced in this authority and were expressed in these words by Lord Goddard C.J. at page 205.

> "In a case such as the present, unless the accused is or knows the actual importer, so that a receipt for the payment of duties can be produced or first-hand evidence of payment given, it would probably always be difficult and often impossible, for him to prove actual payment. Though the powers of Customs Officers are always used with discretion, it is in law possible for them to require anyone, be he trader or not, who has dutiable goods in his possession to show that duty had been paid."

When one reads a little further on at page 206 it will be seen that the position of the possessor of such goods is not as unfair as it would seem to be at first sight. It goes on as follows :—

> "The prosecution having proved that the accused was in possession of dutiable goods in such circumstances as would entitle a court to find that he was consciously in possession of them and the accused having failed to prove that the duty had in fact been paid, there is then, in the opinion of the court, an onus on him to give some explanation of his possession from which a jury might infer that he did not know that duty had not been paid. It must be for him to give this explanation because the facts relating thereto must be exclusively within his knowledge."

A little later on the Learned Chief Justice said :—

> "A simple way of proving lack of knowledge is to prove that the goods were bought in the ordinary course of trade. If a man buys a box of cigars in a shop at the ordinary price, why should it be supposed that he knew they had been smuggled, if, in fact, they had been ?"

I have quoted quite extensively from this Judgement because from passages in the Judgement of the Learned Chief Magistrate he seems to have let himself be guided by a consideration of the hardship that would be caused by his conviction of the accused

rather than an interpretation of the law as it stands. A court's primary duty in cases of this nature is to interpret the law as it appears and not as the Court would like to see it. If any hardship arises from an application of the law, its amendment is a matter for the Legislators and not for the Courts. In one passage of the Judgement the Learned Chief Magistrate said that :—

> "Thus even here the way was not clear to accuse the defendant of not paying duty on the goods. Therefore the argument of the defence Counsel is correct that as the goods were made for United Africa Company there is a presumption that the goods were bought from United Africa Company."

Apart from the fact that only a part of the bottles of Schnapps were so marked and none of the brandy bottles, I fail to see now the fact that some of the goods were marked in a way that showed they were made for a particular firm can affect the position. There is evidence that there is a branch of such firm across the border, and even if such goods were not brought across the border, could they not have been taken from a ship in port or from an aeroplane at the airport and brought through the customs without payment of duty ? There is surely no such magic in the words "made exclusively for the United Africa Company" as to carry with them the presumption of payment of duty.

In the words of the deputy Chairman of Middlesex Quarter Sessions in the case of *R. v. Cohen* at page 207 of the report the onus placed on the accused was summed up in this direction to the Jury :—

> "If he has satisfied you, acquit ; if your minds are in reasonable doubt, acquit ; if he does not satisfy you, convict."

Now what explanation did the accused give in this matter ? According to Prosecution Witness 3, Bolaji Odebiyi a Customs Preventive Officer, the accused told him that Dofi gave him the goods. In his statement to the Police Exhibit "F", he said he was keeping the bottles for this friend of his Dofi. In his evidence in Court he said the goods were pledged to him by Dofi for a loan of £200. This man Dofi has not been seen from the day the accused was arrested to the day of trial. The evidence shows that he too is a frequent traveller across the border. Are those three explanations reasonable ? That was the main question for the Magistrate to determine. Are the explanations such that one can draw the inference that the accused did not know that duty

had not been paid on them ?

In my view, on the facts of the case as well as on the grave misdirection as to the law relating to the onus probandi the order of acquittal cannot stand. I would remit the case together with this Judgement to the Chief Magistrate's Court for determination, not by way of a rehearing, but having regard to the law stated above as to the onus of proof, whether the accused had given an explanation consonant with his professed innocence of the crime.

A Bench Warrant will issue on the accused to appear on Monday 22nd August, 1966.

HIGH COURT, LAGOS

KHADIJAH TINUOLA & 5 ORS. .. .. APPELLANTS

v.

MISS ARET EFFIONG OKON .. .. .. RESPONDENT

(SUIT NO. LD/34A/66)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J.; 8th August, 1966]

Civil Appeal—recovery of premises—giving notice to quit when notice is not necessary—effect of.

The appellants (plaintiffs in the court below) sued the respondent for possession of premises at 255 Igbosere Road, Lagos, basing their claim on the fact that the tenancy was terminated by a notice to quit given on behalf of the plaintiffs. In fact the tenancy terminated by effluxion of time as stated in an agreement between the parties. The Magistrate dismissed the plaintiffs' claim on the ground that the proper procedure had not been followed in instituting the action, because instead of merely serving a 7-day notice to quit and a 7-day notice of intention to recover possession they had served a 30-day notice to quit and a notice of intention to recover possession.

HELD : (*i*) that a written notice to quit as in forms B, C or D as provided for in section 7 of the Recovery of Premises Act, Cap. 176, was not an essential ingredient to the validity of an action for the recovery of possession in every case.

(*ii*) All that was required in a case where the tenant had contracted for a fixed term would be the service on the tenant of a written notice of the landlord's intention to recover possession, after the determination of the fixed term and the refusal of the tenant to quit.

Statute referred to :

Recovery of Premises Act, Cap. 176 *Laws of Nigeria* (1958 *edition*).

Cases referred to :

L. A. Littlewood v. Mrs A. Adeshigbin (1963) *L.L.R.* 11.

Otagbade v. Adekoya (1962) 2 *All N.L.R.* 52.

Shitta for the appellants.

Munis for the respondent.

JUDGEMENT

TAYLOR, C.J. :—The appellants, who were plaintiffs in the Court below sued the present respondent for "possession of premises consisting of one room situate at 255 Igbosere Road, Lagos." The form of the writ is of some importance and I shall a little later on set it out in full.

The Learned Trial Magistrate, after hearing the evidence adduced by both parties held *inter alia* that :—

> "At law, a tenant holding over after the termination of his tenancy is a tenant at sufferance and in my view the tenancy must be determined by serving on such a tenant a seven days notice to quit at the end of his tenancy and also a seven days notice of intention to recover possession. On this point I agree with the defendant's Counsel that the proper procedure had not been followed in instituting this action and for this reason the plaintiffs' claim failed."

The Learned Magistrate then went on to deal with the alternative view, *i.e.*, one based on the assumption that he erred in the exposition of the law as contained in the passage just quoted. The plaintiffs' case was accordingly dismissed.

The appellant has appealed against the Judgement and contends that in as much as the respondent's tenancy has come to an end by effluxion of time as per the written agreement entered into between the parties, there was no need for the plaintiffs to give her 30 days notice to quit. All the plaintiffs had to do was to give her 7 days notice of their intention to recover possession.

Mr Munis for the respondent argued that the appellants having given 30 days notice to quit and having based their case on this cannot now be heard to say that the giving of such notice was unnecessary. The plaintiffs' writ reads thus :—

> "The plaintiffs are entitled to the possession of the premises consisting of one room situate at 255 Igbosere Road, Lagos which were let by the plaintiffs to the defendant from month to month under the rent of £4-10*s*-0*d* which said tenancy was determined on 31st May, 1965 by notice to quit given by the plaintiffs' solicitor on the 30th April, 1965 and on the 8th day of June, 1965 the plaintiffs did serve on the defendant a notice in writing of their intention to apply to recover possession of the said premises and that notwithstanding the said notice the said defendant refused to deliver up possession of the said premises and still detains the same."

It is clear to anyone reading this part of the writ that no reliance is placed by the plaintiffs on any written agreement by virtue of which the period of duration of the tenancy is stipulated and as a result of the effluxion of time the defendant is being asked to vacate the premises. The action, or at least this part of the writ is based

solely on termination of the monthly tenancy by the giving of the usual 30 days notice required by law for such termination. The writ then continues in this manner :—

> "The plaintiffs claim possession and £9-0*s*-0*d* for use and occupation from June 1965 to July 1965, plus mesne profit at £4-10*s*-0*d* per month from August 1965 until possession is given up.
>
> Annual rental value of premises £54-0*s*-0*d*. Ground on which possession is required—Breach of tenancy agreement ; tenant holding over after expiration of period of tenancy."

It is in this latter portion of the writ that one finds any statement as to the existence of a tenancy agreement. Evidence was led and exhibit "A" was admitted as the tenancy agreement, no objection having been raised as to its admission. The defendant in her evidence in the Court below admitted that Exhibit "A" was the agreement between her and the plaintiffs and went on to say that :—

> "I observed all the conditions and terms of my tenancy agreement—Exhibit "A".'

Now Exhibit "A" states *inter alia* :—

> "That both the landlady and the tenant agree that the tenancy hereby created is for a period of Twelve (12) months only commencing as from 1st day of June, 1964, and is determinable either by effluxion of time or by the landlady giving the tenant one calendar month's notice to quit the premises on breach of any of the covenants herein contained."

In Clause 3 (*e*) the tenant covenanted as follows :—

> "At the end of twelve (12) months tenancy herein granted or at the sooner determination of same to yield up the said premises in good and tenantable condition together with all the fixtures therein."

The first point that logically falls for consideration is whether a tenancy for a fixed period of time requires the sending of 30 days notice to quit. The material portion of s. 7 of the Recovery of Premises Act, Vol. 5 Laws of Nigeria Cap. 176 states thus :—

> "When and so soon as the term or interest of the tenant of any premises, held by him at will or for any term either with or without being liable to the payment of any sort, shall have ended or shall have been duly determined by a written notice to quit as in Forms B, C

> or D whichever is applicable to the case, or otherwise duly determined, and such tenant..... shall neglect or refuse to quit and deliver up possession of the premises....."

The particular tenancy in question being a contractual one it came to an end on the 31st May, 1965. The Learned Author of "The Rent Acts" the 9th Edition at page 164 states that :—

> "The ordinary common law rules apply to the determination of a contractual tenancy..... Again a tenancy for a fixed period determines at the end of that period....."

As Mr Shitta rightly pointed out s. 7 above provides for cases where the term or interest of the tenant (1) either shall have ended, or (2) shall have been duly determined by a written notice to quit as in Forms B, C or D or (3) otherwise duly determined. It is apparent from this that a written notice to quit as in forms B, C or D is not an essential ingredient to the validity of an action for the recovery of possession in *every* case. There are cases in which it is essential and the ordinary and common example is that of the tenant who is not in occupation by a written agreement for a specified term, and is in possession on a weekly, monthly or quarterly basis, etc. The section of the Act under consideration then goes on to say that in tenancies which (1) have ended, or (2) have been duly determined by notice in forms B, C or D or (3) have been otherwise duly determined—

> "the landlord of the said premises or his agent may cause the person so neglecting or refusing to quit and deliver up possession to be served.....with a written notice, as in Form E signed by the landlord or his agent, of the landlord's intention to proceed to recover possession on a date not less than seven days from the date of service of the notice."

In short then, all that is required in the case under consideration, *i.e.*, a contractual tenant for a fixed term, is the service, after the determination of the fixed term and the refusal of the tenant to quit, of a written notice of the landlord's intention to recover possession. Common sense also dictates that this should be the position in as much as in the case of a fixed term both the landlord and the tenant are aware of the date of the termination of the contractual agreement. The tenant is aware of the fixed date on which he is to quit and deliver up possession, and no further notice to quit is required. If, however, he refuses to quit at the

end of the fixed term, and the landlord wishes to proceed to recover possession then he must give the tenant notice of such intention as required by law. This view also has the support of de Lestang C.J. in a case dealing with forfeiture of a lease, *i.e.*, *L. A. Littlewood v. Mrs A. Adeshigbin* 1963 *L.H.C.R.* 11 *at* 12 where the Learned Chief Justice said that :—

> "Under section 7 of the Recovery of Premises Act once the tenancy is determined the only notice required before possession may be obtained is the seven day's notice which was given in the present case."

It is true that that case dealt with a forfeiture of a lease, but a declaration of forfeiture is as much a way of duly determining a tenancy as by effluxion of time. A similar statement of the law was made as obiter by Bellamy J. in *Otegbade v. Adekoya* 1962 2 *All N.L.R.* 52 *at* 56.

The case on appeal before me, unlike that of *Littlewood v. Mrs Adeshigbin* is made a little more complicated by the following factors :—

(1) The appellants did in fact serve a 30 days notice on the respondent.

(2) The ground on which possession is sought is one of an alleged breach of tenancy, *i.e.*, by holding over.

(3) The provision in the agreement that the landlord may give one calendar month's notice to quit on breach of a covenant.

Mr Shitta for the appellant has urged that the 30 days notice should be entirely disregarded as it was not a pre-requisite to an action for possession. Mr Munis on the other hand urged that the appellant having chosen to go by way of sending the 30 days notice to be followed by the 7 days notice cannot now be heard to say that the former should be disregarded.

I am aware of the fact that the 30 days notice complies with Form C in the Schedule to the Recovery of Premises Act, but after further consideration, I find it difficult to say that in sending this notice, when he was not obliged to do so, the appellants were waiving their right to hold that the tenancy was determined by effluxion of time. To so hold would mean that a landlord who under these circumstances sends to the tenant a reminder that his tenancy comes to an end in a month's time could be charged with sending an invalid notice. Different consideration I believe might have applied had the notice, *i.e.*, the 30 days notice, not coincided with the date on which the tenancy was to be determined by effluxion of time.

Dealing with the second and third factors together the answer to them will be found on a proper construction of the agreement. It states that the tenancy is determinable by "effluxion of time or the landlady giving the tenant one calendar month's notice to quit the premises on breach of any of the covenants." It is obvious that what is meant here is a breach taking place before effluxion of time for after that the landlord is entitled to possession. A "holding over" after the end of the tenancy is not a breach of the covenants in as much as it is a right given to any tenant of premises covered by the Act. He can be evicted only under the provisions of the Act. That being the case the appellants are entitled to regard the 7 days notice of intention to recover possession sent out by them as the valid pre-requisite to the action for possession. In any case the defendant stated that she never received the 30 days notice and in the absence of any finding of fact by the Magistrate as to whether he rejected her story I cannot see how she could in any way have been embarrassed.

I have dealt with the points raised at the hearing of this appeal, I did not press Counsel for the appellants to address me on ground 1 (*c*) of the grounds of appeal, and Mr Munis for the respondent could not support the finding of the trial Magistrate that :—

> "Plaintiffs claim is bound to fail on the ground that there is no proof of the yearly rent of the said room as required by section 19 (1) (*b*) of the Recovery of Premises Act."

I cannot see what further evidence the Court required of this than the plaintiffs' evidence that :—

> "She (the defendant) is a tenant of mine as well as that of the other plaintiffs. She occupies one room at 255 Igbosere Road, Lagos at the rent of £4-10*s*-0*d* per month."

This evidence of monthly rent the defendant admitted on oath in her examination in chief. A year's rent is calculable from that. The annual rental value of the premises is stated in the Writ of Summons as £54-0*s*-0*d*. One does not dismiss a claim because a plaintiff who claims special damages of £144 for 1 year's loss of salary in his writ of summons only gives evidence that his salary was £12 and he claimed the amount for 1 year.

For the above reasons the appeal must be allowed and the Judgement of the Court below is hereby set aside. As the learned trial Magistrate has dismissed the plaintiffs' case on the technical legal point of the notice being bad and has not gone into the merits

of the case I propose to send this case back for retrial. Before making the order I shall hear Counsel as to the usefulness of such an order in view of their statement to me at the hearing that the defendant ceased to be a tenant of the plaintiffs since the 3rd January, 1966. I shall also hear the parties on costs.

Shitta : There is no point in sending the case back for retrial as the tenant has left the premises. I have no other alternative but to withdraw the action. £9-10*s*-4*d* is our out-of-pocket expenses. I ask for 20 guineas costs in this Court. In the Court below my out-of-pocket expenses were £4-8*s*-0*d*. I ask for 8 guineas costs.

Munis : On the first point—we paid rent up to the time we vacated the premises. *Re costs :* I say that if we were still in possession the case would have been sent back and costs would have abided the event. We should not be saddled with the costs in the Court below. I suggest that each party bears its costs.

Court : I agree that the action should be withdrawn and the order I make therefore is that the action be struck out.

As to costs in the Court below Mr Munis' contention is sound that the order I would have made as to costs had there been a retrial is that costs of the abortive trial should wait the final result. Accordingly the order I make is that each party bears its own costs.

In this Court however the appellant is entitled to his costs which I assess at 20 guineas.

HIGH COURT, LAGOS

J. A. ASHUBIOJO .. .. PLAINTIFF

v.

AFRICAN CONTINENTAL BANK LTD. .. DEFENDANT

(SUIT No. LD/300/66)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J., 22nd August, 1966]

Banking—refusal by bank to pay a customer's cheque when customer's account is in funds—substantial damages.

The plaintiff was a trader with credit facilities with Messrs A. G. Leventis & Co. Ltd. He also had an account with the defendant bank. He complained that the bank dishonoured two cheques for small sums issued by him in favour of Messrs A. G. Leventis & Co. Ltd., as a result of which the credit facilities granted him were stopped ; that he had sufficient money to cover the sums drawn on the cheques. The Court found on the evidence that at the time the cheques were dishonoured the plaintiff had sufficient funds to cover the amounts drawn.

HELD : (*i*) that the defendant bank were liable to the plaintiff in damages.

(*ii*) that the plaintiff, who was a trader was entitled to substantial damages without even pleading and proving actual damage.

Damages of £250 awarded.

Cases referred to :

Capital and Counties Bank v. Gorden (1903) *A.C.* 240.

Bank of New South Wales v. Laing (1954) 1 *All E.R.* 213.

Gibbins v. Westminster Bank Ltd. (1939) 2 *K.B.* 882.

Marzetti v. William 109 *E.R.* 842.

Munis and A. Balogun for the plaintiff.

Opele for the defendant.

JUDGEMENT

TAYLOR, C.J. :—The plaintiff was a trader with credit facilities with Messrs A. G. Leventis and Co. Ltd. at the material time. He also has an account with the defendant Company. He complains of the defendant Company's action in dishonouring two cheques for small sums issued by him in favour of Messrs A. G. Leventis & Co. Ltd., as a result of which the credit facilities granted to him were stopped. He urges that at the material time of presentation of the said cheques he had sufficient money with the defendant Company to cover the sums the subject matter of

the cheques. The defendant Company on the other hand contend in their defence *inter alia* that the plaintiff had insufficient funds with them to cover the two cheques.

The first cheque is Exhibit "A" and is dated the 15th January, 1966. The sum involved is £24-5*s*-0*d*. It was received by the defendant Company on the 19th January, 1966 by Cashier No. 5 and it was marked "Return to Drawer". The second cheque Exhibit "B" is for an even smaller sum, *i.e.*, £6-5*s*-0*d* issued by the plaintiff on the 16th February, 1966 and marked in similar fashion to Exhibit "A" by Cashier No. 5 on the 18th February, 1966. It should be mentioned also that both of these cheques are crossed. The points that arise therefore are whether (1) on the 19th January, 1966 the plaintiff had £24-5*s*-0*d* standing to his credit at the defendant bank and (2) on the 18th February, 1966 he had £6-5*s*-0*d* to his credit in the said bank ?

Now in addition to the oral evidence of the parties, Exhibit "E" the statement of Account of the plaintiff with the defendant bank was tendered in evidence. It is undated but it must have been prepared some time after the 29th March, 1966, the last entry contained therein. According to this exhibit the plaintiff had to his credit the sum of £25-8*s*-0*d* on the 19th January, 1966 and the sum of £11-19*s*-0*d* on the 18th February, 1966. It therefore seems that at first glance the plaintiff was in credit on the two material dates aforementioned.

The defendant Company's contention goes a little deeper than that. They say that the 7th entry in Exhibit "E", *i.e.*, the entry of the payment of £25-0*s*-0*d* on the 17th January, 1966 is a wrong entry in point of time and that as per Exhibit "F" the sum of £25 was paid in on the 19th January, 1966. The cashier, *i.e.*, No. 2 who recorded this sum was not called to give evidence nor was any explanation offered as to his inability to give evidence with the result that there is no evidence as to the hour of the day when this sum was paid in. I accept the defendants' story that this sum was paid in on the 19th January, 1966 for had there been another sum of £25-0*s*-0*d* paid in on the 17th January, 1966 as per Exhibit "E", the duty of rebutting the defendants' story fell on the plaintiff and this he failed to do. The net result, therefore, is that the seventh entry, as far as the date is concerned, in Exhibit "E" is erroneous and should read 19-1-66. That being the case, was the sum of £25 paid in before the cheque Exhibit "A" was received by Cashier No. 5 for crediting the account of Messrs A. G. Leventis & Co. Ltd.? Let us look at the evidence led by

the defence to refute the plaintiff's evidence that he was in credit at the material time. The first defendants' witness, *Godwin Dike* is a reference clerk and a ledger keeper in the defendant bank, and he gave evidence that he always checks the ledgers at the end of each day. He says that Exhibit "A" was presented to him in the morning of the 19th January, 1966 and on going through the plaintiff's account found that the plaintiff had no funds in the bank to meet this payment. He further said he went to the cashiers to check whether any payment-in had been made by the plaintiff and found that none had been made.

The sole point for determination as regards both exhibits is whether the payments-in on both days which put the plaintiff's account in credit preceded the receipt of the cheques Exhibits "A" and "B" by the defendant Bank in point of time. It should be mentioned that the payments-in on the relevant dates were cash payments as per Exhibit "E" and not payments by cheque. In the case of *Capital and Counties Bank v Gordon* 1903 *A.C.* 240 *at* 249 Lord Lindley said :—

> "It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right."

