



WESTERN NIGERIA

REPORTS

of Cases decided in

THE FEDERAL SUPREME COURT

(on appeal from the High Court of Western Nigeria)

AND

THE HIGH COURT OF
WESTERN NIGERIA :

1961

[To be cited as (1961) W.N.L.R.]

EDITED BY

THE COMMITTEE FOR LAW REPORTING, WESTERN NIGERIA

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THE QUEEN

v.

CHIGBATA OLISE

[HIGH COURT OF JUSTICE: Adeyinka Morgan, J., 26th April, 1960.]

*Criminal Law and Procedure—*injection of poison by a person untrained in medical science resulting in death—charge for manslaughter contrary to section 325 of the Criminal Code, Cap. 42—charges for possession of poison for illegal purpose, contrary to section 59 of the Pharmacy Ordinance, Cap. 169 and for injection by unqualified person to whom licence has not been given, contrary to section 34 (1) of the Medical Practitioners and Dentists Ordinance, Cap. 130.

The accused was indicted before the Warri High Court on three counts, namely, manslaughter of one Justina Onwuzulike contrary to section 325 of the Criminal Code, Cap. 42; being in possession of poisonous matter without lawful authority contrary to section 59 of the Pharmacy Ordinance, Cap. 169; and giving injection of a drug into the skin of the said Justina Onwuzulike the accused not being a qualified person to whom a licence had been given for that purpose, contrary to section 34 (1) of the Medical Practitioners and Dentists Ordinance, Cap. 130. The deceased and her husband had approached the accused on 29th August, 1959, to ask if he could treat the deceased who had complained of chest or heart disease. The accused agreed to treat the deceased for a fee of £9 17s 3d, £6 of which he was paid in advance. After the husband had left the deceased with the accused, the latter attempted to give the woman an injection at the back of her hand using a hypodermic syringe and needle but when this was unsuccessful he gave her the injection in the area of her shoulder. The woman died later that evening and when the accused was subsequently asked by a Councillor in the area whether he treated the woman, the accused admitted giving the deceased an injection and said that he was a doctor. According to the doctor who later performed the post mortem examination, the woman had died of acute poisoning from a drug injected into the body. When the accused's house was searched a number of poisons in Part III of the First Schedule to the Pharmacy Ordinance were found. The accused admitted that the poisons were found in his house but said that they were put there by the deceased's people and he denied giving the deceased any injection. The accused did not give any evidence that he was licensed under the Medical Practitioners and Dentists Ordinance or that he had any lawful authority to possess the poisons.

Held: (1) that since the accused had not shown that he had lawful authority to be in possession of poisonous materials he was guilty of being in possession of them for unlawful purpose;

(2) that if a person without medical training takes on himself to administer medicine which may have dangerous effect and such medicine destroys the life of the person to whom it is administered it is manslaughter; that in this case the act of the accused, a person untrained in medical science, in injecting drugs into the deceased in a dose which resulted in acute poisoning was an act of recklessness and the accused was therefore guilty of manslaughter.

Accused found guilty on all the counts.

Cases cited:

R. v. Abengowe, 3 W.A.C.A. 85

R. v. Oshimi, 1955-56 W.R.N.L.R. 52.

R. v. Nwokocha, 12 W.A.C.A. 453.

R. v. Williamson, 3 C. & P. 635.

R. v. Spiller, 5 C. & P. 333.

R. v. Bateman, (1925) L.J. (K.B.) 791.

Hudson v. Viney, [1921] 1Ch. 98.

R. v. Simpson, 1 Lew 172.

Warri Criminal Case No. W/26c/1960.

Ogbobine, for the accused.

Bada, *Crown Counsel*, for the Crown.

Adeyinka Morgan, J.: The prisoner, Chigbata Olise, is standing trial on three counts. The first charges him with the unlawful killing of Justina Onwuzulike on or about the 29th August, 1959 at Ojobo Village contrary to section 317 and punishable under section 325 of the Criminal Code. In count 2 he is charged with having poisonous matter in his possession without lawful authority; to wit, twenty Isoniazid tablets, with intent to use them for an illegal purpose contrary to section 59 of the Pharmacy Ordinance, Cap. 169 of the Laws of Nigeria. Finally, in count 3, he is charged with having given an injection of a drug into the skin of Justina Onwuzulike although he was not a qualified person to whom a licence for that purpose had been given, and committed an offence contrary to section 34 (1) and punishable under section 34 (2) of the Medical Practitioners and Dentists Ordinance, Cap. 130 of the Laws of Nigeria.

Six witnesses were called in support of the case for the Crown and the facts adduced in evidence to court are these.

On the 29th August 1959 the accused went to Ojobo market from Ekeremo and lodged in the house of the fourth prosecution witness, Chukuma Ezeudo. He was introduced to the fifth prosecution witness, Christopher Onwuzulike and told him that he was a doctor.

In the evening the fifth prosecution witness and his wife Justina went to see the accused in the house of the fourth prosecution witness where he lodged. They told him that the woman had a chest or heart complaint and asked him if he could treat it. The accused said that he would examine the woman first. He charged and was paid the sum of five shillings and three pence for the examination. By means of a hypodermic syringe he took some blood from the back of the woman's hand put the blood in a spoon and heated it over a candle flame. He then said that it was true that the woman has a chest complaint and offered to treat her on the payment of a fee of £9 17s 3d. He was paid an advance of £6. He told the fifth prosecution witness that it would take him some time to get the medicine ready and the fifth prosecution witness left his wife there in order to go and take care of their six weeks old baby which they left in the house.

After the fifth prosecution witness had left, the accused, using a hypodermic syringe and needle, attempted to give the woman an injection at the back of her hand. When this was unsuccessful he gave her the injection in the area of her shoulder.

When the woman arrived back at home at about 6.40 p.m. she told her husband what the accused did to her and told him that her eyes were affected and that she could not see well. Her baby was handed over to her but she put the baby down and she herself fell down.

The fifth prosecution witness sent for the accused but the accused at first did not go. When the fifth prosecution witness and another person went to the accused, he went back with them to see the woman. He chewed some medicine and asked her to put it into her mouth and suck it.

He left Ojobo for Ekeremo on the next day on the pretext that he was going to bring an "electric injection" but did not return.

When the woman's condition deteriorated the fifth prosecution witness put her in a canoe and took her to the accused in his house. She died on arrival at the accused's house. Her dead body was taken to Ojobo where it was seen by the third prosecution witness, Mr Justus Seibai, a councillor in the area. Mr Seibai sent for the accused and the accused told him that he was a doctor and admitted that he gave the deceased woman an injection.

The woman's dead body was taken to the General Hospital at Forcados where the first prosecution witness, Dr Fajemisin performed post mortem examination upon it after the body was identified to him by the fifth prosecution witness as the body of his wife Justina.

Externally the doctor saw two penetrating wounds one each at the back of each hand, which appeared to him to be injection sites. Upon compression from above downwards blood oozed from the wounds.

Internally, the doctor made the following observations. The liver was black and greatly reduced in size. The spleen was very black and greatly reduced in size. The stomach duodenum and the coils of the small intestines were jet black. Both lungs were extremely black and shrunken. The doctor said that he had never seen organs of the body as black as those just described except in cases of persons whose lungs are affected by pneumo-coniosis, otherwise known as miner's lungs. He diagnosed that the woman died of acute poisoning from an injected drug. He said that he could not find a drug that would produce the kind of result that he observed but was of the opinion that a mixture of various drugs could produce it. In his experience no natural ailments would produce such extensive discoloration and shrinking of the organs as he observed.

The accused was arrested and when his room was searched various articles including the following were found.—

- (a) 20 Isoniazid tablets,
- (b) Ergometrine maleate,
- (c) Emetine hydrochloride,
- (d) Syringes,
- (e) Steel files.

According to the report of the Government Chemist Isoniazid is a poison in Part III of the First Schedule to the Pharmacy Ordinance and according to the evidence of the first prosecution witness it is used in the treatment of pulmonary tuberculosis. According to the same witness Emetine hydrochloride is used in the treatment of amoebic dysentery and liver abscesses and ergometrine to check post partum bleeding.

The accused made a statement—Exhibit G—in which he admitted that the various articles listed at the back of Exhibit C which was signed by him were found in his room. In his evidence he has alleged that they were put there by the relation of the deceased woman. In his statement, as well as in his evidence in court, he has denied that he gave the woman an injection and has said that he gave her a medicine to drink.