In the case of *Bank of New South Wales v. Laing* 1954 1 *A.E.R.* 213 *at* 221 to which my attention was drawn by Mr Munis for the plaintiff, Lord Asquith said that :—

> "But a further "peculiar incident" is that the Bank is only indebted to the customer for the amount (which may be called "a balance" when it is arrived at by deducting authorised withdrawals from sums paid in) standing to his credit as at the time of demand. Of course, if the customer can prove that at that time the "balance" suffices to pay his demand, he succeeds. If the "balance" falls short of doing so, even by a penny, he fails altogether, another distinction which rails off the creditor-debtor relationship in the case of a customer and banker from that relationship in other cases ;
>
> On this footing, did the plaintiff discharge the onus on him ? Their Lordships consider that he did not. If he had gone into the box and sworn that the eight disputed cheques were forged, and had been believed, he would unquestionably have discharged it. He would equally have shifted that onus to the bank if he had gone into the

box and testified that only cheques A, B and C drawn on the account were genuine and that, after deducting these, there were still sufficient funds to meet the demand. He did neither."

In the case before me as I had said the plaintiff did give evidence that :—

"My account was in credit when the cheques were returned."

Now, an accountant in a Bank holds an important position and is generally regarded as a responsible officer. I have had to ask myself why should such an officer write these two letters, the first, some days after the presentation of the particular cheque to which it relates, and the second some 6 weeks or more after Exhibit "A" had been cleared from the Clearing House, if in fact the contents were untrue ? There can be no excuse that they were written in error as pleaded in the defence for they had ample opportunity to check the account of the plaintiff and according to the evidence of Godwin Dike such checking had taken place. In fact he checks at the end of each day. Then again I have considered the amount of weight that should be attached to these two letters written *ante litem motam* and the evidence of the defendants given naturally, after litigation has commenced. In the final analysis I find myself holding that the plaintiff's evidence together with the weight attached to Exhibits "C" and "D" not to mention portions of the evidence of Bernard Peters to which I have already alluded tips the scales heavily in the plaintiff's favour. I therefore find as a fact that at the time the two cheques Exhibits "A" and "B" were presented the plaintiff, to use the wording of Exhibits "C" and "D", had "sufficient funds to cover" them. I will put it in another way. I find as a fact that the payment-in of the £25-0*s*-0*d* by the plaintiff on the 19th January, 1966 took place in point of time before the receipt of Exhibit "A". Similarly the payments-in of £6 and £5 on the 18th February, 1966 took place before the receipt of Exhibit "B" by the defendant Bank. These sums being cash payments and having been placed to the plaintiff's credit he was entitled to draw upon them. The defendant Bank having dishonoured the cheques are liable to the plaintiff in damages which I shall now proceed to assess.

What is the principle governing assessment of damages in such cases ? In the case of *Gibbins v. Westminster Bank Ltd.* 1939 2 *K.B.* 882 Lawrence, J. said this at page 888:

> ".....and it remains only to consider whether the plaintiff, who, it is admitted, is not a trader, is entitled to recover more than nominal damages for the dishonour of her cheque without having pleaded or proved special damage. The authorities which have been cited in argument all lay down that a trader is entitled to recover substantial damages for the wrongful dishonour of his cheque without pleading and proving actual damage, but it has never been held that that exception to the general rule as to the measure of damages for breach of contract extends to anyone who is not a trader."

In the case before me, that the plaintiff is a trader is well proven, and it would seem on this authority that he is entitled to substantial damages without even pleading and proving actual damage. That he has proved actual damage is beyond any dispute for the evidence of his witness, *Victor Soyinka* which I accept, clearly shows that the plaintiff has lost the credit facilities he formerly enjoyed with Messrs A. G. Leventis & Co. as a result of the dishonour of these two cheques. He has also lost the commission he normally receives in his transactions with the said firm, *i.e.*, one quarter per cent on the sales made. On the highest sales made in one month as per Exhibit "J", the commission comes to no more than about £14-17*s*-0*d* approximately on £5,925-4*s*-3*d*. On his oral evidence he says he makes a daily gain of £25 to £40 and in his Statement of Claim he says it is between £35 and £40. A profit of £35 per day for 6 days in the week amounts to £840 per month and £10,080 per year. I do not believe for one moment that the man who appeared before me has seen as profit in his best days as much as a tenth of that sum per year. It is very hard for me to believe that a man who takes as much as £5,900 worth of goods in one month will only have in his bank account as per Exhibit "E" a credit of £57-8*s*-0*d* at the most. It is true he said that he also pays in cash and the witness called by him stated that the plaintiff pays by cheques on other banks. As to the former I want further evidence by way of receipts to support it before I accept it, and as for the latter the plaintiff himself never supported such evidence.

Be that as it may, he is on the authorities, entitled to substantial damages even in the absence of proof of special damages.

It is true that the amounts involved in the cheques, *i.e.*, £24-5*s*-0*d* and £6-5*s*-0*d* are comparatively small sums but in the case of *Marzetti v. William* 109 *E.R.* 842 Lord Tenterden, C.J. said at page 845 that :—

> "At the same time I cannot forbear to observe, that it is a discredit to a person, and therefore injurious in fact, to have a draft refused payment for so small a sum, for it shews that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade."

Bearing all these authorities in mind and applying them to the facts of the case before me I award the plaintiff substantial damages assessed at £250 and costs which I assess at 100 Guineas inclusive.

The fact as to whether Exhibits "A" and "B" were received from the Clearing House by the defendant Bank before the cash payments-in by the plaintiff which puts his account in credit is a matter wholly within the knowledge of the defendant Bank. The plaintiff would and could only be expected to know the time he paid in the various sums under consideration. The defendant Bank on the other hand must be aware not only of the time payments were made by the plaintiff but also of the time Exhibits "A" and "B" were received by their Bank from the Clearing House. I am of the view that the plaintiff has by the evidence given by him shifted the onus on the bank to show that in fact the cheques were received from the Clearing House before plaintiff made the payments-in to which reference has already been made. What have the defendants done to displace this onus? Apart from the evidence of the Ledger-Keeper Godwin Dike to which I have already referred, one *Bernard Peters* gave evidence and he said this *inter alia* :—

> "Plaintiff called on me and reported that we had wrongly returned one of his cheques and that because of this his customers A. G. Leventis had threatened to stop accepting his cheques, and that this was affecting his business. I called for the Ledger card, and as a result of what I saw I apologised to the plaintiff, and in view of what he told me about his business I promised to write a letter to him."

A little later on in answer to a question from the Court, the witness, who, be it noted, was at the relevant period the Accountant in the defendant Bank, said this :—

> "Before I wrote Exhibits "C" and "D" I called Defence Witness 1 (Godwin Dike) and told him 'you must be careful in checking'. He said he checked before he returned the cheques and saw that the plaintiff had not paid in anything."

It was after this that Mr Peters wrote the two letters Exhibits "C" and "D". He wrote the first one on the 24th February, 1966 in respect of the cheque Exhibit "B" for £6-5*s*-0*d* and the second on the 1st March, 1966 in respect of the cheque Exhibit "A" for £24-5*s*-0*d*. The wording of the letters is identical and it is as follows :—

> "Dear Sir,
>
> We wish to apologise for returning the above mentioned cheque unpaid when in actual fact there was sufficient funds to cover it. We deeply regret whatever embarrassment this might have caused you, and we assure you that such errors will not occur in the future."

The facts as regards the cheque Exhibit "B" for £6-5*s*-0*d* differ a little from those in respect of the cheque Exhibit "A" to the extent that on the 18th February, 1966 the day on which the cheque Exhibit "B" was presented, the plaintiff made two separate payments into his account. The first payment was for £6 which put his account in credit to the tune of £6-19*s*-0*d* and later on in the same day he made a further payment of £5. Both these payments were cash payments.

HIGH COURT, LAGOS

THE CENTURY INSURANCE CO. LTD. .. APPLICANT

v.

I. OBI ATUANYA .. .. RESPONDENT

(SUIT NO. M/124/1966)

[HIGH COURT, LAGOS: D. A. R. ALEXANDER, J.; 14th October, 1966]

Arbitration—application to set aside an award—mode of application—by motion to a single Judge sitting in Court.

The applicant applied by originating summons to set aside an award pursuant to section 12 (2) of the Arbitration Act, Cap. 13. The Act does not stipulate the manner in which a matter of this nature should be brought before the Court, and there appears to be no local Act or Rule of Court stipulating the method by which an application of this nature should be made.

HELD : that in the absence of any local provisions an application to set aside an arbitration award under the Arbitration Act of Lagos must be made in substantial conformity with the practice and procedure for the time being of Her Majesty's High Court of Justice in England for setting aside an award under exactly the same provision of the corresponding Arbitration Act of England, and that is, by motion to a single Judge sitting in Court.

Summons set aside.

Statutes & Rules referred to :

Arbitration Act, Cap. 13, *Laws of Nigeria* (1958 *edition*).
High Court of Lagos Act, Cap. 80, *Laws of Nigeria* (1958 *edition*).
Arbitration Act, 1950 (*U.K.*).
Public Trustee Act, 1906 (*U.K.*).
High Court of Lagos (*Civil Procedure*) *Rules, Cap.* 211.

Case referred to :

In re Squire's Settlement (1946) 174 *L.T.* 150.

Burke for the applicant.

Solanke for the respondent.

RULING

ALEXANDER, J. :—This purports to be an application by originating summons to set aside an award, pursuant to section 12 (2) of the Arbitration Act, Cap. 13, of the Laws of the Federation of

Nigeria and Lagos hereinafter referred to as "the Act", which reads as follows :—

> "(2) Where as arbitrator or unmpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside".
>
> "Court" is defined in section 2 of the Act as "the High Court of Lagos" (See *Legal Notice* 112 of 1964).

The Act does not, however, stipulate the manner in which a matter of this nature should be brought before the Court, that is, whether by originating motion or originating summons. Again, it is provided by Order 34, rule 1 of the *High Court of Lagos* (*Civil Procedure*) *Rules, Cap.* 211 *of the Laws of Nigeria* (1948) that interlocutory applications may be made by motion, but this is not an interlocutory application and Order 34, rule 1 does not therefore apply to it. Indeed, there appears to be no local Act or Rules of Court stipulating the method by which an application of this nature should or may be made.

It is therefore necessary to invoke section 12 of the *High Court of Lagos Act, Cap.* 80, which reads as follows :—

> "12. The jurisdiction vested in the High Court shall, so far as practice and procedure are concerned, be exercised in the manner provided by this or any other Act, or by such rules and orders of Court as may be made pursuant to this or any other Act, and in the absence of any such provisions in substantial conformity with the practice and procedure for the time being of Her Majesty's High Court of Justice in England".

Now, section 23 (2) of the *Arbitration Act*, 1950 (of England) reads exactly the same as section 12 (2) of the Arbitration Act, Cap. 13 (of Lagos), while Order 88, rule 2 (1) (*c*) of the Supreme Court Rules (of England) provides as follows :—

> "2 (1) Every application to the Court—
>
> (*a*) Every application to the Court ; or
>
> (*b*) Every application to the Court ; or
>
> (*c*) to set aside an award under subsection
>
> (2) of the said section 23 ; must be made by motion to a single Judge sitting in Court".

It therefore clearly appears that in the absence of any local provisions, an application to set aside an arbitration award under the *Arbitration Act* of Lagos must be made in substantial conformity with the practice and procedure for the time being of Her Majesty's

High Court of Justice in England for setting aside an award under exactly the same provision of the corresponding *Arbitration Act of England*, and that is, by motion to a single Judge sitting in Court.

But for the provision in Order 88, rule 2 (1) (*c*) of the *Supreme Court Rules of England*, the position would have been governed by the case of *In re Squire's Settlement* (1946) 174 *L.T.* 150 and the result would have been the same. In that case, *Evershed J*, held that as there was nothing in the *Public Trustee Act* 1906, nor in the rules made thereunder as to how an order under section 4 (2) (*i*) should be obtained, the Court had no power, either in chambers or in court, to make an order under section 4 (2) (*i*) on summons, and that the proper procedure was by originating motion.

I accordingly hold that the mode of making an application to set aside an award under section 12 (2) of the *Arbitration Act of Lagos* is by motion to a single Judge sitting in Court, and not by originating summons, and that this application should have been made by motion to a single Judge sitting in Court.

It is therefore ordered that the present summons be set aside, with costs to be paid by the applicant to the respondent assessed and fixed at twelve guineas.

HIGH COURT, LAGOS

1. O. B. AKIN-OLUGBADE
2. TUNDE MEREDITH
3. GLADYS LANIHUN OGUNLUSI
4. IYABO THOMAS
(Executors, Executrices and Beneficiaries to the Estate of Meredith) — PLAINTIFFS

v.

N. A. WILLIAMS .. .. DEFENDANT

(SUIT NO. LD/482/65)

[HIGH COURT, LAGOS : CHUBA IKPEAZU J. ; 17th October, 1966]

Administration of Estates—accounts and enquiries—construction of will—native law and custom

The plaintiffs alleged that the defendant who was not a legal personal representative of the estate was intermeddling with the estate and interfering with the due administration thereof. By his will one Peter who died in March 1945 appointed Lucretia, Meredith his eldest son and Taylor as executrix and executors of his estate. Lucretia and Taylor died and Meredith continued to administer the estate by which he appointed the 1st, 3rd and 4th plaintiffs as the executor and executrices of his estate.

The plaintiffs complained that the defendant collected rents in respect of certain properties which were included in the estate to be administered by the plaintiffs and claimed an account of the rents collected, injunction and enquiries against the defendant.

HELD : (*i*) that for the second and third plaintiffs to succeed in the claim for account and injunction it should be made clear on the writ and statement of claim the capacity in which they claim, the rights they wish to enforce and the basis of these rights so that issue could be joined on those by both parties.

(*ii*) that in construing a will one must bear in mind the custom of the people about creation of a family house and effect must be given to a testator's intention to make such a provision if the intentions are clear.

(*iii*) that where in a will the testator declares a house a family house and at the same time creates a trust in respect of the same property, the dominant and fundamental objective of the testator is the provision for the beneficiaries and this objective must prevail over any other consideration.

(*iv*) that once effect is given to the intention the absolute interest in the house would rest collectively under native law and custom, in all the member of the family entitled to enjoy the property and the head of the family would be vested with the responsibility to look after the family property and to manage it.

(*v*) that in that event the position of the trustees would become completely redundant as the powers and functions which the will created in their favour over the family house were made exclusive to the members of the family under native law and custom.

(*vi*) that the creation of a trust vis-a-vis the declaration of one of the properties as family house was ineffective, as customary tenure does not recognise this alien idea which is in conflict with the incidents of family property.

Judgement for the Plaintiffs in part.

Cases referred to :

Kosoko v. Kosoko (1937) 13 *S.R.*131.

Duro Thomas v. A. N. Thomas & *ano.* 16 *N.L.R.*5.

Chief G. A. Taiwo v. Semeseminju Dosumu & *ano. Supreme Court* 22/12/65 (1966) *N.N.L.R.*94.

Lardner for the plaintiffs.

Alakolaro for the defendants.

JUDGEMENT

IKPEAZU, J. :—The plaintiffs' claim against the defendant is as follows :—

"1. A true and full account of all rents, profits and monies collected by or paid to the defendant by the tenants and/or occupiers of properties comprised in the estates of P. O. Meredith (deceased) and A. W. Meredith (deceased).

2. An injunction restraining the defendant from further collecting rents and/or otherwise intermeddling in the administration of the said estates.

3. All necessary and further enquiries and costs."

The plaintiffs state that the estates consist of several landed properties within the jurisdiction and complain that the defendant who is not a legal personal representative of either estate has without any right so to do been collecting and threatens to continue collecting rents from the tenants and otherwise intermeddling in the due administration of the estates to the prejudice of the plaintiffs and refuses to account to them in spite of repeated demands.

Pleadings were filed and exchanged. At the trial all the plaintiffs except the 4th, Iyabo Thomas, gave evidence and called a witness Tunji Savage, a grandson of Peter Meredith.

By his will Peter Olotu Meredith, to be hereinafter referred to as Peter, who died on the 26th of March, 1945, appointed Lucretia Adetohun Savage executrix, Adolphus Williamson Oladipo Meredith and Eusebius James Alexander Taylor executors and disposed

under it specific landed properties including those with which this case is concerned. These properties are known and described as follows :—

1. 13-15 Okepopo Street, Lagos.
2. 2 Olowu Lane, Lagos.
3. 2-4 Thomas Street, Ebute Metta.
4. 21 Ibadan Street, East, Ebute Metta.

Adolphus Williamson Oladipo Meredith was the eldest son of the deceased and, after the death of Lucretia Adetohun Savage and Mr Eusebius James Alexander Taylor, continued to administer the estate as the sole surviving executor until he died on the 25th of December 1963. He left a will and under it appointed Chief Olu Akin-Olugbade the first plaintiff as executor and Gladys Olanihun Ogunlusi the third plaintiff and Iyabo Thomas the 4th plaintiff executrices. It is therefore a matter of law that the three plaintiffs also became the executors of the estate of Peter of which his son Adolphus remained the sole administrator until his death. The second plaintiff Tunde Meredith is not an executor under either of the wills but is a son of Peter Meredith and a brother of Adolphus and is a beneficiary under the will of his father only. The defendant is a grandson of Peter, being the son of his daughter Sabina who had died before the will was made. He is a beneficiary under the grand-father's will and the properties directly devised to him do not form the subject matter of this case. The probate of the will of Peter Meredith and that of his son Adolphus Meredith were tendered and admitted respectively as Exhibits A and B. According to the codicil to Exhibit A the residuary legacies would desolve on the children of the testator both legitimate and illegitimate. The testator was survived by four children namely Adolphus, Lucretia Savage, Adesola and Tunde Meredith. Any grandchild of the testator can only benefit under this will on succeeding to the interest which had been inherited by his father or mother and the defendant whose mother predeceased the testator cannot take any interest under the codicil to Exhibit A. Under the will 2 Olowu Lane, Lagos, was devised to Adesola who died without issue so also was 2-4 Thomas Street which is the same property referred to in the will as 48 Apapa Road. These two properties fell into residue and vested on the children of the testator upon the death of Adesola. The property at Ibadan Street, East was not acquired at the time of the will and was not mentioned and under the codicil, it became vested as residue on the children of the testator which does not include the defendant as already explained. The first

item of property is 13/15 Okepopo Street and the section of the will affecting it is set out as hereunder :—

> "I devise unto my trustees my dwelling house No. 13 and 15 Okepopo Street, Lagos with all the furniture therein upon trust to hold the same as and I hereby declare the same to be my Family House and to permit my children and their descendants to reside therein for life on condition that if any member of the family should conduct himself or herself in a manner not conducive to the peace and harmony of the family in the said house, my Trustees shall eject such a one from the Family House. I hereby appoint my daughter Adetohun and my son Oladipo as the head of the Family House. They shall let any part that is not occupied and shall receive the rents and profits thereon and pay thereout all rates and taxes on the same Family House. It is my earnest wish that my family house shall not be sold and I enjoin this wish on all those entitled thereto."

According to the plaintiffs' case the testator's eldest son Adolphus Oladipo lived in this house 13/15 Okepopo Street as the head of the family and administered it until he died in 1963, and after him the defendant without reference to the plaintiffs as executors moved into the house namely 13/15 Okepopo Street and has since been living there. He also let some of the rooms and the shops and collects rent for which he has not accounted to the plaintiffs or the members of the family despite demands to do so. The plaintiffs also deny that the defendant was appointed the head of the family.

There is no difficulty about three of these properties namely 2 Olowu Lane, 2-4 Thomas Street and 21 Ibadan Street. The first two were devised to the testator's daughter Adesola on whose death they fell into residue as she had no issue. The third property was not in existence at the time of the will and became also a residuary legacy. As already mentioned, these three properties are governed by the codicil and accordingly would vest on the direct children of the testator, legitimate and illegitimate living at the time of the testator's death. Although the defendant's mother Sabina was a daughter of the testator, she had predeceased her father and accordingly did not inherit under this item of the will. The defendant has therefore no interest in any of these properties and is not entitled to deal with any of them without the authority of the beneficiaries or the executors. At a stage of the case it transpired that the claim in respect of 2-4 Thomas

Street property was in error as it was then stated by the plaintiffs' witness Tunji Savage, a beneficiary as well, that she was the one collecting the rent from this address since the death of Adolphus until the plaintiffs' solicitor wrote her to stop and she did so. The defendant, it is said, has been collecting rent from the other two properties and this is not denied. This was no doubt due to the erroneous impression that these properties vested on all the children of Peter including the defendant's mother who predeceased her father, and that the properties vested generally on the children and grandchildren of Peter Meredith as family property and that he, as the head of the family, is therefore entitled to deal with properties.

The defendant said that on the death of Adolphus in December 1963 he moved into the 13/15 Okepopo Street property in January 1964 and occupied the same room in which Adolphus lived. He admitted that he has been collecting the rents for the rest of the rooms including the shops and also from 2 Olowu Lane and 21 Ibadan Street properties. He said that he opposed the bequest which Adolphus made in respect of these two properties as they were not his own and with the support of the family he took over the collection of the rents and only realised during these proceedings that he was not included as a beneficiary of these two properties. The defendant claims to be the head of the family and said that he was named head of the family as soon as Adolphus died by Mrs Akinloye, an elderly woman who has lived with the family for so long. This took place in the presence of P.W. 3, P.W. 4 and all other members of the family and he was therefore called to assume his responsibility as such head and make all the necessary arrangements for the funeral. Apart from what happened on this occasion his appointment was confirmed at a subsequent meeting of the family. The defendant's appointment as the head of the family was denied by the third plaintiff who testified as the P.W. 4 and said that there was never a full family meeting except occasional meetings of four or five of them when they unsuccessfully asked the defendant to account for the rents. The witness also thought that Mrs Akinloye was the head of the family and only realises since the proceedings that she is not the head of their family. She stated that Mrs Akinloye is not a member of the family and admitted that the defendant has played the part of the head of the family when her father and the mother of the second plaintiff died and that on those occasions the defendant supplied money from the family fund for the funeral. The second plaintiff, Tunde Meredith testified as P.W. 2. He left Nigeria for overseas a week after his brother Adolphus died and came back only a year

ago. Since his return to the country he has not approached the defendant and has not had any discussions with him as to what has been happening regarding the property at 13/15 Okepopo Street and has not asked for an account of the family fund. The other witness for the plaintiff was Tunji Savage who testified as P.W. 3. She was not aware of any meeting at which the defendant was appointed head of the family but she however recalled two meetings, one called when Adolphus died and the other a year after, both of which she did not attend. She, like the 3rd plaintiff, also erroneously thought that Mrs Akinloye was the head of the family even though she is not a member of the family. She agreed that the defendant acted for the family and as their head when the father of P.W. 4 and the mother of P.W. 2 died and supplied money on those occasions from the family fund and agreed also that the defendant has been responsible for the rates in respect of No. 13/15 Okepopo Street.

I will now deal with this property which has raised the only grave issue in this case. The operative question is whether the testator created a trust in respect of the house so as to have it administered in terms of the trust and according to the English law of trust or whether he declared it a family house under native law and custom in which case the incidents of family property should apply. The testator's intention to create the house a family property is manifest and unequivocal and is dominant in that section of the will. The idea is clearly to make a provision for the descendants in the accepted customary method of making such a house available for any of them to reside in case of need as well as to constitute the house a rallying point. In construing the will one must bear in mind the custom of the people about the creation of a family house and effect must be given to a testator's intention to make such a provision if the intentions are clear. Where in a will the testator declares a house a family house and at the same time creates a trust in respect of the same property, it is my view that the dominant and fundamental objective of the testator is the provision for the beneficiaries and must prevail over any other considerations. Once effect is given to this intention the result is that the absolute interest in the house, rests collectively under native law and custom, in all the members of the family who are entitled to enjoy the property, and the head of the family is also vested with the responsibility to look after the family property and to manage it. That being so the position of the trustees will become completely redundant as the powers and functions which the will may have created in their favour over the family house, are made exclusive to the members of the family

under native law and custom. It is my decision therefore that the creation of a trust in this case vis a vis the declaration of 13/15 Okepopo Street as family house is ineffective as the customary tenure does not recognise this alien idea which is in conflict with the incidents of family property.

As a family house the property became vested collectively in the descendants of Peter Meredith. They have the right to reside in it without any reference to the executors. All reference to trusts and trustees in the will with regard to No. 13/15 Okepopo Street are, to my mind, absolutely inconsequential and the power purported to be vested in the trustees to decide who is to reside in the house and under what conditions they will reside therein is in my view inoperative, and equally so is the provision as to the management of the estate. I hold in effect that no trust was created in respect of the property at 13/15 Okepopo Street and accordingly the plaintiffs as executors are not entitled to manage the property or interfere with the members of the family in its management.

It is not disputed that the defendant has been living there since Adolphus died and has been collecting rent ever since and it is said that he does so without accounting to the members of the family. It has been contended that the defendant although a descendant of Peter Meredith, is not a member of the family because his mother predeceased the testator and was not his child at the time of his death. I do not accept this argument. The devise is to his children and his children's descendants. At the time of the testator's death, the defendant was, as indeed he still is, a descendant of the testator and is not discriminated against in the will. He benefited directly as a descendant and has not got to step into anybody's shoes in order to benefit. He is therefore a member of the Peter Meredith family and is entitled to reside in the family house under native law and custom. He collects the rents and profits and claims the right to do so and administer the family house on the ground that he is the head of the family and was so appointed. His headship of the family as we have seen has been denied but after considering the whole evidence and the circumstances of the case, I am inclined to agree with him that he was so appointed. He has been functioning as such with the knowledge and consent of all the members of the family ever since the death of Adolphus in 1963. He moved into the room which Adolphus occupied as the head of the family until he died ; he was at the head of the funeral ceremonies ; he saw to it that the family played their part at the funeral of certain people ; he paid the rates

and has been managing the property during those periods and I feel quite satisfied that there was no controversy over his headship of the family before this case, and I regard the dispute now stirred up over it as for good measure only. As the head of the family house the defendant has the right to reside in the house, the right to collect the rents and profits on behalf of the family, and the right to administer the family funds and in doing he does not require the permission or authority of the executors of Peter or Adolphus neither does he have to account to them for the rents and profits received. The second plaintiff is not an executor under any of the wills and the 3rd plaintiff who is an executrix is a member of the family. Both herself and the 2nd plaintiff are members of Peter's family and are beneficiaries in respect of the family house. What I will now consider is whether they can in this action recover against the defendant as head of the family for an account and for an injunction to restrain him from collecting the rents and administering the funds. In his authoritative book "Family Property Among the Yorubas" the learned author said in regard to the accountability of the head of the family :—

> "In one important respect, however, the head of the family is not a trustee in the conventional sense. As head of the family, he is not liable to account to the other members of his family for rents and profits derived from the family property. The non-liability of the head of the family to account to the other members is no doubt an important privilege attaching to his office. This exemption of the head of the family from accounting has been a feature of the tenure from very early times and it is now a settled incident of family property."

In *Kosoko v. Kosoko* (1937) 13 *WLR. p.* 131, the claim by a single member against the head for account was refused but this was mainly on the ground that the plaintiff and his father before him had acquiesced in no account being rendered or asked for over the years.

Also in *Duro Thomas v. A. M. Thomas and E. R. A. Thomas* 16 *N.L.R. p.* 5 a member of the family claimed for an order for partition or sale of the family property, basing his claim on the ground that the head of the family had monopolised the rents received and had treated the family property as his own. The claim was refused.

The direct decisions on this issue which are available are based on the custom in Ghana and no positive decisions on the custom of the Yoruba people appear to exist. In the recent case of *Chief*

G. A. Taiwo v. Semeseminju Dosunmu and Another decided by the Supreme Court on 22-12-65 and reported in 1966 *N.N.L.R. p.* 94 the Court pointed this out and while not holding that the custom does not on that account exist in Yoruba land as claimed, emphasised that proof of the custom must be established by clear evidence. It observed further that as an account is not an end in itself but is for the purpose of ascertaining precisely the relative rights of the parties so that they may be enforced, the rights of the claimants must be established.

In our present case the two plaintiffs who are members of the family can only base their case for account on custom which governs their rights and interests to the property in dispute. They have not done so either on the writ on the pleadings, or in evidence.

Per Brett, J.S.C. in the above case :

> "If the question is to be treated as and to be settled by evidence, both parties will have to plead with greater particularity what they allege the custom to be, in order that all relevant issues may be brought out and dealt with. The first respondent should make it clear whether he alleges that the head of a family can in no circumstances be called on for an account by any member of the family or, if he does not put it as high as that, in what circumstances he acknowledges a liability to account..... If the appellant (plaintiff) maintains that his standing in the family gives him any rights, sueing as an individual, which less important members of a family do not enjoy, he should make his submissions clear. If it is the appellant's case that the first respondent (head of the family) could not account to "definite deliquency" and that such conduct gives a right to call for an account this too is something that he should plead specifically. The taking of an account is not an end in itself, but is for the purpose of ascertaining precisely the relative rights of the parties so that they may be enforced. The burden of establishing that he has some rights which customary law would regard as legally enforceable would appear to be on him, (the plaintiff) and unless he can discharge it the Court will have to consider whether the taking of an account would serve any useful purpose."

In our present case, for the 2nd and 3rd plaintiffs to succeed in the claim for account and injunction, it should be made clear on the writ, Statement of Claim, the capacity in which they are claiming, the rights they wish to enforce and the basis of these rights so that

issue could be joined on those by both parties. This is not the case here. Neither the writ nor the pleading showed that the two plaintiffs, 2nd and 3rd, base their claim on their rights as members of the family and upon native law and custom nor was the ground for defendant's accountability shown. The evidence was more hopeless. The 2nd plaintiff stated that he had never approached the defendant ever since he moved into the family house nor did he discuss with him how the affairs of the estate were being administered and did not ask him for account.

The issue of the defendant's accountability to the two plaintiffs under native law and custom was never before the Court and was never adjudicated upon and cannot be therefore decided in this action according to the writ and pleadings.

The plaintiffs' claim in respect of 13-15 Okepopo Street must be and is hereby dismissed. The registrar must stop the collection of rents from this property as was ordered by the Court and the amount collected from it is to be handed over forthwith to the defendant.

The claim in relation to No. 2-4 Thomas Street which was clearly made in error is also dismissed. The plaintiffs' claim in respect of No. 2 Olowu Lane and 21 Ibadan Street succeeds and judgement is accordingly entered in their favour.

It is ordered that the defendant do render a true and full account of all rents, profits and monies collected by or paid to him in respect of the two properties. It is further ordered that the defendant be and is hereby restrained from collecting rents from these houses or meddling in the administration of the two buildings.

As the plaintiffs' case partly succeeds and partly fails, there will be no order as to costs.

HIGH COURT, LAGOS

NATIONAL BANK OF NIGERIA LTD. .. .. PLAINTIFFS/APPLICANTS

v.

OKAFOR LINES LTD. .. DEFENDANTS/RESPONDENTS

(SUIT No. LD/485/66)

[HIGH COURT, LAGOS: J. I. C. TAYLOR, C.J.; 24th October, 1966]

Admiralty action—arrest and detention of ship—grounds for.

In the substantive suit the plaintiff bank alleged that the defendant company were in breach of covenants under a mortgage deed and claimed that their rights under the deed had become vested and exercisable. They also claimed the sum of £501,162-12*s*-3*d* as money due and owing by the defendants. Subsequently the plaintiffs took out a summons for an order for a warrant for the arrest and detention of the defendants' ship named "s.s. Chief Awosika" pending the determination of the action. Evidence, both oral and affidavit showed that the defendant company had not the financial resources with which to run a shipping line; that they were unable to pay the wages of the crew for the previous month nor could they pay that for October; that they were indebted to third parties.

HELD: that since the plaintiff bank had shown: that they had substantial monetary interest in the "s.s. Chief Awosika" by virtue of the mortgage deed; that the defendant company was indebted to other parties; that they had no capital by which to pay their indebtedness and that the guarantee on which the defendant company relied did not cover such indebtedness, they had made a case for the arrest and detention of the ship pending trial.

Ordered accordingly.

Rule referred to:

High Court Rules, Order XXII.

Olakunrin for the applicants.

Whyte for the respondents.

RULING

TAYLOR, C.J.:—The applicants who are plaintiffs in the substantive suit sued the defendants/respondents in that suit for a declaration that:—

(1) their rights under the mortgage Deed made between the parties have become vested and exercisable.

(2) the defendants are in breach of the covenants under the said mortgage and that as a result the plaintiffs are entitled to possession of the ship "s.s. Chief Awosika", and

(3) the plaintiffs claim the sum of £501,162-12*s*-3*d* as money due and owing by the said defendants.

The summons was taken out on the 22nd September, 1966 and on the same day the applicants applied *ex parte* under Order XXII of the High Court Rules "for an order that warrant shall issue under the seal of the Court for the arrest and detention of the defendants' ship named "s.s. Chief Awosika" pending the determination of this action....."

An affidavit was sworn to in support of the motion stating *inter alia* that the defendants are indebted to the plaintiffs in the sum claimed ; that the defendants have only the ship "s.s. Chief Awosika" as their asset and have no defence to the substantive action ; that the defendants are indebted to other persons and that the plaintiffs are first Preferred Mortgagees as per deed of 3-6-66. Several documents were exhibited with the application.

I was satisfied on the 26th September, 1966 that in the meantime and until the defendants are served and heard an interim order should be made for the arrest and detention of the said ship and I so ordered. The defendants having been served, a counter affidavit was filed on the 28th September, 1966 by one Stephen Okoye Okafor, the Managing Director and Chairman of the Board of Directors of the defendant Company and in paragraph 22 he swore that :—

> "The plaintiffs are in no danger at all of losing their security 's.s. Chief Awosika' in that the Nigerian Produce Marketing Co. Ltd. has fully guaranteed the amount of £1,980,000 over and above the debt to the plaintiffs".

In view of this I ordered on the 3rd October, 1966 that the plaintiffs do file a reply to this counter affidavit and that the Nigerian Produce Marketing Company Limited be served with all papers in connection with this application as persons likely to be affected by the decision of same. This was done and on the 6th October, 1966 the plaintiffs called the Secretary of the Nigerian Produce Marketing Co. Ltd. to give evidence. The defendants called one Anthony Akukweh, acting Accountant to defendant Company to give evidence.

The evidence disclosed that the Nigerian Produce Marketing Co. Ltd. as per Exhibits "A" and "A.1" guaranteed the defendant Company to the tune of £1,980,000 payable in 60 monthly instalments of £33,000 for the purchase of 4 to 5 ocean-going cargo vessels referred to at the back of Exhibit "A.1". The "s.s. Chief Awosika" was not one of these vessels but there is evidence which I accept to the effect that although the Nigerian Produce Marketing Co. Ltd. did not originally consent to the purchase of this vessel by the defedant Company, they equally did not object to it and later on adopted it as one of the 4 to 5 vessels the subject matter of the guarantee. It is clear from the wording of Exhibit "A.1" that this guarantee covers the purchase of these 4 to 5 ships and nothing else. As per Exhibit "B" the Nigerian Produce Marketing Co. Ltd. wrote to the plaintiffs on the 6th December, 1965 making it clear that no further payments were to be made until the remaining three ships were delivered to the defendants. This has not taken place for the only asset shown to be possessed by the defendant Company is the "s.s. Chief Awosika."

In addition to what I have said above, the evidence, both oral and by affidavit, leaves no room for doubt that the defendant Company has not the financial resources with which to run a shipping line. The defendants themselves admit in paragraph 10 of their counter affidavit :—

> "That the ship 's.s. Chief Awosika' was arrested at Karlsham in Sweden in April 1966 for debts incurred by the aforesaid Anglo Canadian Cement Ltd. which the defendants did not know of then."

The Anglo Canadian Cement Ltd. is a company to which was assigned the management of the defendant company as per paragraph 8 of the defendants' counter affidavit and paragraph 9 of same goes on to say that :—

> ".....all the money debited against the defendants as debts were due to mis-management of the aforesaid Anglo Canadian Cement Ltd. for which the defendants have taken out a law suit against them in this Court in Suit No. LD/3/66."

Then again at the hearing of the application it came to light that the defendant Company were unable to pay the wages of the crew for the month of September and indeed October nor has the evidence shown a likelihood of the Company's ability to meet up with these expenses. It would appear from the arguments of Mr Whyte for the defendant Company that the latter company

subsists on a "hand to mouth" basis and that the expenses of running the shipping line, paying the wages of the crew, victualling, are all to be met by the sums received from freight to be carried. If paragraph 30 of the defendant Company's counter affidavit is correct and the sum of £550 is payable daily to the Nigerian Ports Authority while the ship is in harbour, then already a substantial sum is due to the said Authority.

Finally paragraphs 18 and 19 of the defendants further affidavit show that the defendants are indebted to H.E. Moss & Co. Ltd. and Mersey Ports Stevedoring Co. Ltd. as well as the Nigerian Produce Marketing Co. Ltd. It seems to me that all these, coupled with the finding that the guarantee of £1,980,000 by the Nigerian Produce Marketing Co. Ltd. was to cover purchases of four to five ships and not for the running expenses of the "s.s. Chief Awosika", knock the bottom out of the arguments against the application before me.

Fortunately in the application before me there is no evidence of any cargo being on board the ship and I therefore do not have to consider the possibilities of deterioration. The applicants have shown that they have a substantial monetary interest in the "s.s. Chief Awosika" by virtue of the mortgage Deed in evidence. They have also shown that the defendant Company is indebted to other persons ; that the defendant Company has no capital by which to pay its indebtedness and finally that the guarantee on which they rely does not in fact cover such indebtedness. In my view a case is made for the arrest of the said ship pending the trial and I so order. It will be of importance to both parties if pleadings are ordered and an early day set down for the hearing of the substantive suit. I shall hear the parties on this as well as on the issue of costs and the welfare of the crew pending the determination of the suit.

Olakunrin : asks for 7 days to file Statement of Claim.

Whyte : asks for 60 days to file Statement of Defence.

Court : Statement of Claim to be filed within 7 days and Statement of Defence to be filed within 30 days thereafter. Case to come up for mention on 5-12-66.

Olakunrin : re Welfare of Crew : Mr Olakunrin agrees to pay the wages of the crew until the determination of the suit without prejudice to any application that may be made at a later date.

Costs : I leave that to the discretion of the Court.

Whyte : I leave that to the Court.

Court : Costs in the Cause.

HIGH COURT, LAGOS

JACOB OKAFOR .. .. APPELLANT

v.

INSPECTOR-GENERAL OF POLICE .. RESPONDENT

(APPEAL NO. LD/32CA/66)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J. ; 31st October 1966]

Attempted murder—magistrate convicting summarily without jurisdiction—trial and conviction a nullity—points to consider in ordering a retrial.

The appellant was charged tried and convicted for attempting unlawfully to kill his master by causing his master to take poison. It was without doubt that the magistrate had no jurisdiction to hear and determine the case, and the conviction and sentence were set aside. On the question of retrial it was shown that the complainant and his wife, two of the witnesses for the prosecution had left the Country and that the appellant had been in custody since April 1965.

HELD : that an order for retrial could not be made because a retrial could not take place in the Magistrate's Court but in the High Court and that would not be a retrial but a fresh trial in which preliminary investigations would first have to be conducted in the Magistrate's Court.

Appellant discharged.

Statutes referred to :

Criminal Code, Cap. 42 *Laws of Nigeria* (1958 *edition*).

Criminal Procedure Act, Cap. 43.

Trial by Jury (Lagos) Order in Council.

Case referred to :

Raphael Olakanji v. Regina F.S.C. 106/63 (*unreported*).

Miss Agusto for the respondent.

Lardner for the appellant.

JUDGEMENT

TAYLOR, C.J. :—The appellant was charged with attempting unlawfully to kill Joseph Alexander Vaz contrary to s. 320 (1) of the Criminal Code on Count 1 and on Count 2 with unlawfully and with intent to injure Joseph Alexander Vaz caused poison to be taken by him and thereby endangered his life contrary to s. 337 of the Criminal Code.

After hearing evidence the Learned Chief Magistrate held *inter alia* that :—

> "I further find that the administering of the rat poison for three successive days by the accused was done with intent to kill the 4th Prosecution Witness and accused is found guilty on the 1st count and he is convicted accordingly.
>
> Since the accused cannot be convicted on both counts I treat them as being alternative to one another and the trial of the 2nd count is stayed by virtue of the provision of section 180 of the Criminal Procedure Act."

The appellant has appealed against his conviction on the first count and his Learned Counsel has adduced arguments in favour of one ground of appeal only to the effect that the Trial Chief Magistrate had no jurisdiction to try the offence as the offence was one triable only in the High Court with a Jury.

Mr Lardner for the appellant drew my attention to section 335 of the Criminal Procedure Act which states that :—

> "The Minister may by order direct that any offence or class of offences arising in any place or district specified in such order and charged against any person or class of persons as may also be specified on such order shall be tried with a Jury....."

Following this up Learned Counsel referred me to s. 3 of the Trial by Jury (Lagos) Order in Council which states that :—

> "Any person or class of persons charged with any offence of attempting to commit or of aiding and abetting or of being accessory before or after the fact to any offence punishable with death or the offence of rape arising in Lagos shall be tried with a Jury."

Mr Lardner argued that in the case of *Raphael Olakanji v. Regina F.S.C.* 106/63 the Appeal Court held that the trial of the appellant for an offence of attempted murder contra s. 320 (1) of the Criminal Code in the High Court without a Jury was one held without jurisdiction in view of Order in Council 9 of 1946. In consequence the conviction and sentence were set aside and a retrial ordered with a Jury.

Miss Agusto for the respondent did not support the conviction in view of the law to which reference has been made.

There can of course be no argument adduced in favour of the conviction on this ground and for that reason the appeal must succeed and the conviction and sentence are set aside. It is urged by Mr Lardner that I should not order a retrial because both Mr Lardner and Miss Agusto are agreed that the complainant and his wife who were the 4th and 5th Prosecution Witnesses respectively have left the country. It would, therefore, not be possible for the purposes of a fresh trial with a Jury to have their depositions taken or a Preliminary Investigation conducted. In addition to this the appellant has been in custody since April 1965. I cannot of course enter a verdict of acquittal in favour of the appellant and I think the only course left to me is simply to declare that the trial was without jurisdiction. I cannot order a retrial as in *Raphael Olakanji v. The Queen* because a retrial cannot take place in the Magistrates Court but in the High Court and that would not be a retrial but a fresh trial in which preliminary investigations would first have to be conducted in the Magistrate's Court. The trial being without jurisdiction the accused is discharged.

HIGH COURT, LAGOS

CHIEF ABDUL YEKINI OJIKUTU .. .. PLAINTIFF

v.

1. THE AGBONMAGBE BANK LTD.
2. MARCUS MBADIKE
3. VICTOR OGUAMANANU

.. DEFENDANTS

(SUIT No. LD/213/66)

[HIGH COURT, LAGOS : D. A. R. ALEXANDER, J. ;
4th November, 1966]

Mortgage—notice of foreclosure valid until exercise of power of sale—moneylending transaction.