I believe the evidence of the fourth prosecution witness, Chukuma Ezeudo, and sixth prosecution witness, Frederick Umeh, that the accused gave the woman an injection. I believe the fifth prosecution witness that the accused told him that he was a doctor, and the third prosecution witness that the accused told him that he was a doctor and that he gave the deceased woman an injection. I believe the second prosecution witness Police Constable Eleazor Umanime that he found Exhibits E to E 2 and F to F 12 in the room of the accused and that the room was found locked up when they arrived there to conduct the search. I am satisfied from the accused's own confession contained in Exhibit G, that all the articles belong to him. The accused has not shown that he had any lawful authority to have poisonous materials in his possession. I therefore hold that the Isoniazid tablets were in his possession for an unlawful purpose. I find as a fact that the accused gave the woman an injection and I accept the doctor's evidence that the discoloration of the woman's internal organs was caused by acute poisoning resulting from the injected drug.

I disbelieve the evidence of the accused that the medicine he gave the woman was something to drink. I therefore find him guilty on counts 2 and 3.

As regards count 1 the learned Counsel for the accused has referred me to the case of *R. v. Abengowe*, 3 W.A.C.A. 85 in particular and also to *R. v. Oshimi*, 1955-56 W.R.N.L.R. 52, and *R. v. Nwokocha*, 12 W.A.C.A. 453.

In the last mentioned case it was decided that there must be clear evidence that the death of the deceased was the direct result of the negligence of the accused to the exclusion of all other reasonably possible causes. And in *R. v. Abengowe* it was held that the prosecution must prove that the death of the deceased was caused or accelerated by the unlawful act of the accused and that if poison was found in the body it was the duty of the Judge to consider whether it was the cause of death and whether the amount administered was so excessive as to establish that the accused was guilty of manslaughter by administering an overdose.

In this case, according to the doctor's evidence, the woman died from acute poisoning from injected drugs. The circumstances of this case and the fact that the woman did not take any other drug (I believe her husband's evidence on this point) lead me to the conclusion that the injected drugs which brought about the acute poisoning and which resulted in the woman's death was the drug injected into her by the accused.

According to the decision in *R. v. Williamson*, 3 C. & P. 635, *R. v. Spiller*, 5 C. & P. 333 if a person whether he is a regular practitioner or not honestly and *bona fide* performs an operation or uses a dangerous instrument which causes the patient's death he is not guilty of manslaughter but if he is guilty of criminal misconduct arising from gross ignorance or criminal inattention and not from mere error of judgment then he will be guilty of manslaughter. And according to Lord Hewart, C.J. in *R. v. Bateman*, (1925)

94 L.J. (K.B.) 791 he will not be criminally responsible unless his negligence or incompetence passed beyond a mere matter of compensation and showed such disregard for life and safety as to amount to a crime against the State. The degree of negligence required is one which amounts to recklessness or "an attitude of mental indifference to obvious risks" (*per* Eve, J. in *Hudston v. Viney*, (1921) 1 Ch. 98, 104).

The act of the accused person, a person untrained in medical science, in injecting drugs into the deceased in a dose which resulted in acute poisoning is an act of recklessness. And in the words of Bayley, J. in *R. v. Simpson*, 1 Lew 172 if a person without medical training takes on himself to administer medicine which may have dangerous effect and such medicine destroys the life of the person to whom it is administered it is manslaughter. I therefore find the accused guilty on count 1.

Accused found guilty on all the counts.

| | | | | | |
|--------------------------------|-----|-----|-----|-----|----------------------|
| EUSEBIUS EVOROJA | ... | ... | ... | ... | <i>Petitioner</i> |
| <i>v.</i> | | | | | |
| CATHRINA EVOROJA | ... | ... | ... | ... | <i>Respondent</i> |
| CHIEF ONOVUGHE UWEVBIYERHIAVBE | ... | | | | <i>Co-Respondent</i> |

[HIGH COURT OF JUSTICE: Adeyinka Morgan, J., 4th August, 1960.]

Petition for damages for adultery—proof of adultery by fact of the respondent and co-respondent living together as husband and wife—considerations for awarding damages—section 24 of the Marriage Ordinance, section 30 (1) of the Matrimonial Causes Act, 1950, and rule 9 of the Matrimonial Causes Rules, 1957 considered.

The Petitioner brought this petition claiming damages from the co-respondent for adultery alleged to have been committed by the co-respondent with his wife, the respondent. There was no prayer for a dissolution of the marriage but all papers relating to the petition were served on the respondent. The evidence established that the petitioner and the respondent were married at the Catholic Church, Warri, on 28th March, 1945 and that on 10th May, 1954 the respondent left the matrimonial home for her father's home and that she never returned to the matrimonial home in spite of the petitioner's pleadings for her to return there and the intervention by many people. It was also established by evidence that in July 1957 the respondent and the co-respondent were living together as husband and wife in the house of the co-respondent.

Held: (1) that the fact that the respondent lived with the co-respondent as his "wife" was satisfactory proof that the respondent and the co-respondent had committed adultery;

(2) that as a result of practice arising from the construction of rule 9 of the Matrimonial Causes Rules, 1957, a husband who is claiming damages for adultery only by his petition (which he can do under section 30 (1) of the Matrimonial Causes Act, 1950) must serve on the wife a copy of the petition and must also make her a respondent unless an order dispensing with service upon her has been obtained;

(3) that the court would not award damages in a case of this nature where the husband had proved that the adultery complained of took place after the wife had left the matrimonial home, had lived in her father's house after that and had refused to return to the matrimonial home thus clearly manifesting an intention to live apart from the petitioner and to abandon the matrimonial home.

Petition dismissed.

Cases cited:

Weedon v. Timbrell, (1793) 5 Term Rep. 357.

Winter v. Henn, (1831) 4 C. and P. 494.

Warri Civil Suit No. W/150/1957.

Ovie-Whiskey, for the petitioner.

Ogwuazor for Irikefe, for the respondent and co-respondent.

Adeyinka Morgan, J.: In this petition Eusebius Evoroja is claiming the sum of £550 from the co-respondent, Chief Onovughe Uwevbiyerhiavbe, as damages for adultery committed by him with the respondent, Cathrina Evoroja.

According to the evidence adduced to this Court by the petitioner and his witnesses the marriage between the petitioner and the respondent was solemnised at the Catholic Church, Warri, on the 28th March, 1945. It was a marriage performed according to Christian rites in accordance with the provision of section 24 of the Marriage Ordinance. (See Exhibit A). There is no issue of the marriage.

On the 10th May, 1954, the respondent told her husband that she was going to her father's home for a month to go and make some *gari*. She never returned to the matrimonial home again.

When she did not go back at the time she promised to return home the petitioner went to look for her. She put him off with some excuses and he returned home. When she still did not return home he again went to her and asked her to return. She asked him to speak to her father and he did so. Her father told him that he would not let his daughter return to him because they had been married for about ten years and there was no issue of the marriage. The petitioner thereupon returned to Warri. After his return many persons, including Revd Father Oravbe, intervened but without success.

On the 4th September, 1955, about sixteen months after his wife had left the matrimonial home, the petitioner received a certain letter and on that same day left for Kokori where he saw one Ederaghobor. As a result of what he was told he returned to Warri and instituted an action against the co-respondent and his own father-in-law in the Magistrate's Court.

Then, on the 7th July, 1957, he saw his wife coming out of a lorry at Agbassa. He said that he observed that she was pregnant and on the 14th July, 1957, he went to Kokori. On the following morning, he went to keep a watch on the co-respondent's house, accompanied by Ederaghobor and Gabriel. According to their evidence they saw the respondent come out of the co-respondent's house early in the morning at about 6 a.m. on that day. The petitioner held his wife and a scene followed. In fact a fight almost ensued. The petitioner and his witnesses left the place and the petitioner decided to institute the present proceedings. He is a Roman Catholic and firmly believes that his marriage to the respondent is indissoluble during the lifetime of both of them.

The respondent, in her own evidence, denies that she took part in the rites of a Christian marriage performed in accordance with the Marriage Ordinance. She maintains that the marriage between her and the petitioner was under native law and customs and had in fact instituted proceedings in the Abraka Clan Court to dissolve the marriage.

Both the respondent and the co-respondent deny that they are living together and deny adultery. On the other hand the petitioner's uncle, who incidentally is also the respondent's uncle, said that the respondent's father gave her in "marriage" to the co-respondent after she had left her lawful husband and that he received a dowry of £60 from the co-respondent.

I find as a fact that the marriage between the petitioner and the respondent was one solemnised according to Christian rites under the provisions of the Marriage Ordinance and I disbelieve the respondent's evidence to the contrary. In my judgment her evidence that she did not know that the marriage was a lawful one under the Marriage Ordinance is untrue and an attempt to obtain an easy divorce.

On the issue of adultery I am satisfied that the respondent was living with the co-respondent as his wife and even though there is no satisfactory evidence that she was pregnant I reject her evidence and the co-respondent's evidence that they are relations and hold that adultery has been satisfactorily proved.