The plaintiff as a customer of the first defendant bank obtained advances by way of overdraft from the bank by mortgaging three of his properties including No. 10 Onikoro Street, Lagos to the bank. The interest charged from time to time was 15 per cent and was agreed to by the plaintiff. The original transaction took place some 12 years previously and the bank furnished accounts to the plaintiff from time to time. On 23rd June, 1965 the plaintiff's indebtedness to the bank stood at £6,924-9*s*-4*d* which was admitted by the plaintiff in his statement of claim as also in his evidence in Court. On this date the plaintiff appealed to the bank to stop charging interest on the sum of money due from September to 31st March, 1966 when he promised to settled his account in full. The plaintiff's letter was sequel to a notice of foreclosure and sale served on him by the bank. On the failure of the plaintiff to pay on 31st March, 1966 the bank sold the property at 10 Onikoro Street to the second and third defendants by private treaty. The plaintiff asked for a declaration that the sale was void and should be set aside and an injunction. He complained that although the bank accepted the proposals contained in his letter dated 23rd June, 1965, it did not stop charging interest.

HELD : (i) that the notice of foreclosure was the notice to which the plaintiff was entitled.

(ii) that a notice of foreclosure once given and received remained valid and in force until the exercise of the bank's power of sale.

(iii) that the transaction between the plaintiff and the bank related not only to the making of advances but came within the definition of "banking business" and was therefore governed by the Banking Act.

(iv) that persons *bona fide* carrying on the business of banking like the first defendant bank, were specifically excluded from the operation of the Moneylenders Act and do not fall within the category of persons other than moneylenders mentioned in section 13 (4) of the Moneylenders Act.

Action dismissed.

Statutes referred to :

Moneylenders Act, Cap. 124 *Laws of Nigeria* (1958 *edition*).
Banking Amendment Act, 1962 *No.* 19.
Banking Act, Cap. 19, *Laws of Nigeria* (1958 *edition*).
Conveyancing Act, 1881, (*U.K.*).

Cases referred to :

Kadiri v. Olusoga (1956) 1 *F.S.C.* 59.
Sanusi v. Daniel & Abikoye (1956) 1 *F.S.C.* 93.

Chief W. A. O. Ojikutu for the plaintiff.
S. O. O. Abudu for the 1st defendant.
O. I. Alokolaro for the 2nd and 3rd defendants.

JUDGEMENT

ALEXANDER, J. :—The plaintiff's claim is for—

> "a declaration that the purported sale of his property situated at No. 10 Onikoro Street, Lagos by private treaty on the 13th day of April, 1966 is void and should be set aside",

and for—

> "an injunction to restrain the defendant, its servants or agents from parting with the said property which is mortgaged to them pending the determination of this matter".

The claim was originally against the 1st defendant only, but the 2nd and 3rd defendants were subsequently joined on their own application. Pleadings were ordered, filed and delivered.

The plaintiff's case is that the 1st defendant as mortgagee exercised its power of sale in respect of the property No. 10 Onikoro Street, Lagos, mortgaged by the plaintiff to it to secure loans or advances by way of overdraft, without notice to him ; and further, that the rate of interest of 15 per cent charged on these loans or advances is excessive and illegal, as being contrary to section 13 of the *Moneylenders Act, Cap.* 124 and, consequently, both the mortgage and subsequent sale are irregular and illegal, and the sale is therefore void and should be set aside. This contention of illegality was, however, expressly raised only in the closing address of learned counsel for the plaintiff. More will be said about this later.

The 1st defendant as well as the 2nd and 3rd defendants, rely on a letter written by the plaintiff after notice of foreclosure and sale was served on him, giving an undertaking that he would discharge his indebtedness by the 31st of March, 1966, and also an authorisation to the 1st defendant to sell the property by private treaty if his indebtedness was not discharged by that date. Their case, is, therefore, that the plaintiff, having received notice of foreclosure and sale, gave this undertaking and authorisation but, having failed in his undertaking, the 1st defendant was at liberty to sell the property to the 2nd and 3rd defendants and accordingly did so.

The 2nd and 3rd defendants aver, further, that before purchasing the property they made necessary investigations and exercised reasonable diligence and were satisfied that the 1st defendant's power of sale could be validly exercised and that the property could be sold by private treaty.

The following are the facts of the case. The plaintiff, as a customer of the Agbonmagbe Bank Limited, the 1st defendant, (hereinafter referred to as "the Bank"), obtained advances by way of overdraft from the Bank by mortgaging 3 of his properties, including No. 10 Onikoro Street, Lagos to the Bank. The interest charged from time to time was 15 per cent and was agreed to by the plaintiff. The original transaction took place about 12 years ago, and accounts were furnished by the Bank to the plaintiff from time to time. (*See Exhibits* 9/1 *to* 9/6). On the 23rd of June, 1965, the plaintiff's indebtedness to the Bank stood at £6,024-9*s*-4*d* (*Exhibit* 9/1). It is implicit in the plaintiff's statement of claim that he was indebted to the Bank up to the time that the Bank exercised its power of sale under the mortgage and sold No. 10 Onikoro Street, Lagos to the 2nd and 3rd defendants. Indeed, the plaintiff admitted in his own evidence that he is still indebted to the Bank, and that he owed the Bank £6,024-9*s*-4*d* on the 23rd of June, 1965, as previously acknowledged by him in writing (*See Exhibit* 1). He also admitted under cross-examination that between June 1965 and March 1966 he did not pay a penny to the Bank. Chief Okupe testified on behalf of the Bank and was clearly a witness of truth. I accept his evidence in its entirety. He said that even after the sale of No. 10 Onikoro Street, Lagos, the plaintiff was still owing £3,238-12*s*-11*d*. It is therefore clear and beyond any doubt whatever that the Bank's power of sale had arisen before the 23rd of June, 1965 and subsisted up to the time of the sale to the 2nd and 3rd defendants.

In *Exhibit* 1 dated the 23rd June, 1965, the plaintiff appealed to the Bank to stop charging him interest as from September 1965 up to 31st March, 1966, when he promised to settle his account in full. He assured the Bank that settlement of his account "up to the last penny" would be made by him on the 31st of March, 1966. He went on to say—

> "I further agree that if I fail to fulfil my promise in settling the said account at the specified time, I hereby authorise the Agbonmagbe Bank Limited to sell my mortgaged property by private treaty and not by public auction to avoid public disgrace".

The plaintiff complained that although the Bank accepted his proposals in *Exhibit* 1 by letter dated 1st July, 1965 (*Exhibit* 2) it did not stop charging interest. It was, of course, not bound to make any such concession or to suspend the exercise of its power of sale, since no consideration moved from the plaintiff and there was no binding agreement between the parties in that regard. *Exhibit* 1 is no more than what it is expressed to be, that is, an appeal by the plaintiff to the Bank not to exercise its power of sale (which it was entitled to exercise *immediately*) before the 31st March, 1966 (that is, about 9 months later) on a self-imposed condition that his admitted indebtedness would be discharged on that date, and an authorisation to the Bank to sell the property by private treaty to avoid the disgrace of a public auction, if he defaulted. The plaintiff in fact defaulted and it is difficult to see how he can legally hold the Bank to its promise to stop the interest if he discharged his indebtedness in full on or before the 31st of March, 1966.

Chief Okupe explained that the Bank agreed to make these concessions as a result of the intervention of two Honourable Gentlemen who are mutual friends of the plaintiff and Chief Okupe.

The plaintiff, on the other hand, was hoping to get some compensation for land acquired from him by the Lagos Executive Development Board in order to discharge his indebtedness to the Bank. There was no legal obligation on the Bank to await the pleasure or convenience of the plaintiff or the Lagos Executive Development Board before exercising its legitimate power of sale. The Bank was well within its rights in ignoring *Exhibit* 3 requesting it to give the plaintiff a further extension of 8 weeks to enable him to pay up. *Exhibit* 4 purports to be a request to stop the sale, but was written 12 days after the sale had taken place and is consequently of no evidential value.

Although there is no doubt that the Bank's power of sale had arisen, the plaintiff contends that he received no notice of the impending sale of No. 10 Onikoro Street, Lagos. He denied receiving the notice of foreclosure dated the 31st of January, 1965 a copy of which was admitted in evidence as *Exhibit* 13. I have no doubt, having regard to the evidence of Chief Okupe and Mr Awosanya on the point, which I believe, that the notice of foreclosure was sent to the plaintiff by registered post, and I go further and find as a fact that he must have received this notice, notwithstanding his denial. On the whole, I was not favourably impressed by the plaintiff's demeanour in the witness-box, and I reject his evidence whenever it conflicts with the evidence of Chief Okupe.

The notice of foreclosure is the only notice to which the plaintiff was entitled and he did not in fact make any request in *Exhibit* 1 that the Bank should notify him further of any impending sale in exercise of its powers under the mortgage. Learned Counsel contended, however, on his behalf that this notice expired or lapsed as a result of the Bank's acceptance of *Exhibit* 1 and suspension of the exercise of its power of sale. I disagree with this contention and hold that the notice of foreclosure, once given and received, remained valid and in force until the exercise of the Bank's power of sale. There is no evidence that the authority given by the plaintiff to the Bank in *Exhibit* 1 to sell No. 10 Onikoro Street, Lagos by private treaty if he defaulted was cancelled before the Bank exercised its power of sale and he is in the circumstances estopped from questioning the manner of sale.

Learned Counsel for the plaintiff also contended that the rate of interest charged by the Bank, that is, 15 per cent, is excessive and illegal. The plaintiff merely pleaded in his statement of claim that the rate of interest of 15 per cent is excessive. It is, however, the rate of interest agreed by him. There is nothing in the statement of claim to indicate that illegality is pleaded or relied on by the plaintiff.

However, in his closing address, learned counsel for the plaintiff contended that the rate of interest of 15 per cent contravened section 13 of the *Moneylenders Act*. The *Moneylenders Act* is "an Act relating to moneylending". "Moneylender" is defined to include "every person whose business is that of moneylending..... ...." It, however, excludes "any person *bona fide* carrying on the business of banking....."

Section 13 (1) of the Act provides :—

> "13 (1) The interest which may be charged on loans whether by a moneylender or by any person other than a

> moneylender shall not exceed the respective rates specified hereunder—(*a*) on loans secured by a charge on any freehold property.....simple interest at the rate of fifteen *per cent per annum* for the first five hundred pounds or part thereof and at the rate of twelve-and-a-half *per cent per annum* on any amount in excess of five hundred pounds".

On the other hand, the *Banking Act, Cap.* 19 is "An Act to provide for the regulation and licensing of the business of banking".

"Bank" is defined in section 2 of the Act as—

> "any person who carries on banking business".

"Banking business" is defined as—

> "the business of receiving money on current account from the general public, of paying or collecting cheques drawn by or paid in by customers and of making advances to customers".

Section 7 (4) of the Act, as amended by the *Banking Amendment Act*, 1962 provides:

> "(4) Rates of interest charged on advances or other credit facilities by licensed banks shall be linked to the minimum rediscount rate of the Central Bank subject to a stated minimum rate of interest, and the interest rate structure of each licensed bank shall be subject to the approval of the Central Bank; and the minimum rate of interest when so approved shall be the same for all licensed banks".

Chief Okupe testified and *Exhibits* 10 *and* 11 show that the Central Bank of Nigeria notified the appropriate rates of interest to the defendant Bank and that the rate of interest of 15 per cent is applicable to "Other Advances", in which category the advances made by the Bank to the plaintiff fall.

In my view, the transaction between the plaintiff and the Bank related not only to the making of such advances but came within the definition of "banking business", and was therefore, regulated by the *Banking Act*. Persons *bona fide* carrying on the business of banking, like the defendant Bank, are also specifically excluded from the operation of the *Moneylenders Act*, and in my view, they do not fall within the category of persons other than moneylenders mentioned in section 13 (1) of the Act. It appears to me that the words "any person other than a moneylender" refer to a person (other than a Bank) who does not make moneylending his regular business but who might indulge in a single transaction or very occasional transactions of moneylending.

To sum up, the transaction between the plaintiff and the Bank was "banking business" regulated by the *Banking Act* and not "moneylending business" regulated by the *Moneylenders Act*. Consequently, the case of *Kadiri v. Olusoga* (1956) 1 *F.S.C.* 59 cited by Counsel for the plaintiff, which relates to a mere "moneylending" transaction and not to a "banking" transaction, is inapplicable to the circumstances of this case.

The following passage in *Maxwell on Interpretation of Statutes*, 11*th Edition*, *at pages* 162 *to* 163, puts the matter in a nutshell—

> "It is sometimes found that the conflict of two statutes is apparent only as their objects are different and the language of each is restricted.....to its own object or subject. When their language is so confined, they run in parellel lines, without meeting".

I therefore hold that the interest of 15 per cent charged by the Bank is not excessive or illegal and that the term as regards interest of 15 per cent in no way vitiates the agreement for advances, the security therefor or the sale consequent on the power of sale exercised under the mortgage.

I have carefully considered the evidence in this case, and the arguments of learned Counsel for the plaintiff and the defendants and the enactments and cases cited by them and, in my judgement, the plaintiff's plea of want of notice, as well as his belated contention of illegality, both fall to the ground.

The 2nd defendant, Mr Marcus Mbadike, testified that he and the 3rd defendant, Mr Victor Oguamananu, bought No. 10 Onikoro Street, Lagos jointly from the Bank for £3,300 on the 13th of April, 1966 and that they paid the purchase money by cheque. No valuer has been called, and in fact no evidence has been adduced by the plaintiff to show that this property was sold at an undervalue, although there is some such suggestion in paragraphs 11 and 13 of the Statement of Claim. Both the 2nd and 3rd defendants saw *Exhibit* 1 before they purchased the property by private treaty. Mr Mbadike admitted, however, that they did not go so far as to contact the plaintiff before paying for the property. I do not consider that it was any concern of theirs to contact the plaintiff once they were satisfied, after reading *Exhibit* 1, that the Bank's power of sale had arisen and that there was no reason to doubt that it could at the material time be validly exercised. Chief Okupe testified that the Bank conveyed the property to the 2nd and 3rd defendants. There was, indeed,

no irregularity or illegality known to them or which ought to have been known to them since, in fact, no irregularity or illegality occurred or existed.

Section 21 (2) of the *Conveyancing Act*, 1881, (which is an English Statute of general application in force in Nigeria) provides as follows :—

> "Where a conveyance is made in professed exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeached on the ground that no case has arisen to authorise the sale, or that due notice was not given or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power".

In *Sanusi v. Daniel and Abikoye* (1956) 1 *F.S.C.* 93, the appellant mortgaged his house to the 1st respondent as security for loans received. The 1st respondent exercised a power of sale under the mortgage and the property was sold by public auction and conveyed to the 2nd respondent. The appellant sought to have the sale set aside on the ground of certain defects in the exercise of the mortgagee's power of sale and it was held that by virtue of the provisions of section 21 (2) of the *Conveyancing Act*, 1881, the 2nd respondent's title could not be impeached.

On the evidence before me, and having regard to the authorities, the plaintiff's claim fails in its entirety and this action is accordingly dismissed with costs assessed and fixed at 50 guineas to be paid by the plaintiff to the 1st defendant and 75 guineas to be paid by the plaintiff to the 2nd and 3rd defendants jointly.

HIGH COURT, LAGOS

MRS V. A. THOMAS .. .. APPLICANT/APPELLANT

v.

J. B. ATUNRASE .. .. 1ST OBJECTOR/RESPONDENT

J. O. COKER .. .. .. 2ND OBJECTOR/RESPONDENT

(APPEAL No. LD/43A/66)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J. ; 14th November, 1966]

Land—conveyance of part only of land which a deed purports to convey—effect.

In proceedings before the Assistant Registrar of Titles in Lagos, three conveyances were tendered in evidence which showed that the legal personal representatives of the deceased had conveyed a piece of land to three persons at different times. It turned out that one of the conveyances conveyed more land than the vendor had and the Assistant Registrar rejected the conveyance on the ground that it could not convey part of the plot of land which it sought to convey.

HELD : that if a person conveyed more land than he had in one deed, the whole of his interest passed under the deed.

Judgement of the Assistant Registrar set aside.

Cases referred to :

Knathbull v. Grueber (1817) 3 E.R. 124.

Re Bryant and Barmingham Contract (1890) 44 H.D. 218.

D. O. Coker for the appellant.

Oseni for 1st respondent.

JUDGEMENT

TAYLOR, C.J. :—The property the subject matter of this appeal which is situated at 8 Atunrase Street, Surulere was admittedly the original property of one Victor Leopold Coker, deceased. On the death of the said Victor Leopold Coker, Shola Coker and Victor Coker were appointed as the legal representatives of the estate. The applicant in the Court below bought the land in dispute on the 9th March, 1953 and it was accordingly conveyed to her as per Exhibit "A" for the consideration of £140. After the purchase by the applicant, in view of certain representations made to her, she paid a further sum of £350 to one Akinyemi Adeseye on the 11th August, 1961 for a ratification of the sale of the 9th March, 1953. This deed of ratification is Exhibit "B". There is no plan attached to it but it purports to ratify the land sold as per

Exhibit "A". It is important to bear in mind that the 2nd Objector is a witness to the deed Exhibit "B" and there was evidence to the effect that he is also a member of the family of Victor Leopold Coker (deceased). The land covered by Exhibit "A" consists of 2 plots, and the land to which Akinyemi Adeseye laid title was only one plot. On discovering this the applicant sued Victor Coker and Shola Coker as per Exhibit "D" for the sum of £376-7*s*-0*d* made up as follows :—

	£	*s*	*d*
Purchase Price	140	0	0
Cost of Deed of Conveyance ..	15	15	0
Cost of Clearing the bush.. ..	8	0	0
Cost of Surveying	12	12	0
General Damages	200	0	0
	£376	7	0

Judgement was entered by consent against the defendants for the sum of £193-8*s*-0*d* a sum which certainly covers the first four heads and a little more. The Judgement was entered on the 26th January, 1962. This sum was repaid to the plaintiff but no deed of reconveyance from the plaintiff to the defendants was prepared or executed. Subsequently the applicant discovered that one of the two plots covered by Exhibit "A" was in fact the property of Coker's estate and paid a sum of £300 to repurchase it on the 27th February, 1963. No fresh deed of conveyance was executed.

The 1st Objector did not lead any evidence in the Registrar's Court, but the 2nd Objector gave evidence that on the 1st February, 1962 he paid £200 for plot No. 151 to the legal personal representatives of the estate of Victor Leopold Coker and was given Exhibit "E" the receipt for that sum. The area was conveyed to him on the 1st February, 1962 as per Exhibit "K".

Though the 1st Objector did not give evidence a deed of conveyance of the identical plot of land covered by Exhibit "K" was made out to him on the 27th July, 1962 by the said legal personal representatives of the estate of Victor Leopold Coker (deceased) and was marked Exhibit "G".

In short the position as regards conveyance of the land in dispute was as follows :—

1. Exhibit "A" conveyed the land to the applicant on 9-3-53 by the said legal personal representatives.

2. Exhibit "K" conveyed the said land to the 2nd Objector on 1-2-62 by the same persons

and

3. Exhibit "G" conveyed the identical land to the 1st Objector on the 27th July, 1962 by the same persons.

The Assistant Registrar of Titles resolved the issue in the following manner:—He found that the deed Exhibit "A" was defective and of no binding effect because, to use his own words :—

> "It cannot convey only part of the plot of land which it seeks to convey. To hold otherwise means registering a parcel of land in favour of a purchaser whose vendor does not own the entire plot sought to be conveyed by the conveyance Exhibit "A"."

As for the 2nd Objector he held that the receipt and the conveyance were worthless documents because they were given to the 2nd Objector "in order not to embarrass him during the Police interview in connection with some not too straight land deal".

The Assistant Registrar then went on to uphold the 1st Objector's objection. His deed, it should be remembered, is subsequent to that of the applicant and the 2nd Objector in point of time. No appeal however has been lodged by the 2nd Objector and the sole issue before me is whether the Assistant Registrar of Titles erred or not when he said Exhibit "A" was defective because it purported to convey plots 150 and 151 when the legal personal representatives had no title to plot 150. There is no need for me to refer to the cases of *Knathbull v. Grueber* 1817 3 *MR.* 124 *at* 146 *or Re Bryant and Barningham Contract* 1890 44 *CH.D.* 218 cited by the Assistant Registrar of Lands because they have no relevance whatsoever to the subject matter in hand.

Before dealing with the law one or two matters should be borne in mind. The present applicant applied to be registered as the owner of the land in dispute on the 26th September, 1962. She applied to register Exhibit "A" on that date. According to Exhibit "M" publication was made by the Registrar of Titles in the *Daily Times* on the 29th November, 1962 and as a result the legal personal representatives of the Estate of Victor Leopold wrote that exhibit on 28-1-63 objecting to the registration of plot 151. It is important to note that no mention is made in Exhibit "M" of any purported conveyance to either of the objectors in 1962 as per Exhibits "G" and "K". The objection raised by Exhibit "M"

was withdrawn on the 27th February, 1963 by a letter marked Exhibit "J" written by the said legal personal representatives, and the 1st Objector's objection was put in, in the same year.

No authority was cited before me at the hearing of this appeal and I am not aware that any authority exists that if I convey to A both Whiteacre and Blackacre for valuable consideration and it is later shown that I have no title to Whiteacre, therefore *ipso facto* the deed of conveyance is defective as regards both Whiteacre and Blackacre. In fact both law and common sense say that the whole of my interest in Blackacre passes by this deed. The Assistant Registrar therefore erred in holding that Exhibit "A" was defective to pass plot 151 to the appellant. That being the only point raised on this appeal I hold that the appeal succeeds and the Judgement of the Assistant Registrar of Titles is hereby set aside and in its place Judgement is entered for the applicant in favour of registration of her title as the owner of the said plot.

Appellant is entitled to her costs and I shall hear parties as to the sum to be awarded.

D. O. Coker : Says out of pocket expenses is £37-9*s*-6*d*. Asks for 50 guineas inclusive in this Court and 25 guineas as costs in the Court below. There were several adjournments in the Court below.

Oseni : As regards the costs in the Court below says costs were awarded there and the issue of adjournment should not be taken into account—leaves issue to the Court.