On the question of procedure and practice section 30 (1) of the Matrimonial Causes Act, 1950 provides that a husband may, on a petition for divorce.....or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner. And Divorce Rule 9 of the Matrimonial Causes Rules, 1957 provides that a copy of *every* petition shall be served on *every* respondent, co-respondent and person charged with adultery.....who is named in the petition. And the practice has survived that the wife must be served and made a respondent in a petition for damages only unless an order dispensing with service upon her has been obtained.

Having found that the co-respondent committed adultery with the respondent during coverture I now come to consider the question of damages.

The petitioner is claiming the sum of £550. There is no doubt that he believes quite genuinely that his marriage to the respondent cannot be dissolved and that he accepts the edict of his faith on this point. Although this is not correct from a legal stand-point yet the importance of religious observance cannot be lightly disregarded. Therefore if I were to award damages in this case I would have awarded the whole amount claimed. However I am of the view that this is a case in which damages cannot and should not be awarded. The respondent left the petitioner on the 10th May, 1954 and has ceased to live with him since then. She went to live in her father's house after deserting the matrimonial home and refused to return despite intervention by many people. She therefore clearly manifested an intention to live apart from the petitioner and to abandon the matrimonial home. Ederaghobor said that he saw her in the co-respondent's house in September 1955 but I am not quite satisfied that this was so. However the petitioner saw her in July 1957 and formed the opinion that she was pregnant. He thereupon went with witnesses to keep a watch on the co-respondent's house. I believe his evidence that he and his witnesses saw the respondent coming out of the co-respondent's house on that day and find as a fact that she was then living with the co-respondent.

It was held in *Weedon v. Timbrell* (1793) 5 Term Rep. 357 and *Winter v. Henn* (1831) 4 C. and P. 494 that no damages are obtainable if husband and wife had been living apart at the time of the adultery. For this reason I hold that damages are not obtainable in this case.

I therefore dismiss the petition. I will make no order as to costs.

Petition dismissed.

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|----------------------|-----|-----|-----|-----|---|-------------------|
| EMUROTU EDE | ... | ... | ... | ... | } | <i>Plaintiffs</i> |
| OKONEDO AKPOJIYOWHIN | ... | ... | ... | ... | | |
| <i>v.</i> | | | | | | |
| OSIRIRE ULOGHO | ... | ... | ... | ... | | <i>Defendant</i> |

[HIGH COURT OF JUSTICE: Adejumo Kester, J., 12th October, 1960.]

Civil Procedure—writ issued in personal capacity—motion for an order to sue in a representative capacity even though the writ has not been amended—application irregular—order 7, rule 9 of the High Court (Civil Procedure) Rules applied—order 3, rule 4 of the Rules of the Supreme Court in England, order 2, rule 2 and order 7, rule 11 of the High Court (Civil Procedure) Rules considered.

In this motion the plaintiffs sought, among other things, the order of the High Court to authorise them to sue in a representative capacity. The writ of summons had shown the plaintiffs as suing on behalf of themselves and no pleadings had been filed. On behalf of the defendant it was contended that if the plaintiffs now intended to sue in a representative capacity the proper course for them to pursue was to get the writ amended accordingly before this present application could be brought.

Held: that the plaintiffs' application should have been one to amend the title of the writ so as to enable the action to be brought in a representative capacity and that the application now before the court was irregular and would be refused.

Application to sue in a representative capacity refused.

Cases cited:

Re Royle, 5 Ch. D. 540.

The Tottenham [1896] 1 Ch 628.

Warri Civil Suit No. W/72/1959.

Ogbe for the plaintiffs.

Odiete and *Okandeji* for defendant.

Adejumo Kester, J. This motion is brought on behalf of the Plaintiffs. It is made up of three applications—

(a) for an order of the court authorising the plaintiff to sue in a representative capacity. The application is said to be brought under order 7, rule 9 of the High Court (Civil Procedure) Rules;

(b) application under order 7, rule 11 for leave to strike out the second plaintiff from the suit; and

(c) for an order for extension of time within which to file the statement of claim. One day extension was asked for.

The applications under headings (b) and (c) were not opposed by counsel for the defendant/respondent. His objection to the application under heading (a) is that the action was taken by the two plaintiffs on behalf of themselves only, and if it is now intended to sue in a representative capacity, the writ must first be amended before the application can be brought. In reply counsel for applicant contended that the writ has nothing to do with the application. He said that the writ was first filed and then leave is now sought to sue in a representative capacity. He also submitted that the writ can only contain an endorsement, but it is the statement of claim that must contain the facts. In the

first place order 7, rule 9 does not stipulate that the authority or permission of the court must first be sought before a plaintiff can sue in a representative capacity. It is only where a person is sued as a defendant that he may be authorised by the court or Judge to defend in such cause or matter on behalf or for the benefit of all persons having the same interest in the cause or matter.

Order 2, rule 2 provides that if a plaintiff sues in a representative capacity the indorsement shall show in what capacity he is suing. This is the same as order 3, rule 4 of the Rules of the Supreme Court in England.

In England the following propositions accurately state the effect of the rule on this subject matter. (See *Annual Practice*, 1957, page 250).

(1) The representative capacity ought to be stated in the title of the writ (*Re Royle*, 5 Ch. D. 540).

(2) It ought to be stated in the indorsement.

(3) Probably it would be sufficient if it is stated in either the title of the writ or in the indorsement. The improper description of the plaintiff in a writ was held to be a mere irregularity and does not render the proceedings void. An amendment may be allowed by the court or a Judge.

(4) Whether stated or not in the title or indorsement of the writ, it must be stated in the title of the statement of claim (*The Tottenham* (1896) 1 Ch. 628).

(5) A statement in the body of the statement of claim will not suffice. But leave to amend the title of the statement of claim may be given.

(6) If duly stated in the title of the statement of claim this will cure its omission from the title of the writ and the indorsement.

From the foregoing it is clear that plaintiff's application should have been one to amend the title of the writ so as to enable the action to be brought in a representative capacity. The application now before the court is irregular and it will be refused.

The application to strike out the name of the second defendant from the writ is granted, and his name is struck out.

The application for extension of time within which to file the statement of claim is granted. In view of my ruling as to bringing the action in a representative capacity, the time within which to file the statement of claim is extended by 30 days from today to enable the necessary amendments to be made.

Application to sue in a representative capacity refused.

J. E. EDOKPOLOR *Appellant*

v.
J. I. IDEHEN *Respondent*

[HIGH COURT OF JUSTICE: Thomas, J., 8th November, 1960.]

Trespass and Injunction—action in Customary Court Grade “A”—evidence of customary law relating to trespass and injunction not allowed to be led—such refusal wrongful—a Grade “A” Customary Court not a court wholly native—sections 6 (1), 19, 20 and 68 of the Customary Courts Law, 1957, applied—section 12 of the Native Courts Ordinance, Cap. 142 referred to.

The respondent who was plaintiff in the court below brought an action before the Benin Grade “A” Customary Court claiming from the appellant the sum of £3,990 as damages for trespass to a piece of land and seeking an injunction against the appellant restraining the appellant and his servants or agents from committing further acts of trespass.

The learned President of the Court ordered pleadings which were duly filed. During the trial, Counsel for the appellant (who was the defendant) asked that he be allowed to lead evidence of customary law but the learned President held that as his court was a customary court he was the repository of customary law; that just as evidence of English law was not required to be led in an English court so also there was no need for evidence as to the existence or non-existence of Customary Law to be led in Customary Courts of Western Nigeria.

Held: (1) that the President was not the president of a court accepted as wholly native in its constitution and concept and administering the law and custom of such native institution but a President administering the law as envisaged by the Customary Courts Law, 1957;

(2) that on a proper construction of sections 19 and 20 of the Law, customary law is not constant but relative and varies sometimes with special localities; in land matters with the place where the land is situated, in other civil causes with the personal law of the parties and in other circumstances with the area of jurisdiction of the Court;

(3) that in this case, evidence of the customary law appropriate to the area should have been allowed to be led.

Appeal allowed; case remitted back for re-hearing.

Case cited:

Egba Native Administration v. Albert Lajubu Adeyanju, 13 N.L.R. 77.

Benin Civil Appeal No. B/3A/60.

Fregene, for appellant.

Boyo, for *Idigbe*, for respondent.

Thomas, J.: This is an appeal from the judgment of the learned President of the Customary Court Grade “A” in Benin.

The respondent claimed the sum of £3,990 as damages for trespass by the appellant, servants, workmen, agents to the respondent’s rubber plantation at Oregbeni in Benin Division and an injunction against him and his servants, etc.

Particulars of damages claimed were as follows:

| | | | | | |
|------------------------------|-----|-----|-----|-----|---------|
| 389 Rubber Trees at £10 each | ... | ... | ... | ... | £ 3,890 |
| 20 Coffee Trees at £5 each | ... | ... | ... | ... | 100 |
| | | | | | £ 3,990 |
| | | | | | £ 3,990 |

The Court below awarded judgment against the appellant for the total sum of £3,990 and costs assessed at £200.

Against this decision the appellant has now appealed on several grounds including the following:—

(i) "The Customary Court Grade "A", Benin Division had no jurisdiction to entertain the suit.

(ii) The said Customary Court was wrong to have overruled the objection to jurisdiction.

(iii) The said Customary Court was wrong to have allowed the plaintiff to give evidence as to custom relating to trespass and injunction and to refuse any evidence in disproof of the alleged custom".

I propose to deal with the above grounds together. I have also selected them from the grounds filed as they are very important in the determination of the present appeal.

The parties by a consent order filed pleadings and plan.

The respondent in his Statement of Claim pleaded as follows:

Paragraph 11—By custom of the Oregbeni people in particular and by the general custom of the Binis an invasion by a member of the Community into the farm rights of another member was visited by a verdict for payment of compensation to the injured member of the Community by the offending member where the right of the injured member to the farm to the exclusion of the offending member was established before a Customary tribunal of the Community;

Paragraph 12—Where however the invasion resulted in the destruction of crops or farm products it was also the custom of the people aforesaid to award compensation commensurate with the measure of damage done or calculated to restore the injured party to his position before he suffered the injury; and

Paragraph 13—In any event where it was obvious to the Customary Tribunal aforesaid that the damage was likely to continue by repeated acts to the offending party, the Customary Tribunal following the custom of the Binis ordered the offending party to refrain from further invasion of the rights of the injured party.

The appellant in paragraph 10 of his Statement of Defence pleaded as follows:

"The defendant denies paragraphs (11) to (13) of the Statement of Claim and will require strictest proof".

It is not disputed that the respondent led same evidence as to custom.

During the cross-examination of the respondent by appellant's Counsel, the record of the proceedings, in the court below, *inter alia*, includes the following:—

"Mr Onyuike asks that evidence of Customary Law be led.

By Court.—This is a Customary court and the court is the repository of Customary Law. If on appeal issues of customary law are raised and the High Court is in difficulty it can require the aid of assessors. Just as evidence of English Law is not required in English Court so there is no need for evidence (for cross-examination) as to the existence or non-existence of Customary Law in Customary Courts of the Western Region”.

Section 19 of the Customary Courts Law, 1957 enacts as follows:

“Subject to the provisions of this Law, a customary court shall administer—

(a) the appropriate customary Law specified in section 20 in so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force.

Section 20—

(1) In land matters the appropriate customary law shall be the customary law of the place where the land is situated.

(2) In causes and matters arising from inheritance the appropriate customary law shall, subject to sub-sections (1) and (4) of this section be the customary law applying to the deceased.

(3) Subject to the provisions of sub-sections (1) and (2) of this section—

(a) in civil causes or matters where—

(i) both parties are not natives of the area of jurisdiction of the court;

(ii) the transaction the subject of the cause or matter was not entered into the area of the jurisdiction of the court; or

(iii) one of the parties is not a native of the area of jurisdiction of the court and the parties agreed or may be presumed to have agreed that their obligations should be regulated, wholly or partly, by the customary law applying to that party; the appropriate customary law binding between the parties.

(b) in all other civil causes and matters the appropriate customary law shall be the law of the area of jurisdiction of the court”.

Section 6 (1) enacts—

“No persons shall be qualified to be appointed as President of a Customary Court Grade “A” unless he is a legal practitioner”.

It is quite clear, firstly, that customary law on a proper construction of the statute is not constant but relative.

It varies sometimes with special localities, in land matters with the place where the land is situated, in other civil causes with the personal law of the parties and in other circumstances with the area of jurisdiction of the Court.

The claim before the court was damages for trespass *i.e.*, a claim for compensation for wrong done to land in plaintiff’s possession.

Some evidence of the customary law of the place where the land is situated was rightly led as pleaded and the learned President should have allowed appellant’s counsel to cross-examine the respondent and later lead evidence as to the customary law relating to the land in question.

The Customary Courts were created by the Customary Courts Law of 1957 and provision was made for the appointment of the various judges, and the Practice and Procedure of the Courts.

By section 6 (1) it is clear that Judges of Grade "A" courts are individuals trained in the same discipline as members of this court. Counsel appear in these courts.

In fact, pleadings were ordered in this particular case, though it is not certain that there is any specific provision in the Rules made under section 68 of the Law for such a procedure.

It is apparent, therefore, that these courts are not native institutions administering customary law. This was the point made in *Egba Native Administration v. Albert Lajubu Adeyanju*, 13 N.L.R., page 77.

I refer to section 12 of the Native Courts Ordinance which reads as follows:

"Subject to such rules as may be made under section 45, the jurisdiction conferred on Native Courts shall (as regards practice and procedure) be regulated in accordance with native law and custom."

At page 80 the judgment continues as follows:—

"Now section 12 is a curious section, and it is difficult to see how it can have any real effect, "Native Courts" as they have for some years been called by the Nigerian Legislative draughtsmen are not native institutions at all. They are creatures of the Nigerian Government. Under the Native Courts Ordinance a "Native Court" need not necessarily even consist of natives. It seems to me obvious that there can be no "native law and custom" dealing with the procedure of an institution which is a creature of what in this connection, I may call "foreign" statutes of the last thirty years or so and has no place in native law and custom. One might almost as well in the Companies Ordinance provide that a Limited Company's affairs were to be regulated by native law and custom!

The position has not materially changed even at this period.

I have noted that the learned President holds the view that as President of the Benin Customary Court Grade "A", he is the repository of customary law.

That might be so had he been the President of a court accepted as wholly native in its constitution and concept, and administering the law and custom of such native institution.

He is a President administering the law as envisaged by the Customary Courts Law, 1957 and on a proper construction of the statute, evidence of the customary law appropriate to the area should have been led and appellant's counsel should not have been stopped on this point, when he was conducting his case.

The appeal therefore succeeds on the ground of appeal that I have referred to above.

I will therefore quash the proceedings heard and determined in the Grade "A" Court, Benin and hereby further order that it be reheard *de novo* before the court of first instance.

Appeal allowed; case remitted back for re-hearing.

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|---|-----|-----|---|------------|
| CHIEF SAM WARRI ESI | ... | ... | } | Plaintiffs |
| MONEFE ABOBO | ... | ... | | |
| OHANOMA OGIO | ... | ... | | |
| (for themselves and on behalf of the Agbassa people of Warri). | | | | |
| v. | | | | |
| ITSEKIRI COMMUNAL LAND TRUSTEES | } | | | Defendants |
| (substituted for Gbesimi Emiko, Erejuwa II, the Olu of Warri). | | | | |
| THE ATTORNEY-GENERAL (WESTERN REGION). | | | | |

[HIGH COURT OF JUSTICE: Adeyinka Morgan, J., 3rd December, 1960.]

Land Law—claim for declaration that a lease executed in 1911 was null and void and should be set aside—previous proceedings between the parties or their predecessors in title, first for an account of rents collected, and later for a declaration of title to the land—whether the present proceedings could be defeated by a plea of res judicata—the doctrine of merger upon term of years becoming vested in the owner of the reversion immediately expectant on the term—grant to a tenant under customary law—the rights of such a tenant—the powers of such a grantor to deal with such land—doctrine of cancellation—sections 3, 5, 7, 10, 11, 29 and 30 of the Public Lands (Acquisition) Ordinance, Cap. 112 of the Laws of the Colony of Southern Nigeria, 1908, applied.

The plaintiffs brought this action in the Warri High Court for a declaration that a deed of lease in respect of part of Agbassa Lands of Warri dated 25th February, 1911 between one Chief Dore Numa and one Chief Ogbie Yahuren on behalf of the chiefs and people of Warri on the one part and Sir Walter Egerton, Governor of the Colony of Southern Nigeria, on the other hand was null and void and that it should be set aside. The action was originally brought against Gbesimi Emiko, Erejuwa II, the Olu of Warri alone, but by an order of the Court, the Itsekiri Communal Land Trustees were substituted for the Olu of Warri and the Attorney-General, Western Region, as successor in title to the Governor of the Colony of Southern Nigeria was joined as a co-defendant.

After pleadings had been completed it was submitted on behalf of the defendants that the subject matter of the present action was the same as in previous actions and the parties were the same. In support of this, Counsel referred to former actions first for an account of rents collected and secondly in 1925 for a declaration of title to a large area of land including the piece demised to the Government by the deed of 1911 which actions were instituted by the plaintiff's predecessor against Chief Dore Numa but which actions failed. It was therefore urged on behalf of the defendants that the doctrine of *res judicata* barred the present action.

It was also submitted on behalf of the defendants that since the land demised under the lease of 1911 had been assigned to the successor in title of the grantor, merger had taken place and that the lease had therefore become extinguished and that there would be no lease to set aside and the claim for a declaration that the lease of 1911 was null and void should be set aside should fail.