Court : In my view the sum of 50 guineas costs in this Court is most reasonable and I award this sum. Re costs in the Court below I award 20 guineas.

HIGH COURT, LAGOS

ADERAWOS TIMBER TRADING CO. LTD. .. .. APPLICANTS

v.

FEDERAL BOARD OF INLAND REVENUE .. .. RESPONDENTS

(SUIT No. LD/159/65)

[HIGH COURT, LAGOS : CHUBA IKPEAZU, J. ; 21st November, 1966]

Certiorari—Companies Income Tax—capital receipts—structure of business not affected—contracts incidental to company's business.

The applicant company was granted a concession by the Ife District Council to extract timber for a period of 25 years. He in turn entered into a contract with the African Timber and Plywood Ltd. (AT&P) to supply timber to AT&P for five years. The agreement was modified at the end of four years and payment of £30,000 was made to the applicants and in consideration for this sum and the increase in price of timber they agreed not to terminate the contract before the end of five years from the time of the second agreement. The structure of the applicants' business was not destroyed and there was no serious dislocation of the normal organisation of their business and they suffered no loss. The defendant raised and collected £7,000 in respect of the 1962-63 ; 1963-64 and 1964-65 tax assessments on the amount of £30,000 on the basis that the amount of £30,000 received by the applicants was a trading receipt of a revenue nature as the consideration for it did not cripple the applicants' profit-making operations. The applicant appealed to the defendant unsuccessfully and thereupon applied for an order of certiorari to quash the decision of the defendants and contended that the sum of £30,000 did not come under any of the items in section 17 of the Companies Income Tax Act 1961 No. 22 under which the assessment was made, inasmuch as it was not a rent or premium, dividend or interest as laid down in the Act.

HELD : (*i*) that the payment was income and not a capital receipt in that the structure of the applicants' business was not destroyed and no serious dislocation of the normal organisation of the applicants' business had resulted and nothing was lost by the applicants.

(*ii*) that it was incidental to the applicants' trade or business to enter into ordinary commercial and beneficial contracts which would include the grant of licences to other persons to cut timber from their timber estate and to modify such contracts.

(*iii*) that the original agreement which the applicant entered into with the AT&P as also the subsequent one modifying it was one entered into by the applicants in the ordinary course of their trade or business and any sum received for such modification, which was not destructive of their profit-making machinery was a sum which would go into the ordinary trading receipts of the applicant company and was taxable.

Application dismissed.

Statute referred to :

Companies Income Tax Act, 1961.

Cases referred to :

Ormon Investment Co. v. Betts (1928) *A.C.* 162.

Commissioner of Income Tax v. Shaw, Wallace & Co. (1931) *L.R.I.A.* 206.

Inland Revenue Commissioner v. British Samson Aero Engineers Ltd. (1938) 2 *K.B.* 482.

Murray v. Commissioners of Inland Revenue 32 *Tax Cases* (1950-52) 238.

Kelsall Parsons & Co. v. Commissioners of Inland Revenue 21 *Tax Cases* (1938) 608.

Commissioners of Inland Revenue v. Fleming & Co. (Machinery) Ltd. Tax Cases (1950-52) 57.

Short Brass Ltd. v. The Commissioner of Inland Revenue (1927) 12 *Tax Cases* 955.

Chief F. R. A. Williams for the applicants.

JUDGEMENT

IKPEAZU, J. :—This is an application to quash the decision of the Federal Board of Inland Revenue, refusing to make refund of sums totalling £7,000 (seven thousand pounds) to the Applicants for the 1962-63, 1963-64, 1964-65, tax assessments. The Applicants, known as Aderawos Timber Trading Company Limited, is a limited liability company incorporated in Nigeria with its registered office at Ile-Ife in Oyo Division in the Ife Province of Western Nigeria.

The Applicants had at the material time a Licence permitting them to cut, extract and dispose of timber from an area of approximately 53 square miles in Oyo Division and in December 1957, they entered into a contract with the African Timber and Plywood Limited, hereinafter referred to as the Company, to supply timber to the latter during a specific period of time. Under the agreement, the Company had agreed to provide services in connection with the working of the Area and to purchase timber arising on the terms and conditions agreed between the parties. Under these terms, the Company should have a right of pre-emption over all logs produced by the Applicants and shall provide out of its monies, all roads, bridges, whares, equipments' fixtures and other facilities necessary for it to work the area and shall pay to the proper authorities on behalf of the Applicants all Fees and Royalties as and when they become due to be paid and shall recover the same eventually from the Applicants.

Certain other clauses which were regarded as material in this case may be set out as follows :—

"*Clause* 7. In consideration whereof the Licensee shall sell to the company all timber arising in the Area at the prices set out in paragraph 14 below and shall not sell any timber growing in or arising from the Area otherwise than to the Company.

Clause 14. The price to be paid to the Licensee by the company for the purchase of such timber shall be 4½*d* (four pence half penny) per cubic foot plus the amount of any fees and royalties payable upon that timber and that price shall be subject to revision from time to time but not more than once in any period of twelve consecutive calendar months by mutual agreement.

"*Clause* 15. This Agreement shall remain in force until the expiration of the Licence including renewal of the Licence provided that :—

(*a*) In the event of any breach by either party of any of the terms of this Agreement or if either party becomes bankrupt or insolvent or makes any arrangement with creditors or has a receiver appointed, or being a company, goes into liquidation (other than voluntary liquidation for the purpose of reconstruction or amalgamation) the other party may terminate this Agreement forthwith and thereupon the Agreement shall automatically determine.

(*b*) Without prejudice to proviso (*a*) of paragraph 15 above, the company may determine the Agreement by giving to the Licensee six months notice in writing.

(*c*) Without prejudice to proviso (*a*) of paragraph 15 above, the Licensee may determine this Agreement by giving to the Company six months notice in writing provided he pays up any debt owed to the Company before giving such notice. Provided that if the Licensee determines this Agreement within five years of the date of this Agreement he shall pay to the company before doing so part of the initial development expenses of the area calculated in accordance with paragraph 16 below."

In 1961, the Agreement of 1957 was modified in the manner hereinafter appearing :—

"Now it is hereby agreed that (1) In consideration of the payment by the Company to the Licensee of the sum of £30,000

(thirty thousand pounds) the receipt of which the Licensee hereby acknowledges and the revision of the price per cubic foot of timber as set out in Clause 14 of the Principal Agreement from 4½*d* (four pence half penny) to 5½*d* (five pence half penny) the Principal Agreement shall be varied by the deletion of Clause 15 and substitution of the following :—

"This Agreement shall remain in force until the expiration of the Licence including renewal of the Licence provided that :—

(*a*) As in 15 (*a*) of the previous agreement.

(*b*) As in 15 (*b*) of the previous agreement.

(*c*) Without prejudice to the proviso (*a*) of paragraph 15 above, the licensee may determine this Agreement by giving to the company six months notice in writing *but shall not give such notice until the expiration of five years from the date thereof.*

Provided further that any such determination shall be without prejudice to any other rights or liabilities previously acquired or incurred by either party and that in the case of the Licensee any debt owed to the Company is paid before the giving of such notice".

By Agreement between Counsel on both sides all the relevant documents were compiled in a record form and was admitted at the hearing and marked Exhibit A and all references to the pages therein are to the typescript and not to the red pencil paging.

The dispute in this case arose as to whether the sum of £630,000 paid on the revision of the original Agreement is taxable as income or whether it is not. This sum was received by the Applicants during the year ending 31st March, 1962 from the company in accordance with the terms of the renewed Agreement and was treated as rents in advance by the company's Accountants and in accordance with the provisions of section 2 of the Income Tax Act 1962 (1962 No. 35) this income was spread over five years and was taxed accordingly as rents in advance. The tax collected for the period 1962-63, 1963-64, 1964-65 amounted to £7,000. Subsequent to this, a report was made on the account of the Applicants by a firm of Chartered Accountants—Messrs Akintola Williams & Co.—and the opinion expressed by the Accountants was to the effect that the sum of £30,000 paid to the Applicants for waiving their rights under Clause 15 (*c*) of the original Agreement does not constitute income and should not be taxable. The

Clause in the original Agreement entitled the Applicants to determine the Agreement at any time by giving six months notice but by the modification the Applicants could no longer do so before the expiration of five years. If the contention as to the non-taxability of the sum of £30,000 is right, it would follow that tax overpaid was as follows :—

(*i*)	For 1962-63 year of assessment	£2,200
(*ii*)	For 1963-64 year of assessment	£2,400
(*iii*)	For 1964-65 year of assessment	£2,400
	totalling	£7,000

It was also contended that the need for the clause to be varied was to secure the very heavy expenditure involved in the installation of plant and machinery and the construction of bridges and roads which had been carried out by the African Timber and Plywood Limited and which at the time of the amending Agreement there was a serious risk of losing by virtue of a strong possibility that notice to terminate the Agreement was about to be given. In furtherance of this report, representations were made to the Respondents on behalf of the Applicants that the receipt of the sum of £30,000 does not come within the terms of section 17 of the Companies Income Tax Act 1961 and that accordingly the sum is not liable to tax. The section referred to is in the following terms :—

(*i*) Tax shall, subject to the provisions of this Act be payable at the rate hereinafter specified for each year of Assessment upon the profits of any company accruing in, derived from, brought into, or received in, Nigeria in respect of—

(*a*) any trade or business for whatever period of time such trade or business may have been carried on ;

(*b*) rent or any premium arising from a right granted to any other person for the use or occupation of any property ;

(*c*) dividends, interest, discounts, charges or annuities ;

(*d*) any source of annual profits or gains not falling within the preceding categories ;

(*e*) any amount deemed to be income or profits under a provision of this Act or, with respect to any benefit arising from a pension or provident fund, of the Income Tax Management Act 1961."

The Board deliberated over the Applicants' representation and rejected it on the basis that the amount of £30,000 received by the

Applicants was a trading receipt of a revenue nature as the consideration for it did not cripple the recipient's profit-making apparatus. There were further exchanges of communications between the Applicants' Solicitor and the Board but the Board maintained its original decision that the sum is taxable. The Applicants thereupon asked for leave to apply for an order of certiorari to quash the decision of the Board refusing to make repayment of the sum of £7,000 as aforesaid upon two grounds namely—

(1) That the Federal Board of Inland Revenue erred in law in holding that the receipt of the sum £7,000 (should read £30,000) by the Applicants—the Adewaros Timber Trading Company—is income chargeable with tax.

(2) That the said decision is erroneous in law and consequently made without jurisdiction.

Leave was on the 15th of November, 1965, granted and by consent of both counsel all the documents including correspondence affidavits and counter affidavits relevant to the case were bound together into a record which was admitted in evidence and marked Exhibit A and references to pages therein are to the typescript.

At the hearing of this application it was argued on behalf of the Applicants that the sum of £30,000 received by the Applicants does not come under any of the items in section 17 of the Companies Income Tax Act 1961 under which the assessment was made. It was not a profit derived from trade or business, counsel contended, and was not a rent or premium neither was it a dividend or interest as laid down in the Act. Taxing statutes, it was said, must be construed strictly. It is the law that the language of a statute imposing a tax, duty or charge must receive a strict construction in the sense that there is no room for any intendment and regard must be had to the clear meaning of the words. If the State claims a tax under a statute it must show that the tax is imposed by clear and unambiguous words, and where the statute is in doubt it must be construed in favour of the subject however much within the spirit of the law the case might otherwise be but a fair and reasonable construction must be given to the language used without leaning to one side or the other. In the case of *Ormond Investment Company vs. Betts* (1928) *A.C. p.* 162 *Lord Atkinson* in delivering the judgement of the Privy Council said as follows :—

> "My Lords, when it is remembered that it is well established that one is bound, in construing Revenue

> Acts, to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a Subject by an Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of the statute must be adhered to, and that so called equitable constructors of them are not permissible."

If the tax assessed on the amount in question cannot be brought within the provisions of the Companies Income Tax Act, the imposition of this tax can find no basis or justification. It was submitted on behalf of the applicants that the tax was assessed under section 17*a* of the Act and that the words 'carried on' in that section implies continuous activity and that a payment to terminate a contract or waive a right under the contract does not stem from a continuous activity to which section 17*a* relates and therefore is not a profit derived from trade or business.

The Board's answer is that the sum of £30,000 paid to the applicants for the waiver of their right to terminate their contract with African Timber and Plywood Limited at any time within five years is a trade receipt and is susceptible to taxation. A trade receipt, it is said, may not only be derivable under section 17*a* of the Companies Act 1961 but would include receipts under the other sub-heads of section 17 namely, subsections 17 (*b*), 17 (*c*) and 17 (*d*). Chief Williams for the applicants maintains that a payment of this nature is not a profit within the provisions of the Companies Income Tax Act governing taxation and the question as to whether the imposition of tax on this sum of money, namely, the £30,000, is right or wrong must be determined within the confines of this Act and one must not invoke the aid of English law or the decision of English Courts in resolving the issue as our Companies Income Tax Act differs from the English Income Tax Acts which are so complex and consisting of 532 sections and 25 schedules and that decisions based on such complex laws ought not to be followed in deciding our own cases. He referred to the Indian Tax Act and a decision of the Privy Council in an Indian Tax Case in which it was held that the Indian Income Tax Cases differed materially from the English Income Tax Acts and at any rate in that particular case, decisions under English statutes were of little assistance in applying the Indian Act. The decision of the case hinged on the term 'income'. Under the Indian Tax Act 1922, the term connotes a periodical monetary return "coming in" with some sort of regularity, or expressed regularity from definite sources and excluded anything in the nature of a windfall.

Under the Indian Tax Act, the fundamental idea of business is the continuous exercise of an activity being carried on by an assessee. In that case *Commissioner of Income Tax v. Shaw, Wallace & Co.* (1931) *L.R.I.A. p.* 206, a sum of money paid as compensation for cessation of an agency and another for loss of office as agents were taxed as income but the taxation was set aside by the High Court of Calcutta which held that the payments were not taxable under the Indian Income Tax Law. In the Privy Council decision affirming the judgement, their lordships stated—

> "Again their lordships would discard altogether the case law which has been painfully involved in the construction of the English Income Tax Statutes—both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not in pari materia; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this Country have had to deal. Under these conditions their lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think that the solution of the problem lies very near the surface of the Act, and depends mainly on general considerations".

The decision of the case clearly turned on whether the money was the produce or result of carrying on the agencies of the company during the year the money was received as required by the Income Tax Act to make such sum taxable. If that is not the case, as in fact it was not, the money is not income within the provision of the Indian Law and would not be taxed.

In determining whether the aid of English decisions will be invoked the provision of the local law has to be examined to know whether such a need has arisen. To my mind, where expressions or terms used in our local statutes are similar to those used in English statutes and such terms or expressions are used in the same context and with the same connotation and where these expressions or terms have been given judicial interpretation or construction by the English Courts, it is to these decisions that we must go in search of light to construe those terms in our laws where the statute itself has supplied none. The Companies Income Tax 1961 no where defines trade or income or capital

neither has the English Tax Act done so, and one must rely on the facts and the decisions for the determination of those terms.

While each case is found to turn upon its own facts and no infallible criterion emerges, nevertheless, the decisions are useful as illustrations and as affording indications of what should be borne in mind in approaching the problem. The distinction between capital payment and revenue is not an easy one to draw in the matter of Income Tax and is one which agitates the mind of the Courts over and over again. This impression was stressed in the case of *Inland Revenue Commissioners v. British Samson Aero Engineers Ltd.* (1938) 2 *K.B. p.* 482 *at p.* 498 by the Master of the Rolls *Sir Wilfrid Greene* in the following words :—

> "There were in 1925 and there have been since many cases where the matter of capital or income has been debated. There have been many cases which fall on the border line. Indeed in many cases it is almost true to say that the spin of a coin would decide the matters almost as satisfactorily as an attempt to find reasons. But that class of question is a notorious one, and has been so for so many years."

In our case, as already stated, the Applicants as dealers on timber have the right to sell timber as an incident of their trade and if they bargain with that right and receive money in course of that bargain the money so received can be treated as a trading receipt or revenue. Under the original agreement the Applicant contracted to sell timber to the company but was entitled to terminate the agreement at any time on giving six months notice but to pay certain percentage of the Development capital if this was done before the expiration of five years. In 1961, this was altered as we have seen. The price of timber was increased from $4\frac{1}{2}d$ per cubic foot to $5\frac{1}{2}d$ per cubic foot and the sum of £30,000 was paid to the applicants in consideration of the payment and recission the applicants bound themselves not to determine the agreement until the expiration of five years. In other words, they sold their right of terminating the contract at any time on giving six months notice as provided in the previous agreement. This in effect meant that their right to sell their timber to whomsoever they liked within the period of five years had been sold to the company. The sum so received would amount to a gain received in the way of their trade and would appear to be within the purview of section 17 of the Companies Income Tax Act 1961.

In *Murray vs. Commissioners of Inland Revenue* 32 *Tax Cases* (1950-52) *p.*238—Murray, a timber merchant and crofter, purchased standing timber in two plantations for £2,900 in 1940. In January 1943, he sold the right to cut timber in one of them for £1,000. In June, he sold his rights in the second plantation for £14,000. He was assessed on these sums and he contended that the realisation of his rights in the plantations was a capital transaction, the profits of which were not assessable. It was held by the Commissioners that the transactions were part of his normal trading as a timber merchant and that the resulting profit was part of his trading profit and was chargeable to Income Tax.

It is a profit whether the money was realised from actual sale of timber itself or from the sale of the right to sell timber. In another case *Kelsall Parsons & Company vs. Commissioners of Inland Revenue* 21 *Tax Cases* (1938) *p.* 608—The Appellants carried on business as commission agents for the sale of products of various manufacturers and entered into agency agreement for that purpose. At the instance of the manufacturer concerned one of the agreements which was for a period of three years, was terminated at the end of the second year in consideration of payment to the Appellants of the sum of £15,000 as compensation. This was taxed as profits and held to be rightly taxed. The money paid was compensation for cancellation of a contract which was incidental to his business as commission agent and such a contract was liable to variation or adjustment. The agreement by which the agency was terminated effected a surrender of one year's benefit and in return for this surrender the agent received compensation which should receive the same treatment as the benefit in lieu of which it was paid. The normal rule as regards trading receipts is that compensation for the non-performance of a business contract is taxed on the same footing as the profits for the loss of which the compensation is paid. The only case as regards trading receipts where the compensation can be regarded as capital is where the compensation represents the price paid for the loss or sterilisation of a capital asset and is therefore a capital and not a revenue receipt.

In *Commissioners of Inland Revenue vs. Fleming & Co. (Machinery) Ltd.* 33 *Tax Cases* (1950-1952) *p.* 57 where the facts are the same as in the foregoing case of Kelsall and Parson, Lord Russell at page 63 stated the Law as follows :—

> "The sum received by a commercial firm as compensation for the loss sustained by cancellation of a trading

> contract or the premature termination of an agency agreement may in the recipient's hands be regarded either as a capital receipt or as a trading receipt forming part of the trading profit. It may be difficult to formulate a general principle by reference to which in all cases the correct decision will be arrived at since in each case the question comes to be one of circumstance and degree. When the rights and advantages surrendered on cancellation are such as to destroy or materially cripple the whole structure of the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organisation and resulting perhaps in the cutting down of the staff previously required, the recipients of the compensation very rightly affirm that the compensation represents the price paid for the loss of sterilisation of a capital asset and is therefore a capital and not a revenue receipt".

In the instant case, the Applicants was granted a concession by the Ife District Council for a certain period of time (I was told 25 years and this was not disputed) the Applicants in turn granted a concession to the Company for five years. The agreement was modified at the end of four years and payment was made to the Applicants and in consideration for that and the increase in price of timber, they agreed not to terminate the contract before the end of five years from the time of the second agreement. The structure of the Applicants' business was not destroyed and no serious dislocation of the normal organisation of their business took place and nothing was lost by them and the payment cannot in my view be categorised as a capital receipt. It is income. One more case I would like to refer to is the case of *Short Brass Ltd. vs. The Commissioners of Inland Revenue* (1927) 12 *Tax Cases p.* 955. The Appellant Company contracted in February 1920, to build two steamers but in November of the same year agreed to the cancellation of the contract in consideration of the payment of the sum of £100,000 which was paid to it in the same month. This was included by the Tax authorities in the compilation of the profits of the company but the company contended that the sum was a capital receipt and ought not to be included in the accounts from which the profit of their trade is to be ascertained, because it was not received by way of a profit arising from their trade or business but that it was a sum which was received by them in return for which they ceased to engage in the trade of building the ships. It was held that the sum was simply a receipt, in the course

of a going business, from that business and from nothing else. It was incidental to the business to make and modify contracts and any arrangements so made are in the ordinary course of that business, and a sum received for such modification or cancellation is a sum which would go into the ordinary trading receipts of the company. In his judgement *Sargant L.J.* stated thus—

> "It seems to me that the ordinary conduct of the business of a shipbuilding company including not only the making of contracts for the building of ships, but the modification or alteration of those contracts. If during the progress of the work the shipowners and shipbuilders had desired either to accelerate the construction of the vessels and the payment of the amount to be paid, or to defer those payments, they would have been perfectly able to do so, and the arrangements so made would in my judgement have been arrangements made by the company in the ordinary course of its business."

In our present case it is stated in the counter affidavit of the Respondents' agent that the objects set out in the memorandum of Association of the Applicant company included the selling of timber, its conversion into logs, timber of firewood and transport for sale within Nigeria or shipment overseas, and the doing of all such other things as are incidental or conducive to the attainment of the above object. I did not see the memorandum of Association but the affidavit stating those facts was not controverted. It is therefore clear to me in the light of the evidence and the authorities that it is incidental to the Applicants' trade or business to enter into ordinary commercial and beneficial contract which would include the grant of licences to other persons to cut timber from their timber estate and to modify such contracts and the original agreement entered between the Applicants and African Timber and Plywood Limited as also the subsequent one modifying the original arrangements is one entered by the Applicants in the ordinary course of their trade or business and any sum received for such modification, which was not destructive of the Applicants' profit-making machinery, is a sum which would go into the ordinary trading receipt of the company.