It was further submitted on behalf of the defendants that a lease which was a nullity *ab initio* had never had any existence in law, and therefore could not be set aside, and that therefore the claim for a declaration that it should be set aside was

misconceived; that if in the present case the lease of 1911 was a nullity *ab initio* as contended by the plaintiffs because the grantors at the time they were granting the lease had made a grant of occupation under native law and custom to the plaintiffs' predecessors in title, then the action was misconceived as there was nothing to be set aside. It was also submitted that the jurisdiction to set aside a lease being based on the equitable doctrine of cancellation, fraud, actual or constructive, or mistake must be pleaded and proved and that no such averment was made in the Statement of Claim.

On behalf of the plaintiffs it was submitted that the action was not based on the doctrine of cancellation but on customary law and that what the plaintiffs challenged was the right of the first defendant's predecessor in title to grant the lease of 1911. It was further submitted that even if a valid lease was in existence between the lessors and the lessees an action lay at the instance of the customary tenant to set aside the lease. It was therefore contended that the Agbassa people had a right in the land demised to the Government and that they were thus entitled to bring an action to declare the lease as void.

Held: (1) that a man cannot at law be a reversioner to himself and that when a term of years becomes vested in the owner of the reversion immediately expectant on the term the term is at law merged in the reversion;

(2) that it is the usual practice, when the intention to bring about a merger is not to be left in doubt, for the intention to be specifically expressed in the deed of surrender although a merger can be brought about by an assignment of the reversion expectant on the term to the lessee as well as by a surrender of the residue of the term to the owner of the reversion immediately expectant on the remainder of the term;

(3) that in this case, unless the lease of 1911 was a nullity *ab initio* it would still subsist either in respect of the whole land comprised in the lease if there was no intention to bring about a merger in respect of the portions surrendered, or merely in respect of the reserved portions if there was an intention to effect a merger;

(4) that a lease which is void, that is, which is a nullity *ab initio* and has never had an existence in law cannot be set aside and that a claim for a declaration that such a lease be set aside is misconceived;

(5) that a grantor cannot grant to another person the same interest, or any part of it which he has granted to his customary tenant under native law and custom without the customary tenant's consent or permission; but that all the interest that a customary tenant has in land granted to him under native law and custom is a *usufruct* and upon a grant of occupation being made under native law and custom there remains in the grantor a right or interest which has been described as a reversion, a right to receive rent or tribute, or as a seignuerial right;

(6) that this right can be assigned or transferred for a term of years and that a lease to B of a property granted to A under native law and custom is valid as a concurrent grant provided it is made by deed; such a lease operates as a grant of the reversion upon the earlier grant and entitles the tenant under the lease to the benefits of the rents, tributes, rights and obligations accruing under the former grant;

(7) that at the time when the predecessor in title of the first defendants demised the land in question to the Government on the 25th February, 1911, he still had right or interest in the land which he could grant to a lessee even if he had previously made a grant of occupation under native law and custom to the plaintiffs' predecessors in title and that therefore the lease was not void in the sense of being a nullity *ab initio*, but operated to pass to the lessee such interest or rights only as the lessor had in the land;

(8) that in any event the second defendant had an indefeasible leasehold title under section 30 of the Public Lands Acquisition Ordinance, 1908, and the plaintiffs were estopped from raising the issue of the validity of the lease;

(9) that since in the 1925 case for declaration of title to a large area of land including the land comprised in the 1911 lease instituted by the plaintiffs' predecessor in title against Chief Dore the plaintiffs' predecessor in title did not question the right of Chief Dore to grant leases of the land and exercise other acts of ownership, the plaintiffs were now estopped from seeking to set aside the 1911 lease and the matter was for that reason *res judicata*;

(10) that the appropriate relief in the case of a third party in relation to the execution of a deed of conveyance by which one party purported to convey the plaintiffs' land to a second party was not by way of the equitable relief of cancellation of the deed but by a declaration of title or where there had been trespass, an action for damages; that it was only in an action in which could properly be pleaded mistake, misrepresentation or fraud, actual or constructive, that cancellation would be the appropriate and effective remedy.

Claim dismissed.

Cases cited:

- Burton v. Barclay*, (1831) 7 Bing. 745.
Doe d. Rawlings v. Walker, (1826) 2 B. and C. 111.
Capital and Counties Bank v. Rhodes, [1903] 1 Ch. 631.
In re Fletcher, Reading v. Fletcher, [1917] 1 Ch. 339.
Foster v. Robinson, [1951] 1 K.B. 149.
Bassey and others v. Chief Etete and others, 4 W.A.C.A. 153.
Chief Etim and others v. Chief Eke and others, 16 N.L.R. 43.
Onisowo v. Fagbenro, 21 N.L.R. 3.
Harner v. Bean, (1853) 3 C. and K. 307.
Neale v. Mackenzie, (1836) 1 M. and W. 747.
Hill v. Saunders, 4 B. and C. 529.
Doe d. Strode v. Seaton, (1835) 2 C., M. and R. 728; 150 E.R. 308.
Amodu Tijani v. Secretary, Southern Provinces, 3 N.L.R. 21.
Braimoh Onisowo and others v. Taiwo Gbangboye, 7 W.A.C.A. 69.
Ogegede v. Dore Numa, un-reported.
Eyo Ita v. Asido, 2 W.A.C.A. 341.
Rufus Adekunle Wright v. The Ahmadiyya Movement-in-Islam and another, un-reported but see case No. W.A.C.A. 2886 of 7th May, 1949.

Warri Civil Suit No. W/112/58.

Harvey, Q.C. (Irikefe with him) for the plaintiffs.

Rotimi Williams Q.C., (Rewane with him) for the defendants.

Adeyinka Morgan, J.: The claim before the Court in this action reads as follows:

“The plaintiffs seek the following relief from the Court against defendant:—

A declaration that the deed of lease in respect of part of Agbassa Lands of Warri dated 25th February, 1911 (otherwise known as the 1911 lease of Warri) Registered as No. 2/1911 at pages 21-24 in Volume Ib (Warri) of the Register of Deeds kept in the Land Registry at Lagos between Chief Dore Numa of Benin River and Chief Ogbie Yahuren of Igbwangué, Warri, Southern Nigeria, acting for and on behalf of the chiefs and people of Warri aforesaid (hereinafter called lessors) of the one part and Sir Walter Egerton, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Governor and Commander-in-Chief of the Colony of Southern Nigeria (hereinafter called the Governor) (Lessee) of the other part is null and void and should be set aside”.

The proceedings were instituted on the 12th December, 1958, by a writ under the hands of three solicitors.

Chief Rotimi Williams, Q.C. appeared with Mr O. Rewane and Mr Efueye for the defendant, the Olu of Warri, while Mr A. G. Irikefe led a number of solicitors for the plaintiffs and was himself led at a later stage of the proceedings by Mr Harvey, Q.C.

Certain submissions were made by Chief Rotimi Williams and on the 24th June, 1960, I gave an interim ruling to the following effect:—

1. That the Itsekiri Communal Land Trustees be substituted as defendants in place of the Olu of Warri.
2. That the lessee ought to have been joined as a defendant.
3. That the Governor be put on notice and a copy of my order be transmitted to the Deputy Governor to be laid before His Excellency the Governor.

The Attorney-General (Western Region) applied on the 4th August, 1960, for an order to be joined as a co-defendant and an order to that effect was made on the 16th August, 1960.

After I had substituted the Itsekiri Communal Land Trustees for the Olu of Warri and joined the Attorney-General (Western Region) further submissions were made to me by all the parties and my ruling on the merit of the submission now follows.

Chief Rotimi Williams has put forward four reasons why the claim should be dismissed. I have already given a ruling in respect of one of the points he raised and have, as a result, substituted a new defendant and joined another. The other reasons, put forward are these:

1. Action is *res judicata*.
2. Action to set aside the deed does not lie on the pleadings.
3. Action for declaration is misconceived.

In support of the first point it is submitted that the subject matter of the present action is the same as in a previous action, that everything which was in controversy in the former case is in controversy in the present one and that the parties are the same.

As regards the second point it is submitted that the action does not lie on the pleadings, that the jurisdiction to make a declaration being discretionary there was no point in making a declaration because the plaintiffs have averred in their pleadings that they have treated the lease as being non-existent.

Finally, in respect of the third point, it is submitted, firstly that if the deed is void there is nothing to set aside; secondly, that the jurisdiction to set aside a lease being based on the equitable doctrine of cancellation, fraud, actual or constructive, or mistake must be pleaded and proved and that no such averment was made in the Statement of Claim.

Mr Irikefe and later Mr Harvey submitted in reply that the action is not based on the doctrine of cancellation but on customary law and that what the plaintiffs challenge is the right of the defendants' predecessor in title to grant the lease. It is further submitted that even if a valid lease was in existence between the lessors and lessees an action lies at the instance of the customary tenant to set aside the lease. It is therefore contended that the Agbassa people have a right in the land demised to the Government and that they are therefore entitled to bring an action to declare the lease void.

In respect of the submission that the matter is *res judicata* the counsel for the plaintiffs submit that the claim in the former action was for a declaration of title and that it would have been inconsistent with that claim to say that they derived title from the first defendant's predecessor in title.

Counsel for the plaintiffs agree with counsel for the defendants that there was a surrender of the lease and that once a lease has been surrendered to the person entitled to the immediate reversion the lease becomes merged with the reversion and becomes extinguished. They however say that the Court should make a declaration of the interest which the plaintiffs have in the land following the extinguishment of the lease.

I shall therefore start this ruling by considering the question of merger, because if there was a merger of the whole of the remainder of the term demised by the lease with the reversion immediately expectant upon the lease, in respect of the whole premises subject to the lease, the lease would become merged with the reversion and thereby become extinguished. In that case there would be no lease to set aside and a claim for a declaration that the lease of 1911 is null and void and should be set aside would fail.

It is of course clear law that a man cannot at law be a reversioner to himself and that when a term of years becomes vested in the owner of the reversion immediately expectant on the term the term is at law merged in the reversion (*See Burton v. Barclay*, (1831) 7 Bing 745, 746 and *Doe d. Rawlings v. Walker*, (1826) 5 B and C 111, 121).

The question may then be asked is there in this case such a merger as to extinguish the whole term *in toto*?

On the question of merger the principle followed by Courts of Equity was laid down as follows by Cozens-Hardy, L.J., in *Capital and Counties Bank v. Rhodes* [1903] 1 Ch. 631, 652 and was followed in *In re Fletcher, Reading v. Fletcher* [1917] 1 Ch. 339, 344 to wit;

"They had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place."

At this stage of the present proceedings no evidence has been taken and even though in their submissions both sides agree that a merger has occurred I do not propose directly to express any opinion on the issue, partly because of the conclusion at which I shall arrive and partly because of certain reservations inherent in Mr Harvey's submission, because at one stage in his submissions he said:

"If the lease has been surrendered then there is nothing to set aside. But the deed is described as an assignment and a merger in the proper sense has not occurred".

It is of course the usual practice, when the intention to bring about a merger is not to be left in doubt for the intention to be specifically expressed in the deed of surrender, thus:

"To the intent that the residue now unexpired of the term of.....years thereby granted may merge and be extinguished in the leasehold reversion of the said premises hereby surrendered".

(See Precedent No. 27 Key and Elphinstone's *Precedents in Conveyancing*, 14th edition, Vol. 1, page 1166). There can be no doubt however that a merger can be brought about by an assignment of the reversion expectant on the term to the lessee as well as by a surrender of the residue of the term to the owner of the reversion immediately expectant on the remainder of the term. The difference is that the question whether a merger has occurred or not becomes one of inference to be deduced from the intention of the parties either at the time of the assignment or even from their acts after the assignment. (See *In re Fletcher, Fletcher v. Reading*).

In the present case however it is possible to say whether or not the lease is still subsisting without going into the question of the intention of the parties on the issue of merger. And, in my judgment, the lease of 1911, assuming that it is not a nullity *ab initio*, is still subsisting. My reason for this conclusion being that only a portion of the land demised under the lease was assigned to the successor in title of the grantor, the lessee retaining the remaining portion. There can be no doubt that it is permissible to surrender a portion of the land comprised in a lease while retaining the remaining portion. A precedent giving effect to such a surrender will be found at page 1166 of Vol. I of Key and Elphinstone's *Precedent on Conveyancing*:

".....the said A as beneficial owner hereby surrenders and assigns unto the said C all those pieces of land.....forming part of the lands and premises comprised in and demised by the within-written lease".

Finally, an intention that the deed of lease should continue to subsist must be inferred from the reservation by the lessee of portion of the land demised by the lease, because if the lease is surrendered *in toto* a further instrument of grant would be necessary to support the interest of the lessee in the portion reserved. If it were intended to bring about the extinguishment of the whole lease, by bringing about a merger the lessee could have executed a deed of surrender of the whole term and been given a licence, permitting him as a consideration for the execution of the deed of surrender, to occupy the reserved portions as a licensee paying no rent.

(See *Foster v. Robinson* [1951] 1 K.B. 149). For the foregoing reasons I hereby rule, that unless it was a nullity *ab initio* the lease of 1911 is still subsisting either in respect of the whole land comprised in the lease if there was no intention to bring about a merger in respect of the portions surrendered, or merely in respect of the reserved portions if there was an intention to effect a merger.

I now come to the question whether the lease in question is void in the sense that it is a nullity *ab initio*. At this point I have to state that I uphold the submission of Chief Rotimi Williams that a lease void in the sense that it is a nullity *ab initio* has never had any existence in law, that it therefore cannot be set aside, and that a claim for a declaration that it should be set aside is misconceived.

The basis of the claim for a declaration that the lease is void appears to be the maxim *nemo dat quod non habet*. In my view the claim is inspired by the following portion of the judgment of the West African Court of Appeal *coram* Kingdon, Petrides and Webb, C.J.J., in *Bassey and others v. Chief Eteta and others* (a case originating in Calabar). 4 W.A.C.A. 153, 155:

"But no instance has been brought to our notice of a letting like those in the present case by the grantor, or his successors in title, in derogation of the grant made by him, and it may well be that the grantee, or his successors, would be entitled to treat such a letting as absolutely void".

It is not surprising therefore that the plaintiffs aver in paragraph 8 of their Statement of Claim—

"that the Government (the lessee in the 1911 lease), has acknowledged the rights of the plaintiffs and dealt with the plaintiffs as if the lease aforesaid did not exist".

In the *Eteta case* (decided on the 3rd November, 1938) the grantor of a certain piece of land demised the same land to a third party without the consent of the grantees under native law and custom. The grantees acquiesced in and adopted the leases and claimed an equitable share of the rents derived from the leases. It was not necessary in that case for the Court of Appeal to give an opinion as to whether the lease was void or not.

In a later case, *Chief Etim and others v. Chief Eke and others*, decided on the 3rd November, 1941 (16 N.L.R. 43, 50) Martindale, J. said—

"It is now settled law that once land is granted to a tenant in accordance with native law and custom, whatever be the consideration, full rights of possession are conveyed to the grantee. The only right remaining in the grantor is that of reversion should the grantee deny title or abandon or attempt to alienate. The grantor cannot convey to strangers without the grantee's permission any rights in respect of the land".

If this were the law then, unless there is a statutory provision to the contrary, the 1911 lease would be invalid because it was made without the permission of the predecessors in title of the plaintiffs. But I think that the view expressed by Martindale, J. must be construed to mean that the grant or cannot grant to another person the same interest, or any part of it, which he granted to his customary tenant under native law and custom, without the customary tenant's consent or permission. There is, however, no doubt that all that a customary tenant has in land granted to him under native law and custom is a usufruct and upon a grant of occupation being made under native law and custom

there remains in the grantor a right or interest, which has been variously described as a reversion, a right to receive rent or tribute, or as a seigniorial right. This right of reversion, which includes the right of forfeiture, is real and in January 1954 in *Onisiwo v. Fagbenro*, 21 N.L.R. 3, 7, De Comarmond, S.P.J., said of it—

“One may feel tempted to attach little importance today to the rights of reversion or to the right of forfeiture established and recognised under native law and custom. One may think that owing to the impact of Western Laws and the existence of modern social and economic conditions the old order of things in Nigeria must fade out. I think, however, that the proper way of relegating irksome or outmoded law and custom is to have recourse to legislation.....”

I am of the view that the right can be assigned or transferred for a term of years and that a lease to B of a property granted to A under native law and custom is valid as a concurrent grant provided it is made by deed. Such a lease operates as a grant of the reversion upon the earlier grant and entitles the tenant under the lease to the benefit of the rents, tributes, rights and obligations accruing under the former grant. (*See Harmer v. Bean* (1853) 3 C. and K. 307). If the former grant is determined either by forfeiture, surrender or even by extinction of issues of the grantee under native law and custom the tenant under the lease becomes immediately entitled to possession. (*See Neal v. Mackenzie* (1836) 1 M. and W. 747, p. 762). Furthermore, if a lessor has, at the time of granting a lease, any interest in the land he lets, such interest only will pass, and the lease will have no further effect though the interest purported to be granted be really greater than the lessor had power at the time to grant. *See Williams on Real Property*, 22nd edition, page 518 and *Hill v. Saunders*, 4 Band C. 529; *Doe d. Strode v. Seaton*, (1835) 2 C., M. and R. 728, 730; 150 E.R. 308).