Chief Williams has stressed that the words 'carried on' in section 17*a* of the Companies Income Tax Act 1961 implies a continuous activity, and does not relate to payment made to buy off the right to sell timber elsewhere or for waiving a trade right; that the assessment of tax on this sum of £30,000 under section 17*a*

is wrong in law and without jurisdiction and he asked the Court to quash the decision of the Board and not to substitute taxation under any other section of the Act. The answer to this is that even if taxation under section 17*a* is wrong, which to my mind is not, an appeal by a tax payer under section 65 empowers the Board to consider the assessment on an overall basis.

After considering the facts of this case and the law I am clearly of the opinion that the modification of the appellants' applicants' trading agreement is a trading transaction which is incidental to their timber trade and the proceeds accruing therefrom are revenue receipts and are taxable. It is my judgement that the Board acted properly within their rights and this application must be and is hereby dismissed with costs assessed at 100 guineas.

HIGH COURT, LAGOS

1. J. O. EMONO
2. A. M. AGBANAMA
3. MICHAEL MONYE
4. ISAAC OKINASO
5. F. G. ADELAKIN
6. AMOS ISIKEYE
7. ISAAC IMU
8. TIJANI ISHOLA

.. .. .. PLAINTIFFS

v.

NIGERIA PORTS AUTHORITY .. .. DEFENDANTS

(SUIT No. LD/29/66)

[HIGH COURT, LAGOS : OLUMIDE OLUSANYA OMOLOLU, J. ; 28th November, 1966]

Misjoinder of plaintiffs—plaintiffs of different ages and served for different periods—difficulty of assessing damages.

All the plaintiffs who were riveters by trade were employees of the defendants and the appointment of each of the plaintiffs was terminated on the same day. The evidence showed that they were on different salary scales. They claimed jointly and severally against the defendants, damages for wrongful dismissal, alleging that the defendants prevented them from serving until retiring age and qualifying for a higher amount of retiring benefits or gratuity. The defendants contended that the writ was bad for misjoinder of plaintiffs.

HELD : (*i*) that to be able to assess the claim everyone of the plaintiffs should give evidence as their claim if proved would give rise to an amount of damages to be related to each claimant. That it would be impossible in the circumstance of the case for any court to assess the damages and relate the award to each claimant as the factors to be considered in relation to each individual vary much.

(*ii*) that the writ was bad for misjoinder.

Plaintiffs non-suited.

Statute and Rule referred to :—

Ports Act, Cap. 155. *Laws of Nigeria* (1958 *edition*).
Order IV, Rule 2, *High Court* (*Civil Procedure*) *Rules.*

Case referred to :—

Amachree & ors. v. Newington, 20 *N.L.R.* 13.

Somoye for the plaintiffs.

Jacobs for the defendants.

JUDGEMENT

OMOLOLU, J :—There are eight plaintiffs in this case. They are former employees of the Nigerian Ports Authority who are the defendants. On the 21st December, 1964 each of them received from the defendants a notice of termination of employment which took effect on the 1st of July, 1965 in each case.

The plaintiffs contend that none of them had reached the retiring age of 55 years at the time of the termination of their employment and as they were all medically fit to continue in the employment of the defendants they considered the termination of their appointments was wrongful and for this they claim damages. The writ of summons reads as follows :

> "The plaintiffs, jointly and severally claim from the defendants the sum of £10,000 being damages for wrongful dismissal of the plaintiffs".

The defendants did not give evidence but their learned Counsel Mr Jacobs submitted :—

1. that the writ was bad on the ground of misjoinder of plaintiffs ; and

2. in the alternative, that the claim was barred under section 97 (1) of the Ports Act.

I will deal first with the question of misjoinder as if Mr Jacobs' first submission is upheld there will be no need to consider the second submission.

Now Order 4, rule 2 which deals with this matter reads as follows :

> "where a person has jointly with other persons a ground for instituting a suit, all those other persons ought ordinarily to be made parties to the suit".

This is the rule on which the learned Counsel for the plaintiffs, Mr Somoye relied.

No doubt there are many cases within the intendment of this rule but it is now to be considered whether it contemplates a case of this kind. It is true that all the plaintiffs were employees of the defendants and that their employment in each case was terminated on the same day. That is, as far as they have a common ground of action. From the evidence it is clear that they are all on different salaries and although they are all riveters by trade they

are in different grades of craftsmanship. Furthermore the claim which they make against the defendants is for damages on the ground that the defendants have wrongfully prevented them from serving until retiring age. In other words the defendants they alleged, have prevented them from earning so much more money which they would have earned if they had stayed on till the age of 55 and secondly, the defendants have prevented them from qualifying for a higher amount of retiring benefits or gratuity since they could not now put in so many more years of service as they should have.

It seems to me that to be able to assess this claim everyone of the plaintiffs should have to give evidence as their claim, if proved, would give rise to an amount of damages to be related to each claimant. For instance the eight plaintiffs are all of different ages. The first plaintiff for instance is 53, the second is 50, the third is 53 and so on. Also the amount of years of service put in by the plaintiffs vary. First plaintiff had put in 22 years service, the second 38 years service, the third 32 years service and so on. In these circumstances it would be impossible for any court to assess the damages and relate the award to each claimant as the factors to be considered in relation to each individual vary so much. Yet the plaintiffs have claimed a round figure of £10,000 jointly and severally from the defendants ! I am of the opinion that there has been a misjoinder in this case and if any authority were required for this view it would be found in the case of *Amachree and Others v. Newington*, 20 *Nigerian Law Reports at page* 13 where Order 4, rule 2 was considered and interpreted. In that case about 10 Kalabari Chiefs who had been unlawfully detained on three occasions by the defendant who was an Administrative Officer brought a claim against him in which the Chiefs jointly claim the sum of £20,000 for false imprisonment in respect of the three unlawful detentions. At page 15 of the Report Ademola, J (as he then was) said :

> "In a case of this nature where each plaintiff alleges he suffered damage as a result of false imprisonment, I am of the view that each may sue separately in respect of the damage he suffered. I am of the opinion that Order 4 Rule 2 relating to parties does not apply in a case like this".
>
> ".....I hold the view in this case that the plaintiffs cannot all bring one suit claiming damages generally for damage suffered by each on an alleged

> false imprisonment if they can, and in my view they cannot, the summons, I hold, must show damage suffered by each and show specifically what damages each claim in respect of such damage".

For these reasons I am of the view that the plaintiffs' writ is bad and I therefore non-suit the plaintiffs with 20 guineas costs to the defendants.

HIGH COURT, LAGOS

JOHN CHARLES MICHELL .. .. .. PLAINTIFF

v.

DE FACTO WORKS LIMITED .. .. DEFENDANT

(SUIT NO. LD/63/66)

[HIGH COURT, LAGOS : G. S. SOWEMIMO, J.,
12th December, 1966]

Master and Servant—notice of termination of service—where contract of service does not provide for withdrawal of notice, notice already given cannot be withdrawn.

The plaintiff alleged that his appointment with the defendant company was wrongfully terminated. His contract of service provided for six months notice of intention to terminate the contract, by either party. The plaintiff had tried unsuccessfully to persuade the defendant company to reduce the length of notice to three months. In June 1965 the plaintiff gave the defendant company three months notice of his intention to leave their employment and the company accepted his letter of resignation but reserved to themselves the right to sue the plaintiff for not giving appropriate notice. The plaintiff alleged that he wrote another letter withdrawing his letter of June 1965 and giving six months' notice instead, but the company denied receipt of this letter. The plaintiff claimed £1,200 being damages for wrongful termination of his employment in that the company refused to allow him to serve the full period of six months notice.

HELD : that where there was no provision in the contract of service for withdrawal of notice of resignation by an employee and the employer had accepted a notice of termination of employment given by the employee, the employee cannot withdraw notice given and already accepted.

Claim dismissed.

Kushimo for the plaintiff.

Sonuga for the defendant.

JUDGEMENT

SOWEMIMO, J. :—In this claim the plaintiff is claiming £1,250 being special and general damages for breach of contract of service made between the parties and dated the 10th of July, 1963. The allegation of the plaintiff was that the defendants wrongfully terminated his appointment and refused to allow him to serve the full notice of resignation. He therefore claims special damages of £1,042-6*s*-6*d* and General damages of £207-13*s*-6*d*.

The agreement which the plaintiff relies upon is Exh. 'A' and paragraph 12 reads as follows :—

> "Six months notice of termination of service is required on either side."

Sometime in April and especially on the 29th of May, 1965, by letter Exh. 'O' the plaintiff put forward certain suggestion as regards amendment or alteration to the contracts of service agreement and paragraph 6 of Exh. 'O' reads as follows :—

> "Clause 6 of the Agreement notice period to be reduced three months on either side and on guarantee of repatriation to the U.K. at Tourist Air Passage rate for self and family on termination of employment."

The defendants did not at any time agree to the alteration as suggested by the plaintiff but the plaintiff served a notice Exh. 'D' dated 14th June, 1965 of his intention to resign within the three months of the notice. He went further to say *inter alia* :—

> "As mentioned this afternoon I would like the company to meet me half way, to bear half the cost of U.K. passages in view of my good and faithful service since I joined you in September 1962."

After this letter had been written the defendants wrote to the plaintiff accepting his letter of resignation which is Exh. 'B' but they reserved to themselves the right to sue the plaintiff for not giving the appropriate period of notice which they considered was deliberate on the plaintiff's side. It was on receipt of this letter Exh. "B" which is dated 29th June, 1965 that the plaintiff said he consulted a solicitor and as a result of what he was told he wrote a letter dated 18th June, 1965 withdrawing his letter of 14th June, 1965 and gave the defendants formal notice of six months. The defendants have denied receipt of this letter.

In order to prove receipt by the defendants that plaintiff called his steward and a former Secretary to the Company. The sum total of their evidence was to the effect that during the absence of the Managing Director in the U.K. a Mr Fashina who was acting as Managing Director was given a letter which they purported was the letter which the defendants are denying receipt of.

I have carefully considered these matters on their merits. I am satisfied that having accepted the first letter of resignation the contract in law is deemed to be at an end. There is no provision for the withdrawal of the letter of resignation sent in by the plaintiff after acceptance. The plaintiff is an intelligent individual and he well knew the contents of Exh. 'A' which in fact in April 1965 he had been asking to be amended amongst other things in order to allow three months notice to be substituted for six months. He tendered the reply he got to his letter which was to the effect that

his requests as contained in the letter of May 1965, which I referred to as Exh. 'O' would be passed on to the Board of Directors for necessary action.

It is in evidence that by the 1st of December the plaintiff had secured another employment. Whilst it is not being suggested and in any case no evidence was led to that effect that the plaintiff was anticipating this new employment when he gave his notice on the 14th of June, 1965.

I am satisfied on the evidence before me that the letter withdrawing his previous notice of resignation was never received by Mr Fashina. Even if one accepts the evidence of the Secretary called by the plaintiff as a witness it was not Fashina to whom the letter was alleged to have been delivered who gave it for copying purposes but it was another individual who did not know about the receipt who was alleged to have given the letter for copies to be made out.

On the facts therefore I hold that there is no evidence of wrongful dismissal and plaintiff's claim therefore fail. I need hardly say that I have been referred to some statement of the law on *Chitty on Contracts* and some decided cases but on the facts before me and on my findings, they are not relevant. The claim will therefore be dismissed with costs assessed at ten guineas.

HIGH COURT, LAGOS

A. O. EMODI .. .. PLAINTIFF

v.

A. A. FAWOLE
S. S. OYADIRAN
MOMODU SALISU .. .. DEFENDANTS

(SUIT NO. LD/279/66)

[HIGH COURT, LAGOS : J. I. C. TAYLOR, C.J. ;
28th NOVEMBER, 1966]

Negligence—res ipsa loquitur—apportionment of damages.

The second defendant's vehicle was at the time of the collision driven by the third defendant, and the first defendant drove his car himself. The plaintiff's car was properly parked at 76 Wakeman Street, Yaba, where he resided. The first defendant's car and the second defendant's lorry were in collision, as a result of which the plaintiff's car was damaged where it was parked.

HELD : (*i*) that if under the circumstances a vehicle in motion collided with the plaintiff's car, the *res ipsa loquitur*, and that vehicle in the absence of a satisfactory explanation would be deemed to have been negligently driven.

(*ii*) Judgement was given for the plaintiff for the sum of £300 against all three defendants in the ratio of 75 per cent payable by the first and 25 per cent by the second and third defendants.

Cases referred to :

The Koursk (1924) *All E.R.* (*Reprint*) 168.

Admiralty Commissions v. S.S. Tarquehanna (1926) *A.C.* 655.

Nicol for the plaintiff.

Impey for the first defendant.

Ogunlami for the second and third defendants.

JUDGEMENT

TAYLOR, C.J. :—The plaintiff claims from the defendants jointly and severally the sum of £535-5*s*-0*d* being damages caused to the plaintiff's taxi car No. WA 9787 by a collision which took place between the 1st defendant's car No. WAK 965 and the 2nd defendant's tipper lorry No. LB 4901, on the 10th May, 1966 at about 7.30 a.m. The 2nd defendant's vehicle was at the time of the accident driven by the 3rd defendant, and the 1st defendant drove his car on the day in question. There was no allegation made against the plaintiff as to any contributory negligence due to the manner in which the car was parked or arising in any other way nor did the evidence led at the hearing attempt to show this. In the

result I must take it that the plaintiff's car was properly parked by 76 Wakeman Street, Yaba, where the plaintiff resided.

It is clear that if under these circumstances a vehicle in motion collides with the plaintiff's car the *res ipsa loquitur*, and that vehicle in the absence of a satisfactory explanation is deemed to have been negligently driven. In the case before me I have to decide whether one or other of the defendants is guilty or whether they are both guilty of some degree of negligence.

The evidence of the only independent eye witness to the scene of the accident was that of one Mr Christopher Olatunde Segun a member of the Nigerian Bar who lives at 76 Wakeman Street and who at the material time was standing on the balcony of the house and was in a position to see the two vehicles approaching. I have no doubt that his version was the more reliable and wherever his evidence as to what happened at the scene of the accident differs from that of the 1st and 3rd defendants I accept his without any hesitation.

The 1st and the 3rd defendants were untruthful as to their speeds at the particular time, and one wonders how the accident could have taken place at all if either or both of their versions is or are accepted. The 1st defendant would have me believe that he was travelling at only 20 mph and the 3rd defendant that he, the 3rd defendant, had brought his vehicle to a dead stop before reaching the junction between Spencer and Wakeman Streets and yet the former's car could have been so catapulted that it went and hit the plaintiff's car and a tree or vice versa. Mr Segun's evidence, which I believe, with the exception of the speed at which the vehicles were travelling is to the effect that both vehicles approached the junction at some speed and neither would give way on roads of equal importance. As to the speed deposed to by Mr Segun, I have no doubt that both vehicles were travelling above 30 mph, but speed being a very difficult thing to gauge from the position in which Mr Segun was placed, he could have been in error as to the speed in mph at which the vehicles were travelling. Suffice it to say that I find they were both travelling above 30 mph and would not give way at the junction. Now, the fact that it was the near side of the rear portion of the 1st defendant's car that came into collision with the front near side bumper of the 3rd defendant's lorry shows that the 1st defendant had nearly crossed the junction when the accident took place, but this is to be expected as there was evidence that the driver of the tipper lorry had applied his brakes before the accident and in addition I believe I may take judicial notice of the fact that a saloon car would normally have a better acceleration than a tipper lorry. In

my view the fact that both vehicles would not give way at a junction on roads of equal importance is sufficient evidence of negligence on their part.

Mr Impey in his address has asked me to find that the negligence, if I so hold there was negligence, was of a several and not a joint nature, and in this respect he drew my attention to the case of *The Koursk* 1924 *A.E.R.* 168 *at* 170 in which Jill, J. whose judgement was upheld on appeal, held that :—

> "I think that the question (whether tort feasors are joint tort feasors) must always be one dependent upon the particular facts of the case. Where there are two negligent persons causing one damage I think one has to find out whether they are participating in one act or taking part in separate acts of negligence combining to produce the same damage ? I think the matter may also be fairly tested by considering what you have to plead ? If one would have to make quite separate charges of negligence against the one from those which one would have to make against the other, then one has a test whether they are both of them taking part in one act or neglect, or whether they are guilty of separate acts or neglects, which contributed to effect one damage."

The learned Judge applied the test to the case before him and held that there were two quite separate acts or neglects, which by their combined effect, caused the damage. The facts of that case shortly put were as follows :—

> The ship called the "*Koursk*" through some negligent act was allowed to get out of position in the convoy. The mistake was not corrected with the result that the "*Koursk*" came into collision with another ship the "*Clan Chisholm.*" This collision was one of the contributory causes of the "*Clan Chisholm*" colliding with a third ship the "*Itria.*" The "*Clan Chisholm*" was at fault in that being put in a dangerous situation by the "*Koursk*" she did not reverse and hence did not prevent herself from being driven against the "*Itria.*"

In the case before me the facts are different in the initial and latter stages. In the first place both vehicles were at fault in approaching a junction on roads of equal importance without either of them giving way. In the second place there is evidence given by Mr Segun whose evidence I have accepted that he saw the driver of the Taunus car, *i.e.*, the 1st defendant trying to turn

the steering of the car after the accident. This corroborates the evidence of the 1st defendant on this point that he attempted to take evasive action against some children that he saw nearby. Be that as it may I do believe that in pleading one would have to make separate charges of negligence against both defendants in that it would no doubt be alleged that the 1st defendant was further negligent in not so steering his car or applying his brakes after the accident to avoid the collision with the plaintiff's car. It was however the combined effect of the two torts that caused the damage to the plaintiff's car, the negligences were separate and distinct and independent.

Having come to this conclusion I must now proceed, though I think there is little more to be said from the above analysis of the facts, to determine on whose shoulder falls the greater liability. I have seen Exhibit "G" the photograph taken of the plaintiff's car after the impact and from the indentation on the car it is obvious that the impact must have been great. There is no evidence by the 1st defendant that he made any endeavour to apply his brakes after impact with the tipper lorry, and if I accept the evidence of Mr Segun, as I have done, that the 1st defendant's car first hit a tree and in spite of that went on to hit the plaintiff's car with such force as is evidenced by Exhibit "G" it seems to me that in failing to apply his brakes he was more at fault. The 1st defendant must therefore bear the greater share of the liability in damages.

The final issue is that of damages. To what sum is the plantiff entitled ? The plaintiff claims as follows :

	£	*s*	*d*
(*a*) Cost of repairs to plaintiff's Hillman Taxi ..	535	0	0
(*b*) Loss of earnings at the rate of £4 per day from date of accident until judgement		—	

On the first head the plaintiff admitted that the actual purchase price of the car, which was a "used" car was £250 as per Exhibit "A", and that at the time of the accident the four new tyres referred to in that exhibit were not in use on the car. Mr Nicol argues that in addition to this sum of £250 the plaintiff is entitled to the fee paid for licence and registration as part of the price of the car. Evidence was led by plaintiff's witness that it would cost £535-5*s*-0*d* to repair the vehicle, which is more than double the original purchase price of the car. In that case the measure of damage on this head is the value of the car at the time of the accident. What is the evidence as to this apart from the fact already mentioned that the car was bought for £250 on the 29th April, 1966. The

accident took place on the 10th May, 1966. Had the car depreciated in value in the previous eleven days ? There was evidence that the car was used as a taxi for part of this period of time even though the Hackney Carriage Licence, Exhibit "C" was not issued till the 9th May, 1966. I must take this fact of user into account in determining the depreciation in value of the car. The plaintiff called a Mr Taiwo Okupe, a motor car engineer to give evidence as an expert on this and other matters relating to motor cars. He gave it as his opinion under examination-in-Chief that the car which was bought as a used car on the 29th April, 1966 from Messrs Joe Allen was before the accident on the 11th May, 1966 worth between £400 and £450. Under cross-examination however after certain matters had come to light his tune was in a different pitch and admitted after being shown Exhibit "A" that :—

> "I may have over-estimated my valuation of the car when I value it at £400 to £450."

The odd thing about the evidence of this witness is that though he admitted that the car which was bought for £250 on the 29th April, 1966 was seen shortly after purchase by him, and was roadworthy and in "a driveable condition," yet it was worth £400 to £450 as the pre-accident value even though the witness said that on the 10th May, 1966, the car was in short a "very sick car" suffering from big end trouble and a locked gear box. The cause of this gearbox and big end trouble he could not truthfully say without dismantling both which he had not done. It is for the plaintiff to show, if it is part of his case, that this damage to the car was as a result of the collision. The evidence before the Court as well as Exhibit "F" the estimate of repairs to the taxi car does not bear this out and I hold that it is not proven. The proper pre-accident value of the car must therefore take into account the depreciation that must result from a locked gear box and a big end knocking. The plaintiff's witness, Mr Taiwo Okupe went on to say in cross-examination that :—

> "I would value the car before the accident, presuming it had the gearbox and big end trouble at £225. To put the engine right it would cost about £80 to £90 and the gearbox about £50."

As against this we have the evidence of the 1st defendant's witness, Mr S. O. Akinwunmi, who wrote Exhibit "H.2" to the insurers of the 1st defendant stating that a revised valuation of the car would be put at £170. After hearing the parties to this case and in particular the expert witnesses I prefer to steer a middle

course between £170 and £225. I therefore assess the pre-accident value of the car at £200.