When therefore the predecessor in title of the defendants demised the land in question to the Government on the 25th February, 1911, he still had a right or interest in the land even if he had made a grant of occupation under native law and custom to the plaintiffs' predecessors in title. Therefore, in my judgment the lease even if it was not made valid by statutory provisions is not void in the sense of being a nullity *ab initio*. It will operate to pass to the lessee such interest or rights only as the lessor had in the land.

But the present lease is one granted under statutory provisions and one which confers specific rights upon the tenant under the lease. The relevant legislation is The Public Lands (Acquisition) Ordinance, Cap. 112 of the Laws of the Colony of Southern Nigeria, January 1908, Volume 2. I shall therefore refer to certain relevant sections of the Ordinance.

(a) By section 3 it was made lawful for the Governor in the exercise of his discretion (1) to take and acquire any lands required for public purposes for an estate in fee simple, or (as in the present case) for a term of years, and (2) to pay as consideration or compensation therefor such sum of money or rent as may be agreed upon or determined by the Supreme Court under the provisions of the Ordinance.

(b) Section 5 provided as follows:

“It shall be lawful for all persons being seised, possessed of or entitled to any lands or any estate or interest therein, to sell and convey (or demise) the same to the Governor, and particularly it shall be lawful for all or any of the following persons to sell and convey, that is to say.....trustees for charitable or other purposes..... and all persons for the time being entitled to the receipt of the rents and profits of any such lands; and the power to sell and convey as aforesaid, may lawfully be

exercised by such persons not only on behalf of themselves and their respective heirs.....and successors, but also for and on behalf of every person entitled in reversion.....or in defeasance of their estates,.....and as to such trustees,..... on behalf of their *cestui que* trusts respectively to the same extent as such *cestui que* trusts could have exercised the same powers.....”

(c) Section 7 gave the Governor power to take possession of land acquired by him after the expiration of a period not less than twenty-one days of the giving of the notice of intention to take the land.

(d) Sections 10 and 11 provide that disputes as to title and compensation were to be settled by the then Supreme Court.

(e) Section 29 provided for the filing in the Lands Registry Office of a conveyance executed in pursuance of the acquisition.

(f) Section 30 provided that—

“upon filing, such conveyance shall confer on the Governor named therein, and on every succeeding Governor for the time being, in trust for His Majesty, his heirs and successors the estate, comprised or referred to therein *against* all persons free from all adverse or competing rights, titles, interests, claims, and demands whatsoever, subject to the terms and conditions therein mentioned.”

The land the subject matter of the lease of 1911 was demised to the Governor “according to the true intent and meaning of the Public Lands Ordinance” to wit—

The Public Lands Ordinance, 1903.

The scope of and some of the provisions of the Ordinance were considered by the Privy Council in the case of *Amodu Tijani v. Secretary, Southern Provinces*, 3 N.L.R. 21, 50, 52-59. Portions of the judgment reads thus—

“The Public Lands Ordinance of 1903 of the Colony provides that the Governor may take any lands required for public purposes for an estate in fee simple or for a less estate, on paying compensation to be agreed on or determined by the Supreme Court of the Colony. The Governor is to give notice to all the persons interested in the land, or to the persons authorised by the Ordinance to sell and convey it. Where the land required is the property of a native community the Head Chief may sell and convey it in fee simple any native law or custom to the contrary notwithstanding. There is to be no compensation for land unoccupied unless it is proved that, for at least six months during the ten years preceding any notice, certain kinds of beneficial use have been made of it.....*Prima facie*, the persons in possession, as if owners, are to be deemed entitled. Generally speaking, the Governor may pay the compensation in accordance with the directions of the Court, but where any consideration or compensation is paid to a Head Chief in respect of any land the property of a native community, such consideration or compensation is to be distributed by him among the members of the community or applied or used for their benefit.....”

The judgment continues:

“It (the Crown) will have to pay the Chief for family lands to which he is individually entitled when taken. There may be other portions of the land under his control which he has validly allotted to strangers or possibly even to members of his own clan or community. If he is properly deriving tribute or rent from these allotments, he will have to be compensated for the loss of it and if the allottees have had valid titles conferred upon them, they must also be compensated.”

But it is also clear law that the predecessors of the plaintiffs, even if they were in possession, could not have granted a long term lease without the consent of their grantors without incurring a forfeiture of their grant. (*See Braimoh Onisiwo and others v. Taiwo Gbangboye*, 7 W.A.C.A. 69, 70). And it would appear, having regard to the decision of the West African Court of Appeal in the *Eteta case* (4 W.A.C.A. 153) that the predecessor in title of the first defendant would himself not be able to grant such a lease without the consent of the plaintiffs' predecessors in respect of such portion of the land which is in their possession. In my judgment it is because of disputes which may arise as to title that the Ordinance provided in sections 10 and 11 that the then Supreme Court should have power of adjudication to decide issues of title and quantum of compensation. Further it is my judgment that section 30 was enacted to meet a situation in which a claimant did not take necessary steps within the statutory period to establish his claim and use the machinery laid down by the Ordinance.

This brings me to the issue of *res judicata*. It will be seen that the plaintiffs have not been idle all these years. This is at least their third bite and is yet another phase in the war of attrition they have been waging in the Courts against the predecessors in title of the first defendant. Through the ingenuity of successive solicitors they have brought one kind of action after another, having failed to make use of the machinery laid down by the Ordinance. In 1925, in proceedings entitled *Ogegede v. Dore Numa* (pages 49-56 of Exhibit A) they claimed for—

“An account of rents collected by the defendant *in respect of portions of Agbassa land, leased to the Government of Nigeria and for an Order for payment to plaintiff*”.

In the course of that proceeding the counsel for the plaintiffs asked that it be placed on the record—

“That plaintiffs do not question Chief Dore Numa's right to lease the land named in the Statement of Claim (which includes the one demised by the lease of 25-2-11 (*see page 54 of Exhibit A*): subject to the conditions and covenants in the said leases.

2. In case of a decision in plaintiff's favour they are prepared to *confirm* those leases with their conditions and covenants”.

At page 50 of Exhibit A, Ogegede made two vital but contradictory statements, one immediately following the other. He said—

“I did not lease any land to the Government. Chief Dore did so: he was fully entitled so to do. He has no right to do so. (*sic. T.D.M.*)”.

He continued—

“I now sue him claiming rents received by him. I do so because the Government refused to pay me rent”.

At page 51 he repudiated his instructions to his counsel about Chief Dore's right to grant the lease. He said:

“I don't care what my counsel said on my behalf this morning. The land does not belong to my counsel: What does he know about it?”

Nonetheless the same solicitor continued with the case up till the end. After hearing the case for the plaintiff the learned trial Judge without calling for the defence dismissed the claim saying—

“No explanation has been given me as to why there has been a delay of seventeen years in preferring it. They come to this Court in the persons of a series of utterly illiterate peasant witnesses. Of the first three each seemed to me merely senile; and

I accept (not without hesitation) their Counsel’s assertion that they were sober—or at least normal—in the witness box. Each of the others seemed to me abysmally stupid as well as ignorant.

The evidence such as it is of the whole set of them is a tissue of hearsay rumour, of contradictions, of absurdities. *Where it is not merely fatuous* it is obviously fictitious.”

There was no appeal against this judgment which describes the evidence in support of the claim as fatuous and fictitious. Instead of an appeal the plaintiff’s successors decided on another bite. They instituted a claim for declaration of title to an extensive area of land including the piece demised to the Government by the deed of 1911. The judgment of the then Supreme Court, starting at page 22 of Exhibit A, refers to a term of settlement which included the following statement about the position of strangers:—

“Where strangers require land as tenants or otherwise they can only have the same with the approval of plaintiff (Chief Dore Numa) which cannot be unreasonably refused and only the plaintiff or some one authorised by him can receive rents or tribute for any land..... Where rent is received by the plaintiff from such strangers, it must be shared equitably with any people who have been deprived of their occupation in whole or in part by reason of the grant to the strangers”.

This statement shows that custom permitted the Olu of Warri to take land from an indigene and grant it to a stranger. It would therefore appear *a fortiori* that he was permitted to take land from one stranger to grant to another. It should be observed that on the day the settlement was arrived at, on the 15th November, 1921, the Counsel representing the plaintiffs’ predecessors withdrew an action against Dore Numa claiming the sum of £330 as being eleven years rents.

In 1925 another claim was made for rents in respect of the same Agbassa land with the result already referred to.

The then Supreme Court in dismissing the claim for declaration of title refused the plea of *res judicata* and stated that although the issue of title was raised in the 1925 case the issue was not determined. It however went on to say, at page 24 of Exhibit A—

“The case before me teems with laches and acts of acquiescence on the part of the plaintiff.”