The next head of damage is the claim for loss of use at the rate of £4 per day from the 10th May till today, the 28th November, 1966, *i.e.*, £812. The plaintiff's evidence is to the effect that the only expense chargeable to the £4 per day received or receivable by him was that of repairs to the car. His expert witness gave evidence that during this period of 203 days it is expected that the car would be taken in for servicing, etc., and that I take it must include repairs.

Mr Nicol for the plaintiff, in his address, abandoned the claim in respect of any use of the car before the issue of Exhibit "C" on the 9th May, 1966 and limited himself to a claim on this head based on the fact that the plaintiff had the legal right to use the vehicle as a taxi cab some 24 hours before the collison. In short then he was not relying on the evidence that this car had been used before the accident as a taxi cab earning £4 a day. He further argued that this was more or less a claim for general damages as his claim was unliquidated. It must be borne in mind that Mr Nicol was the last to address me and no claim was made before or even during his address to amend his claim for damages with the result that Counsel for the defendants have not had the opportunity of addressing me as they would have had, had he made an application for amendment. Mr Impey for the 1st defendant argued that the plaintiff has not shown any attempt to minimise his losses and that his impecuniosity was no excuse on this issue of special damages. Mr D. B. Coker on this issue of special damages and the measure of damages associated himself with the submission of Mr Impey.

I have already referred to the plaintiff's claim in the writ and shown that his claim under this head is an ascertainable amount and that in fact on calculation it comes to £812. It is therefore not a claim for unliquidated damages as it is ascertainable in this manner. In the Statement of Claim the plaintiff averred in paragraphs 3 and 12 as follows :—

> (3) The earnings of the plaintiff from the said Taxi was £4 (four pounds) per day at all times material to this action.
>
> (12) The said Hillman taxi has not plied for hire since 10th May, 1966 inclusive and the plaintiff has suffered loss of earnings at the rate of £4 (four pounds) per day since that date."

The plaintiff has not called the driver of the taxi car to prove the alleged arrangement for the payment by the driver to the plaintiff of this sum of £4 per day. Mr Impey cross-examined the plaintiff's expert witness and indeed the plaintiff himself as to how many miles this "used" vehicle would have to travel per day to bring in for the plaintiff a sum of £4 and also allow the driver a margin which would give him sufficient money for petrol, oil and a living. The plaintiff himself was unable to answer these questions beyond the fact that the arrangement with the driver was for the latter to pay £4 to the plaintiff daily. The rest was the driver's concern. He was in my view a material witness and no reason or excuse has been given for his not being called to give evidence.

I am not at all satisfied that the plaintiff has proved this item of damage, *i.e.*, £4 per day for 203 days and I would dismiss it. In normal circumstances that would be the end and all that would remain is for me to assess the degree of blame and liability attached to each defendant, but I must confess some uneasiness at letting the case rest on that note when on the evidence and on the law the plaintiff is entitled to something for loss of use of the taxi car for a reasonable period after the accident which in my view would be up to the time he was able to replace the taxi with another one. The cases to which reference is made at pages 336-337 in *Bingham's Motor Claims Cases* and which are reported in *Lloyds Reports* (unavailable in the Court Library) clearly show this. In the case of *Admiralty Commissions v. S.S. Tarquehanna* 1926 *AC* 655 *at* 661 Viscount Dunedin said after a review of the authorities that :—

> "My Lords I think that the result of the decisions may be stated in the following propositions :—
>
> (1) There is no difference in this matter between the position in Admiralty law and that of the common law, and the common law says that the damages due either for breach of conduct or for Tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act.
>
> (2) If there be any special damage which is attributable to the wrongful act then special damage must be averred and proved, and if proved, will be awarded.

(3) If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question.

(4) For a jury question no rigid rules or rules that apply to all cases, can be laid down, but in each set of circumstances "certain relevant considerations will arise which, were the matter before a Judge, it would be the duty of the Judge in the case to bring before the Jury."

Evidence was led by Mr Taiwo Okupe that he could have obtained a used car like the one of the plaintiff within a month and in my judgement the plaintiff should have general damages for loss of use of this vehicle as a taxi cab for one month which I would assess at £100 (one hundred pounds).

There will therefore be Judgement for the plaintiff for the sum of £300 against the 1st and 2nd and 3rd defendants in the ratio of 75 per cent payable by the 1st defendant and 25 per cent by the 2nd and 3rd defendants. In short then there will be judgement in the plaintiff's favour against the first defendant for the sum of £225 and against the 2nd and 3rd defendants in the sum of £75.

The 1st defendant having paid into Court on the 8th November, 1966, the sum of £250 shall be entitled to withdraw the sum of £25 and the balance shall be paid to the plaintiff. The 1st defendant is I believe entitled to the costs of this action in view of the payment-in which was not accepted by the plaintiff but I shall hear the parties on costs.

Mr Nicol : The difference is only £25. My out-of-pocket expenses come to £26-10*s*-10*d*. I ask for 50 guineas.

Mr Impey : In Order 27, rule 5 whereby when there is a payment made into Court without liability and the plaintiff does not accept the sum paid in the defendant is entitled to costs.

Mr Ogunlami : I leave the question of costs to the Court.

Court : The plaintiff is entitled to his costs against the 2nd and 3rd defendants which I assess at 50 guineas. I make no award against the 1st defendant on the issue of costs and in view of the negligible out-of-pocket expenses of the 1st defendant I make no award in his favour.

HIGH COURT, LAGOS

ABRICO LIMITED .. .. DEFENDANTS/APPELLANTS

v.

FEDERAL BOARD OF INLAND REVENUE .. .. PLAINTIFF/RESPONDENT

(SUIT NO. LD/87A/65)

[HIGH COURT, LAGOS: G. S. SOWEMIMO, J.; 12th December, 1966]

Tax—Accretion to capital—For purposes of assessment for income tax, "income" includes business.

The plaintiff company acquired land at Igbosere Road, Lagos, and erected a building originally intended to house some of their expatriate staff. Later they surrendered the property for acquisition by the Federal Ministry of Lagos Affairs and in this transaction they made a profit of more than £23,000. The company's memorandum included in its objects clause the acquisition and sale of property. The company had acquired some other piece of land and had intended to build thereon to house their staff but had not built at the time of the action. The defendant decided that the transaction constituted trade in land. The plaintiffs appealed to the High Court contending *inter alia* that in deciding whether a company should be assessed for income tax the court should be in a position to decide whether the assessment was based on profits earned by the company or that the transaction was an accretion to the capital of the company by way of disposal of some of its capital projects.

HELD: (*i*) that the Appeal Commissioners were right, on the facts before them in holding that in dealing with the Igbosere Road property the plaintiff company were exercising some of the powers conferred on them by their memorandum and articles, in buying and selling property;

(*ii*) that the word "trade" should be given its ordinary widest meaning. If an isolated transaction was of a commercial nature then it came within the meaning of the word "trade".

(*iii*) that in our law the definition of "income" which ought to be assessed for income tax purposes, (unlike the English definition which restricts itself to "trade or adventure in the nature of trade") our Companies Income Tax Act includes "business".

Appeal dismissed.

Statutes referred to:

Income Tax Act, 1842 (U.K.).

Income Tax Act, 1961.

Cases referred to:

California Copper Syndicate (Ltd. & Reduced) v. Harris, 5 *Tax Cases* 159.

Rutledge v. The Commissioners of Inland Revenue.

Livingstone & Others v. The Commissioners of Inland Revenue 11 *Tax Cases* 538.

Beynon & Co. Ltd. v. Ogg 7 *Tax Cases.*
Leeming v. Jones (Her Majesty Inspector of Taxes) 15 *Tax Cases* 333.
Granville Building Co. Ltd. v. Oxby (H.M. Inspector of Taxes) 35 *Tax Cases* 245.
Van Den Berghs v. Clerk 19 *Tax Cases* 390.

Chief H. O. Davies for the appellants.

Obi for the respondents.

JUDGEMENT

SOWEMIMO, J. :—This is an appeal against the judgement of the Body of Appeal Commissioners of the Federal Board of Inland Revenue given on the 28th day of July, 1965.

It would seem from the record of proceedings filed that the procedure adopted in the lower court was only to listen to argument addressed to it as to the assessment for income tax by the appellants in this case. Although the judgement was not forwarded with the records in this case but the counsel for the respondent had made a certified true copy available for my use. The main contention of Chief H. O. Davies who appeared for the appellants was that the appellants are not entitled to be charged income tax and he referred to the 6 grounds of appeal which he filed.

I must confess however, that in arguing this case Chief H. O. Davies treated all the grounds of appeal as being one. The result therefore is in deciding on the issue which had arisen as a result of the judgement of the lower court one cannot separate the argument addressed to the court on one particular ground from the argument addressed to the court on all the grounds.

Chief Davies had submitted three propositions for my consideration. That in deciding whether the company should be assessed for income tax the court should be in a position to decide whether the assessment was based on profits earned by the company or that the transaction was an accretion to capital of the company by way of disposal of some of its capital projects, referring the propositions he stated :—

(*i*) that the main objects of a company are set out in the Object Clause. It is his contention that any act done by the company which is only incidental to the execution of the main object of the company although not specifically provided for is not *ultral vires* the company and whatever profits are earned should only be treated as part of the capital of the company.

(*ii*) secondly, the mere fact that a wide range of objects had been inserted in the Object Clause of a company even if some

of the objects set out acts which are ancillary to the main object the execution of such ancillary objects are not *ultra vires* the company;

(*iii*) the third proposition which he has put forward is that where an object clause of a company can reasonably be read as incidental to the main object a court would so read it.

Having made the submission on the propositions he referred to certain cases which are English Authorities.

I would say, however, that in treating the appeal before the court whilst I am prepared to concede the fact that the English authorities are not merely of a persuasive nature but are authorities which one would dread to disagree with unless of course provisions in the law are quite different in England and Nigeria, I must say, however that as was stated by the learned counsel for the respondent in reading the provisions of the English law and the judgements based thereon one has got to take into consideration that the provision of our law is definitely more extended. I would refer to this matter later on.

My attention has been drawn to the case of *California Copper Syndicate* (*Ltd. & Reduced*) *v. Harris* reported in 5 Tax Cases page 159. The portion of the judgement on appeal in that case was to the effect that the Commissioners on the evidence furnished by the counsel of the appellant company, that the property purchased by the company was acquired with the object of being resold and by the purchase and resale of their property the company carried on an adventure or concern in the nature of trade in the meaning of the first case of Schedule D of the Income Tax Act of 1842.

The contention in that case as Chief Davies has emphasized was that in order to make an income taxable the profit must be shown to have been made as a result of a trade carried on by the company or on adventure in the nature of trade.

I will read this relevant portion of the judgement of Lord Justice Clerk :—

> "It is quite a well settled principle in dealing with questions of assessment of income tax, that where the owner of an ordinary investment choosing to realise it, and obtains a great price for it than he originally acquired it at, the enhanced prize is not profit in the sense of Schedule D of the Income Tax Act of 1842, assessable to income tax."

The learned Lord Justice went further to say :—

> "What is the line which separates the two classes of cases may be difficult to define and each case must be considered according to its facts; the question to be determined being is the sum of gain that has been made mere enhancement of value by realising a security or gain made in an operation of business in carrying out a scheme but for profit making ?"

And Justice Trayner in the same case said *inter alia* :—

> "But it was said that the profit—if it was profit—was not realised profit and therefore not taxable. I think the profit was realised. A profit is realised when the seller gets the price he has bargained for. No doubt here price took the form of fully paid shares in another company, but, if there can be no realised profit, except when that is paid in cash the shares were realisable and could have been turned into cash if the appellants had been pleased to do so. I cannot think that income tax is due or not according to the manner in which the person making the profit wishes to deal it."

I was further referred to another authority which is the case of *Rutledge v. The Commissioners of Inland Revenue.* In that case the appellant was a money lender who was also in 1920 interested in a cinema company. He had since that time been interested in various businesses. Being in Berlin in 1920 on business connected with the cinema company, he was offered an opportunity of purchasing very cheaply large quantity of toilet papers. He effected the purchase and within a short time after his return to this country sold the whole of the consignment to one person at a considerable profit. It was held in that case that the profits in question were liable to assessment to income tax Schedule D and to excess profits duty as being profits of an adventure in the nature of a trade. The argument or contention of Chief Davies was that the amount that was realised regarding the transaction in the case before the court was only an isolated transaction by the appellant and by virtue of that single transaction, the court cannot decide that by that alone the appellant was carrying on his trade. The Lord President (Clyde) said *inter alia* in his opinion

> "It is no doubt true that whether a particular adventure is in the nature of a trade or not must depend on its character and circumstances, but if—as in the present

> case—the purchase is made for no purpose except that of a resale at a profit there seems little difficulty in arriving at the conclusion that the deal was in the nature of a trade though it may be only insufficient to constitute by itself a trade. It is not difficult, on the other hand to imagine circumstances in which the question might become very narrow and in *Inland Revenue v. Livingston* I instanced such a case which may be worthwhile to expand. Suppose the appellant on the occasion of his visit to Berlin had seen a picture for sale which he admired and which he thought likely to appreciate in value in the course of years; he might buy it—and might be conclusively influenced to buy it—because of an anticipated rise in its value. After using it to embellish his own house for a time he might sell it if the anticipated appreciation in value ultimately realises itself. In such a case, I pointed out that it might be impossible to affirm that the purchase and sale constituted an adventure in the nature of trade although again the crisis of judgement might turn in the particular circumstances."

My attention was also drawn to the case which I had already referred to *Livingston and Others v. The Commissioners of Inland Revenue* reported in 11 Tax Cases page 538 and I refer in this respect to this pertinent portion of the judgement of Lord President (Clyde) which reads as follows :—

> "The trade of a dealer necessarily consists of a course of dealing, either dealing actually engaged in or at any rate contemplated and intended to continue. This principle is difficult to apply to adventures of a more complex character such as that with which the present case is concerned, I think the test which must be used to determine whether a venture such as we are now considering is or is not in the nature of a trade is whether the operations involved in it are of the same kind and carried on in the same way as those which the venture was made. If they are, I do not see why the venture should not be regarded as in the nature of a trade, merely because it was a single venture which took only three minutes to complete."

And Lord Sands in a concurrent judgement stated as follows :—

> "In the present case there was an isolated purchase of an ***unum quid*** and an isolated sub-sale and accordingly

> the transaction does not come within the category covered by the cases cited, but is this consideration necessarily conclusive ? I am disposed to think that there may be, that the subject of purchase and sale may be so treated in interval as to bring the transaction within the category of carrying on a trade. I do not think that merely putting the article in question in a suitable condition for favourable sale would necessarily have this effect as for example having a picture cleaned or a ship's boilers cleaned and the hall repainted. I am disposed to think that it would introduce the elements of carrying on a trade if the purchaser were by himself or his own employees or by a contractor to carry through a manufacturing process which changed the character of the article. An illustration might be the purchasing of a quantity of peak iron and having it manufactured into steel or of gold bearing ore and having the gold extracted by milling the ore".

It would seem therefore although I have earlier on referred to the fact that Chief Davies had dealt with all the grounds or appeal in a lump way he was actually dealing with the first ground of appeal. I intend therefore in further considering all the contentions made by counsel for the appellant to treat this matter as if the grounds of appeal had been argued separately.

The first ground of appeal is that "The Appeal Commissioners applied the wrong test in law due to a misunderstanding of the word trade in the Income Tax Act, 1961".

In support of this I was referred to page 8 of the judgement of the Commissioners where they held *inter alia* :—

> "Having thus held that the appellant is acting *intra vires* in holding this land at Igbosere Road and in dealing with it by selling it to the Ministry of Lagos Affairs, we come next to consider whether a single sale of this nature resulting in a profit, could be regarded as a trade or an adventure in the nature of a trade so as to bring the profit realised within the ambit of section 17 (*a*) of the Income Tax Act 1961.
>
> There is no definition given in the Income Tax Act, 1961 as to the meaning of trade or business but we are satisfied from the cases cited particularly *California Copper Syndicate Ltd. v. Harris* 5 *Tax Cases page* 165,

Beynon & Co. Ltd. v. OGG 7 *Tax Cases and A & E Investment Trust Ltd. v. CIT Case No.* 31 *Volume* 2 *Part* 2, that in an appropriate case or cases one single transaction can constitute trade.

We appreciate the definition quoted by counsel for the appellant from the Shorter Oxford Dictionary which attaches the phrase '*habitually carried on*' to the word '*trade*' but the remarks of many learned judges as to the interpretation of the word trade in the several cases cited before us are such that in our opinion this dictionary meaning of trade cannot carry the same weight as the pronouncements of these learned judges. We do not agree therefore with the appellant's contention that because it was the first and only occasion that the company sold a property no trade in land was carried out."

In fairness to the Commissioners who heard the appeal, it was proved before them that although the appellant had alleged that the Igbosere property was acquired and built for accommodating members of its staff, it was later sold to the Ministry of Lagos Affairs and another land acquired along Ijora Causeway for this purpose but no building was ever erected for the purpose of housing its staff. So that in considering this appeal, the Body of Commissioners of Inland Revenue felt that the profit which was realised as a result of the transaction could not be part of the capital of the Appellant's company so long as in selling the property it was carrying on part of the object clause 2D and 2 (1) of appellant's Memorandum and Articles of Association.

In argument it had been stated that it was with some reluctance that the appellants surrendered the property for acquisition by the Federal Ministry of Lagos Affairs with a profit of over £23,000 but it has never been proved in this Court except by the *ipsa dixit* of the counsel for the appellant that the property was meant to house members of the appellant's staff. It has also been urged that but for the intervention of the Chief Justice of Nigeria the property could not have been disposed of by the appellants. I think in fairness to the Commissioners there was no evidence whatsoever that the Chief Justice of Nigeria played any part whatsoever in forcing or influencing the appellants to sell their property at a profit to the Federal Government. I am confirmed in my view by the very fact that at one stage of the negotiation when it would seem the Federal Government was no longer interested it was the appellant company who wrote urging the Federal Government to complete negotiation on the sale of the property.

With regard to the question, therefore, of whether the Commissioners had applied the right test in this case I have been referred to the case of *Leeming v. Jones (Her Majesty Inspector of Taxes)* 15 *Tax Cases page* 333. I have been referred to this portion of the judgement of Lord Buckmaster where he stated *inter alia* :—

> "Lord Justice Lawrence appears to me to have accurately stated the difficulty in the appellant's way in the following words 'It seems to me in the case of an isolated transaction of purchase and resale of property there is really no middle course open. It is either an adventure in the nature of trade or else it is a case simply of sale and resale of property.' To that proposition I can see no adequate answer. For that reason and those I have given I think the appeal must fail."

Viscount Dunedin in the same case stated *inter alia* :—

> "With reference to the dictum which I have just referred to in the judgement of Lord Buckmaster it was sought to assail this dictum by quoting *Cooper v. Stubbs* 1925, 2 *K.B.* 753, where there was a finding as here that no trade had been carried on and yet the tax was imposed but the answer is simple, the whole point of *Cooper v. Stubbs* was that the transaction was not an isolated transaction. Lord Justice Warrington says that the transactions extended over a considerable period of years and Lord Justice Atkin says that the annual profit or gain must be something which is in the nature of revenue or income and he points out that the transaction in that case had been going on for eight years running. The last argument of the counsel for the Crown was that there was a finding that the respondent never meant to hold the land but as an investment. The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of a trade in respect of his investments but perhaps it leads to no conclusion whatever."

Chief Davies's further contentions are set out in grounds 2, 3 and 4 of the additional grounds of appeal. In ground 2 he contended that the appeal Commissioners erred in fact and in law when they said :—

> "We are satisfied that although the sale is an isolated transaction it nevertheless constitutes part of the trading activities of the appellant company."

The evidence before them was that the building was erected for the purpose of housing the expatriate staff of the appellant company. As the Appeal Commissioners quite rightly stated in their judgement at page 1 of the records which reads as follows :—

> "Appellant contended that the building was erected originally to provide accommodation for the company's expatriate staff who between 1961 and 1962 numbered from 11 to 18. It was intended to accommodate about 10 of these employees in the building.
>
> During the development of the site, in fact, on the 28th July, 1961, (Exh. R) Appellant was allocated approximately 2 acres of land for industrial purposes on the Ijora Causeway (Plot No. 5c). It was then considered more expedient for the purposes of the business of the appellant to develop the plot at Ijora Causeway having flats on top and workshops below. This was considered more satisfactory for the staff as they would then be nearer their place of work rather than having to live at Igbosere Road. But appellant had not proceeded with development of the Ijora site because of certain restrictions placed on the building of residential flats by the Lagos Town Council and the L.E.D.B., restrictions which the appellant felt could be overcome in the long run as other developers in the same area had done, *e.g.*, Hassan Transport Ltd. and G. Cappa Ltd."
>
> "Exhibits J and M were also tendered in which appellant Accountants wrote to the respondent stating that the Igbosere Road buildings became surplus to the requirements of the appellants and that the sale of the property was an isolated transaction"

It is apparent that the finding of fact was that by the evidence of the appellants themselves as shown in the statement of accounts submitted by their Accountants at the time the transaction for the sale of Igbosere Road was being made it was already considered surplus to the requirements of the appellants. I have been referred by Chief Davies to several English authorities but one would discover as I earlier remarked that in determining whether an isolated act constitutes a trade depends on the peculiar circumstances of that act. I do not see how the Appeal Commissioners erred in law when the appellants themselves had decided to sell the property at Igbosere Road and which they had power to do under their Memorandum of Association having considered it

surplus to their needs. I do not think there is any substance in the contention on this ground. I need hardly refer to the series of authorities to which my attention has been drawn. They have been of great help to me in determining the point of law which had been raised. Each case as one reads it depends on its peculiar facts.

In ground 3 Chief Davies contended that the Appeal Commissioners erred in law in inferring from Objects 2D and 2 (1) of the Memorandum and Articles of Association of the Appellant company that by selling Igbosere Road property they were carrying on their normal activity or transaction. I hold that the Appeal Commissioners were right on the facts before them that in dealing with the Igbosere Road property the appellant company were exercising some of the powers conferred on them in building and selling properties.

On the 4th ground Chief Davies has contended that the Commissioners erred in law when they stated as follows :—

> "We are further strengthened in our view by the fact that on the receipt of the proceeds of sale no development of the Ijora Causeway Plot to provide for alternative staff accommodation was undertaken by the appellant. On the contrary the evidence before us show that the proceeds of sale went to swell the appellant's working capital."

I have not been shown how the Appeal Commissioners had erred in law in respect of this finding. I must confess that the whole of the argument of Chief Davies was based on the first ground of appeal and no more.

In reply Mr Obi for the Respondent submitted that the main contention in this case is one based on legal grounds. He referred to the facts before the court with respect to the Igbosere Building, how the land was acquired, building erected and later sold to the Government. In determining therefore the income, considerations are always given to the following :—

(1) Nature of assets ;

(2) Circumstances of purchase ;

(3) Vocation of the tax payer ;

(4) The number of like transactions ;

(5) The Object Clause of the Memorandum and Articles of Association ;

(6) The length of time property was held by the company ; and

(7) The circumstances of the sale.

It is his contention that in determining the income assessed to be in respect of a particular transaction different considerations apply whether the income had been derived by an individual or a company. He referred to 2 cases as supporting his contention.

He first referred to the case of *Harvey v. Caulcott* 33 *Tax Cases page* 159 and referred to pages 164 and 165. The relevant portions of which read as follows :—

> "Accordingly, it is not surprising to find the Commissioners saying that they accepted the evidence of the Appellant in this respect, and that of his solicitor. The intention to hold these two properties as an investment being accepted by the Commissioners, and the facts showing that the intention was implemented, how can the subsequent profit on the sale be charged to Income Tax ? Only, of course, by showing that before the sale something had happened or had been done which made these shops trading stock of the Appellant's business. There was no proof of any such fact before the Commissioners."

> "Such a case as the present is always coloured by the fact that the man is a builder. That no doubt puts a peculiar onus on him, to show that the profit from the sale of some property is profit from an investment, or profit from something which is not trading stock. That onus is not incapable of discharge, and here I think the Appellant did discharge it."

He referred next to the case of *Granville Building Company Ltd. v. Oxby* (*H.M. Inspector of Taxes*) 35 *Tax Cases page* 245 and referred to the portion of the judgement at page 250. The portion of the judgement of Mr Justice Hamman is as follows :—

> "The appeal was based on that state of facts and on testimony by the auditor that it was made clear to him that the directors had always considered the two houses as an investment and not as part of the Company's stock-in-trade. The Commissioners refrain from saying whether they accept or do not accept that evidence. They may well have accepted what the auditor was told in 1942, but again that is the fact that the houses had

> appeared as ordinary parts of the stock-in-trade of the Company for four years previously. This again, as I say, is a question of fact for the Commissioners, and it is said that, if they accepted the view that it had always been the intention of the Company to treat these houses as an investment, that is a basis which did not allow them to conclude that these were part of the stock-in-trade of the Company which the Company were turning to account in the ordinary way."
>
> "Reliance was placed on the case of *Harvey v. Caulcott*, 33 T.C. 159, where a builder built a dozen shops, transferred half of them to his private account, and sold the rest in the ordinary course of his business. Donovan, J. held that there was nothing to prevent a man conducting his affairs like that and that, if the Commissioners (as they appear to have done) accepted that view, they were bound to come to the conclusion that those properties were the man's investments and not part of his stock-in-trade."

He contended further that all the cases cited by Chief Davies with the exception of 2 concerned only individuals and if his submission is correct for income tax purposes individuals should be treated differently from companies, then of course only those two cases which dealt with Limited Liability Companies should be taken into consideration when considering the argument of Chief Davies.

Income is not defined in our local Act or in the English Act and in determining what an income is Mr Obi contended that one has to refer to what an Accountant refers to as income in a statement of account and he refers to the case of *Van Den Berghs v. Clerk* 19 *Tax Cases* 390, a portion of the judgement reads as follows :—

> "My Lords, the problem of discriminating between an income receipt and a capital receipt and between an income disbursement and a capital disbursement is one which in recent years has frequently engaged your Lordships' attention. In general the distinction is well recognised and easily applied, but from time to time cases arise where the item lies on the borderline and the task of assigning it to income or to capital becomes one of much refinement, as the decisions show. The Income Tax Acts nowhere define "income" any more than the define "capital", they describe sources of income and prescribe methods of computing income, but what

> constitutes income they discreetly refrain from saying. Nor do they define "profits or gains" while as for "trade" the "interpretation" section of the 1918 Act (section 237) only informs us, with a fine disregard of logic, that it "includes every trade, manufacture, adventure or concern in the "nature". Consequently it is to the decided cases that one must go in search of light. While each case is found to turn upon its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of consideration which may relevantly be borne in mind in approaching the problem."

Reference was made to an earlier case of the *California Copper Company v. Harris* 5 Tax Cases. In his submission Mr Obi contended that the amount realised by the appellant in selling the Igbosere Road property to the Ministry of Lagos Affairs should be regarded as income and therefore subject to tax. I quite agree that in determining the word trade it should be given its ordinary meaning where the Act does not restrict such meanings. In this case I agree with the Appeal Commissioners that the word trade should be given its ordinary widest meaning. If an isolated transaction is of a commercial nature then it comes within the meaning of the word trade. In our definition of income which ought to be assessed for income tax purposes unlike the English definition which restricts itself to trade or adventure in the nature of trade business is included in our own Act. It then reinforces the conclusions of the Appeal Commissioners that the transaction which forms the subject matter of this appeal must be regarded as a transaction in which the appellants were entitled to carry out as an ordinary business transaction covered by its Memorandum and Articles of Association. I have been referred to two East African cases which deal with the meaning of income and the provisions of the law in the two East African cases showed that the Acts which those courts were considering were similarly worded like our local Acts. In the circumstances, therefore, I hold that this appeal must fail. It is therefore dismissed with costs assessed at ten guineas.

HIGH COURT, LAGOS

1. J. A. O. ORIKU .. ..
2. A. E. OTTU .. ..
3. H. H. S. CHINWO (For themselves and as trustees of the Nigeria Oil, Chemical & Allied Workers' Union) .. PLAINTIFFS

v.

1. REGISTRAR OF TRADE UNIONS
2. SHELL B.P. PETROLEUM CO. OF NIGERIA LTD. .. ..
3. MESSRS : C. A. IGWE .. ..
   M. G. DABIRI ..
   C. M. I. EGOLE ..
   (As representatives of Shell B.P. and Allied Workers' Union) .. .. .. DEFENDANTS

(SUIT NO. LD/264/1966)

[HIGH COURT, LAGOS : O. O. OMOLOLU, J. ;
19th December, 1966]

Trade Union—amalgamation—right to dissolve amalgamation—fresh registration after dissolution.

HELD : (*i*) That there is nothing in section 23 of the Trade Union Act and Rule 15 of the Trade Unions Registration Rules to prevent any of the constituent trade unions forming an amalgamation from seceding at any time provided due notice has been given to the rest of the amalgamation ; that this is the only natural and fair interpretation of the concept of amalgamation which is based on voluntary agreement although no method is prescribed in our law, in the rules or in the constitution of the amalgamated unions for its dissolution.

(*ii*) that the right of free association is fundamental and entails free dissolution.

(*iii*) that it is not necessary after the dissolution for any of the constituent unions to register afresh as a trade union apart from a formal letter notifying the Registrar of Trade Unions of the fact that it has seceded from the amalgamation.

(*The facts appear in the judgement—refer also to the ruling in the same case given on* 12-7-66 *by the same Judge*)

K. O. Adeniji for the first defendant.

Agwu for the second defendants.

Kunle Oyero for the third to fifth defendants.

JUDGEMENT

OMOLOLU, J. :—In a writ of summons dated 1st June, 1966, the plaintiffs claim against the defendants as follows :—

I. A declaration

(1) that the Nigeria Oil, Chemical and Allied Workers' Union whose registered office is situate at No. 97 Herbert Macaulay Street, Ebute Metta, is the only legally registered Trade Union entitled to represent all the employees of Shell B.P. throughout Nigeria and to negotiate on their behalf with the management.

(2) that the purported certificate of recognition issued to the 3rd defendants as representatives of Shell B.P. and Allied Workers' Union by the 1st defendant is invalid.

II. An injunction

(1) restraining the 1st and 2nd defendants from holding any plebiscite or any meeting at all with the representatives of the Shell B.P. and Allied Workers' Union as represented by the 3rd defendants or recognising the 3rd defendants as a registered Trade Union.

A few days later the plaintiffs brought an application for an interim injunction against the defendants in accordance with their writ of summons and in the Ruling of this court dated 4th of July, 1966 the application was refused and pleadings were ordered. The court indicated that it would be prepared to give the case an expedited hearing during the last court vacation in September, if possible, but for various reasons mainly due to applications for adjournments by counsel because their witnesses could not travel to Lagos from the Eastern Region during the recent disturbances, the hearing of the substantive action which took five days was not concluded until 9th November.

The facts as I find them may be summarised as follows :

There were originally four registered Trade Unions which claimed to represent workers in the Petroleum Industry in Nigeria. These were :

(1) The Shell B.P. and Allied Workers' Union ;

(2) The Consolidated Petroleum Workers' Union of Nigeria and Cameroons,

(3) The Union of Shell Operatives ; and

(4) The Texaco African Workers Union.

Sometime in October 1962 an agreement was reached by the representatives of these four Unions that they should amalgamate and form themselves into one Trade Union to be known as the Nigerian Oil Chemical and Allied Workers Union (hereafter called NOCAWU). The various requirements of the Trade Union Act Cap. 200 were complied with and the amalgamation was formally registered. Of the four Unions which formed the amalgamation the Shell B.P. and Allied Workers' Union (hereafter called SAWU) appeared to be the strongest and the largest. Even from the beginning considerable doubts and reluctance appeared to attend the deliberations of SAWU as to whether or not to join the amalgamation. This is revealed from various entries in the Minutes Book (Exhibit Z) of SAWU during the period. There is no doubt, however, that its Executive Committee agreed although it is the part of the case of the 3rd to the 5th defendants that their President rushed them into joining the amalgamation that he had not their authority to do so, and as such it was not genuine.

After the amalgamation an Inaugural Conference of NOCAWU was held in Port Harcourt on the 13th and 14th October, 1962 at which a Draft Constitution for NOCAWU was adopted. This was done by resolution which was carried unanimously. In the election of officers which followed later that day the following were appointed :

President	Mr G. C. Okonta
Vice President	Mr J. A. O. Ubiku (1st plaintiff)
Financial Secretary	Mr T. D. Okafor
Treasurer	Mr O. A. Udenze

One of the ex-officio members of the Executive Council was Mr C. Igwe, the third defendant.

Mr A. E. Ottu the 2nd plaintiff was appointed the General Secretary and Mr C. M. Egole the 5th defendant was appointed the Assistant General Secretary.

Having formally inaugurated NOCAWU the organisers filled the Form N as they are required to do by the Trade Unions Act which they despatched to the Registrar attaching a copy of the agreement which set out the terms upon which the amalgamation was effected (Exhibits B and B1).

The fact of amalgamation was duly communicated to the 2nd defendants who gave NOCAWU their formal recognition. By series of correspondence which were tendered it appears NOCAWU enjoyed this recognition for some time until the 2nd defendants started to have doubts about the support which NOCAWU enjoyed among their workers. During the time it enjoyed the recognition of the 2nd defendants, NOCAWU negotiated the Collective Agreement Exhibit F with the 2nd defendants on behalf of all their workers. This Collective Agreement is the document which sets out the conditions of employment and regulations of all the workers in the Industry represented by NOCAWU and the duration of the agreement would be for two years commencing from 22nd December, 1964 to 21st December, 1966.

Another conference of NOCAWU was held in Benin on the 19th and 20th September, 1964. Certain elements who were mainly delegates of SAWU were among those present at the Conference. They apparently became unruly and the Conference suspended them indefinitely whereupon they walked out of the Conference. These delegates later met and decided to revive their own separate Trade Union. In other words they decided to break away from the amalgamation.

They had many reasons for this. They thought that NOCAWU did not present a very effective machinery for negotiation. For instance, during the only year that NOCAWU represented all the workers, they had no Christmas Bonus whereas the workers had enjoyed this bonus before NOCAWU existed. Secondly, they were disgusted with the weak front presented by NOCAWU at the time of the general strike when at first NOCAWU decided not to join and it was only at the last minute that they joined the general body of workers. Thirdly, it was said that NOCAWU did not press the 2nd defendants to give the workers the Morgan Award which was recommended by Justice Morgan in his Report and which the Government had accepted and recommended all private employers to pay. Finally, these delegates of SAWU were naturally peeved and annoyed at the treatment they received at Benin Conference from which they were suspended.

As already stated these delegates met and decided to secede from amalgamation and a letter to the conference in session notifying them of this intention was written (Exhibit AA). The news was also published in two newspapers of the 6th and 9th November, 1964. In general I find that the intention of the 3rd to the 5th defendants to secede from the amalgamation was brought to the knowledge of the plaintiffs.

The next stage is that SAWU had an Inaugural Meeting as a result of which they applied to the 1st defendant for registration as a Trade Union to be called *Shell B.P. and Associated Workers' Union.* This application was refused in the following letter written by the 1st defendant :

"MINISTRY OF LABOUR"
"No. TU. 1682/23"
"Office of the Registrar of Trade Unions
34/36 Ikoyi Road,
Lagos, Nigeria.
4th March, 1966.

"The General Secretary,
Shell-BP & Associated Workers' Union,
c/o C. A. Igweh Esq.,
Obia Postal Agency,
Via Port Harcourt,
Nigeria.

Dear Sir,

Shell-BP & Associated Workers' Union

With reference to your application dated 3rd October, 1964 for registration of the above-named union, I regret I am unable to register it on the ground that such registration will contravene the provisions of Section 15 (*e*) of the Trade Unions Act since the Shell-BP and Allied Workers' Union is by law an existing trade union and bears a name so nearly resembling the name of your union as to be likely to deceive the members or the public.

I have the honour to be,
Sir,
Your Obedient Servant,
(*Sgd*) D. S. COKER,
Ag. Registrar of Trade Unions."

The 3rd to the 5th defendants were in effect informed that their original Union, SAWU, was still an existing Trade Union. At a mass meeting on 8th February, 1966, a resolution was passed to revive SAWU. Thereupon they applied to the 2nd defendants for recognition.

In the meantime another Registrar of Trade Unions had taken office, one Mr J. A. A. Ogun whose opinion on the meaning of the amalgamation differed from that of Registrar Coker. The effect

of Registrar Ogun's opinion was that having amalgamated it was not possible for SAWU to apply to exist separately as there had been complete dissolution of all the activities of the original Constituent Unions forming the amalgamation. Registrar Ogun advised the 3rd to the 5th defendants to fill Form M to show dissolution of SAWU but the 3rd to the 5th defendants refused as they did not wish to have anything more to do with NOCAWU.

At this stage the 2nd defendants themselves had a dilemma as to which of the two organisations—NOCAWU (which they had recognised) and SAWU (which appeared to have support of the majority of the workers)—to recognise. SAWU was pressing the 2nd defendants for recognition. The 2nd defendants applied to 1st defendant for a clarification of the legal position but all they obtained were the two conflicting opinions of the two Registrars.

In order to avert industrial action or in other words a strike action threatened by SAWU due to delay in their recognition by the 2nd defendants, the latter invited an Industrial Commissioner, one Mr Adio Moses of Federal Ministry of Labour to intervene. As a result of this intervention a plebiscite was to be held among all the workers to test the popularity and support enjoyed by NOCAWU on the one hand and SAWU on the other hand.

NOCAWU refused to participate in this plebiscite and it will be observed that their writ of summons in this case contains an application for an interim injunction to restrain the 2nd defendants from having this plebiscite which was fixed for 3rd June, 1966. Between the date of filing of the summons and the date of hearing however, the plebiscite was held. Out of 1,700 votes, 1,682 were in favour of SAWU ; in other words, 82 per cent votes. In the meantime the 2nd defendants are waiting for the result of this case to decide which of the two bodies they should recognise as representing the workers and with which they should negotiate a new collective agreement due on 22nd December, 1966.

These are the facts in brief as shown from the evidence.

The learned Counsel for the parties are as follows :

Mr K. O. Adeniji for the plaintiffs
Mr D. S. Coker for the 1st defendant
Mr Awgu for the 2nd defendants ; and
Mr Kunle Oyero for the 3rd to the 5th defendants.

The first important question to decide is that of jurisdiction. Learned Counsel Mr Oyero raised the question of jurisdiction with reference to section 9 (1*d*) of the Trade Unions Act and the Agree-

ment to amalgamate Exhibits B and B1. I have sufficiently dealt with this matter in my Ruling of 4th July when I expressed the view that the prohibition contained in section 9 could not apply to any agreement made with a view to amalgamation.

Next is the question of Amalgamation. Learned counsel Mr Adeniji submitted there was, that it was recognised by the 2nd defendants that the amalgamation still existed and that in the circumstances the revival of SAWU was illegal and ultra-vires. He also invited the court to apply the "presumption of regularity" in complying with the requirements of the Registrar and finally submitted that in view of the recognition already given by the 2nd defendants to NOCAWU, the doctrine of estoppel now forbad the 2nd defendants from refusing to recognise NOCAWU.

On the other hand learned counsel Mr Oyero, submitted that there had been no amalgamation—

(1) because section 23 of the Trade Union Act had not been complied with ;

(2) because President Okonta of SAWU who signed the Agreement to amalgamate on behalf of NOCAWU did so without authority from his Executive Council ;

(3) and because Form N has not been complied with as required by Rule 15 of the Trade Unions Registration Rules set out in the 2nd Schedule to the Trade Unions Act Cap. 200.
Now section 23 of the Trade Union Act provides as follows :

> "23. Any two or more registered trade unions may, by the consent of not less than two-thirds of the members of each or every such registered trade union, become amalgamated together as one trade union with or without any dissolution or division of the funds of such trade unions, or either or any of them ; but no amalgamation shall prejudice any right of a creditor of either or any union party thereto."

And Rule 15 of the Trade Unions Registration Rules provides as follows :

> "When two or more registered trade unions become amalgamated together, notice shall be given as in Form N in the appendix, accompanied by statutory declarations from each such trade union as in Form O in the appendix,

> and the Registrar shall return to the amalgamated trade union one copy of the notice, endorsed with the word "registered" and duly authenticated."

I have examined Exhibits B and B1 and I am satisfied that they complied with the requirements of the above Statutory Provisions.

Having decided that this court has jurisdiction to entertain the suit and that there was indeed amalgamation of all the four original Trade Unions it is now necessary to decide whether SAWU had a right to secede and what, if any, was the effect of such secession.

Unfortunately there are practically no authorities on this subject and as I have said the 1st defendant, the Registrar of the Trade Unions did not help the issue by giving conflicting opinions to the parties. The Draft Constitution of NOCAWU to which one could turn in such circumstances, apart from the casual reference in its rule 11 (*f*), also failed to mention anything about secession or dissolution of the amalgamation. The court therefore has had no guidance from the parties themselves.

It is my view that there is nothing preventing any of the Constituent Trade Unions forming an amalgamation from seceding at any time provided due notice has been given to the rest of the amalgamation. This is the only natural and fair way of interpreting the conception of amalgamation. SAWU was therefore perfectly entitled to secede from NOCAWU in the way it did. All that was necessary was that due notice be given to NOCAWU which was done, to Registrar of Trade Unions which was done and to the 2nd defendants which was done.

I do not think it was necessary for SAWU to apply for registration again as a Trade Union apart from a formal letter notifying the Registrar of the fact that it has seceded from the Amalgamation.

In holding that SAWU had a right to secede I consider that the conception of Amalgamation itself is based on a voluntary agreement although no method is prescribed either in our law or in the rules of the Amalgamation for its dissolution. I consider that nothing can be more in conformity with the rules of natural justice than that any of the Constituent Unions should be able to secede voluntarily. There is also the fact that the right of free association is fundamental and this entails free dissolution. Furthermore it seems to me that Mr Adeniji's submission that secession is illegal and ultra-vires would be against all rules of fairness and justice.

I do not agree with Mr Adeniji that SAWU became an illegal body by seceding. In my view it only regained its independent

existence which had temporarily been surrendered or "put in cold storage" during the Amalgamation. SAWU was a registered Trade Union before the Amalgamation and still holds its certificate of registration. It was at no time an illegal body.

In the alternative, that is if I am wrong in my view about the legality of SAWU's secession, this court would not make an order which it could not enforce. I have sufficient evidence that SAWU as an independent Trade Union enjoys overwhelming support of the workers. Having found that all the legal requirements have been complied with I would refuse to grant Mr Adeniji's request.

As a result of this decision the 2nd defendants were therefore perfectly entitled to recognise SAWU and to negotiate with them over the plebiscite which eventually turned out to be in favour of SAWU.

The Order of this court shall be that declarations sought by the plaintiffs in their writ of summons are refused.

Before I deal with the question of costs I wish to say that in future where the Registrar of Trade Unions is in doubt about any point of law or where he is faced with conflicting opinions it would be desirable for him to contact the Solicitor-General for advice. Much of the trouble in this case has been caused by the conflicting opinions coming out of the office of the Registrar of Trade Unions and no attempt was made by him to inform his correspondents that he was seeking opinion from a higher level. If he had done that perhaps much of the costs in this matter could have been saved. For this reason I will make no order as to costs to the 1st defendants. The 2nd defendants as well as the 3rd to the 5th defendants are entitled to their costs of this action.