On an appeal to the Full Court the Court in the judgment of Berkely, J., said (*see* page 33 of Exhibit A):

“The plaintiffs do not seek in any way to disturb existing leases”.

In a further appeal to the Privy Council (*see* the annexure to Exhibit A) which was dismissed the Court said—

“.....on the other hand the defendants through this period exercised rights of ownership over the land and in particular from time to time have leased land to the

Government. In pursuance of those leases buildings have been erected on the land which could not possibly have escaped the notice of the plaintiff and his people, which leases have not in any way been complained of by the plaintiff”.

The decision in the case rests upon acts of ownership by the defendants, evidenced *inter alia* by the grant of leases, including that of 1911, which according to the counsel for the plaintiffs’ predecessors, the plaintiffs did not question the right of Chief Dore to make, which, according to Berkeley, J. the plaintiffs did not seek in any way to disturb, and which, according to the decision of the Privy Council, “have not in any way been complained of by the plaintiffs people”. In my judgment therefore the plaintiffs are estopped from seeking to set aside the lease now and the matter is, for that reason *res judicata*.

The plaintiffs’ predecessors took an action to recover rent and failed. They then took another for declaration of title to the land and failed, even though the Court, as in the case of *Eyo Ita v. Asido* (2 W.A.C.A. 341), could have made a declaration in their favour indicating their right to occupy, farm upon and use a determinate portion of the land in accordance with native law and custom.

It seems that the misfortune of the plaintiffs and their predecessors stems from one malady; an exaggeration of the quantum of their interest in the land granted to them and probably also as to the area covered by the grant. They failed to take action as laid down by the Ordinance and when they took action they made wrong claims. Well might one, with some variation, say in the words of Maitland—

“The forms of action we have buried, but they still rule us from their graves..... A lawyer can still do his client a great deal of harm by advising a bad or inappropriate course of action, it is true he cannot bring about a total shipwreck”. In my judgment the second defendant has an indefeasible leasehold title under section 30 of the Public Lands Acquisition Ordinance, 1903 and the plaintiffs are estopped from raising the issue of the validity of the lease. It would therefore appear that the doctrine of *res judicata* and statutory provisions have combined to make this shipwreck a total one.

I shall now deal briefly with the submission relating to the doctrine of cancellation by quoting a portion of the decision of the West African Court of Appeal in the case of *Rufus Adekunle Wright v. The Ahmadiyya Movement-In-Islam and another* (W.A.C.A. unreported case No. W.A.C.A. 2886 of the 7th May, 1949).

“The appropriate relief in the case of a third party in relation to the execution of a deed of conveyance by which one party purports to convey the plaintiffs land to a second party, is not by way of the equitable relief of cancellation of the deed but by a declaration of title or where there has been trespass an action for damages. It is only in an action in which can properly be pleaded mistake, misrepresentation or fraud, actual or constructive that cancellation will be the appropriate and effective remedy”.

For the foregoing reasons I hereby rule that because the Government has an indefeasible leasehold title to the land and because the matter is *res judicata* this claim must fail. I therefore uphold the submissions made by Counsel for the defendants and I accordingly dismiss the claim.

Claim dismissed.

THE QUEEN

v.

LAMBO SOKOTO

[HIGH COURT OF JUSTICE: Charles, J., 14th December, 1960.]

Criminal Law and Procedure—offences of child stealing, deprivation of liberty and abduction of a girl under the age of sixteen years, contrary to sections 371 (1), 365 and 362 of the Criminal Code, Cap. 42, respectively—girl confined by accused by means of hypnotism—meaning of “against his will” in section 365 of the Criminal Code—section 180 of the Criminal Procedure Ordinance, Cap. 43, applied.

The accused was charged with stealing a child of eleven years of age named Wosilatu Adunni, contrary to section 371 (1) of the Criminal Code, depriving the said child of her liberty by unlawfully confining her against her will contrary to section 365 of the Code, and abducting the said girl by unlawfully taking her out of the protection of her father, contrary to section 362 of the Code. It was established by evidence that the accused in the night of 8th December, 1959, caught hold of the girl along the street and dragged her to his room where he undressed her, forced her to kneel down naked, place a piece of cloth on her head and thereafter she was unable to move and speak. Later the girl's father and a policeman arrived on the scene. At that stage the girl was unable to answer her father's questions. On request by the policeman, the accused promised to release the girl if he was treated gently. He then called the girl thrice by name and spoke to her in a language unknown to the policeman. The girl then answered and thereafter was able to speak. There was medical evidence to the effect that hypnotism was practised by many native doctors, that a hypnotic trance could be produced and ended by voice and gestures and that a person could not be hypnotised without his consent and that the girl in this case was very susceptible to hypnotism. Although the father of the girl deposed to the fact that the girl was eleven years of age, the court, from her appearance, felt not satisfied beyond doubt that she was under twelve years of age.

Held: (1) that since the court was not satisfied beyond reasonable doubt that the girl was below twelve years of age, the accused would be found not guilty on the first count;

(2) that as the accused had no lawful authority for confining the girl “against her will”, which in this context meant “without her consent”, it was unnecessary to prove that the girl had exercised the powers of volition by deciding to leave the place of confinement but had been prevented from giving effect to that decision and that it was sufficient to prove that she did not consent to the confinement;

(3) that although there was medical evidence that hypnotism could not be effected without the submission of the subject, the girl's submission in this case did not involve real consent on her part having regard to her age and the failure of the accused to give any evidence that he explained to her what he was about to do;

(4) that acting under section 180 of the Criminal Procedure Ordinance, the court would stay the trial on the third count.

Accused found not guilty on first count; guilty on second count; and trial on third count stayed.

Cases cited:

R. v. Hopkins, (1842) C. & M. 254.

R. v. Harling, [1938] 1 A11 E.R. 307.

Abeokuta Criminal Charge No. AB/3c/60.

Osinibi, *Crown Counsel*, for the Crown.

Charles, J.: The accused is charged with three offences:

(1) Child stealing contrary to section 371 (1) of the Criminal Code in that, on the 8th December, 1959 at Ago-Owa he unlawfully detained Wosilatu Adunni, a child of eleven years with intent to deprive Folorunso Akano, her father, of the possession of the child.

(2) Deprivation of liberty, contrary to section 365 of the Criminal Code, in that, on the 8th December, 1959, at Ago-Owa he unlawfully confined Wosilatu Adunni against her will.

(3) Abduction of a girl under sixteen years of age, contrary to section 362 of the Criminal Code, in that, on the 8th December, 1959, he unlawfully took Wosilatu Adunni, an unmarried girl of eleven years out of the protection of her father, Folorunso Akano, against the will of the latter.

The case, as presented by the Crown, is an extraordinary one. The girl, Wosilatu Adunni, gave evidence that at about 8 p.m. on the 8th December, 1959, while she, preceded by her sister, was going to the latrine, the accused caught her by the hand and dragged her to his room where he undressed her, forced her to kneel down naked, and placed a piece of cloth on her head: that she became unable to move and talk: that shortly after her mother and father arrived: that the accused refused to let her speak or move: that the mother then went out and returned with a policeman who ordered the accused to release her: and that the accused then called her name and she was able to move and speak. The sister corroborated the evidence as to the accused having caught the girl by the hand and having dragged her to his room. The father deposed that he entered the accused's room with his wife and a policeman; that he saw the girl kneeling down naked, with her hands behind her back, a piece of cloth on her head, and with her eyes staring wide open: that he spoke to the girl but received no answer: that the policeman then asked the accused to release the girl and the accused promised to do so if he were treated gently: that the policeman again repeated his request: that the accused then called the girl by name three times, and told her that she should answer his call, whereupon she said "please, please", and that the accused then told the girl to stand up and she did. The policeman gave similar evidence, stating that he called the girl by name three times without her responding to him: that he then, through an interpreter, told the accused, who is a Hausaman, that there might not be a case if he would make the girl speak: that the accused then spoke to the girl in a language which the policeman did not understand and she stood up and began to speak.

Dr Lambo, who was called by the Court, deposed that hypnotism is practised by many native doctors: that a hypnotic trance can be produced and ended by voice and gestures, and even by the use of language which the subject does not understand: that such a trance can be produced in a few minutes: that it is possible to produce a trance in which the victim can neither speak nor move and then to reduce the trance so that the victim can move on command but cannot speak: that it is possible for a person in an hypnotic state not to re-act in any way to speech by a person other than the hypnotiser: that a person could not be hypnotised without his consent: and that he, Doctor Lambo, had tested the girl in this case and found her to be very susceptible to hypnotism.

The accused in evidence denied that he knew anything about hypnotism and that he had dragged the girl to his room. According to him the girl often visited him with a companion for food, but on the 8th December, 1959 she had come alone: that he gave her some pounded yam and then went out to the latrine, telling her that he would give her some soup on his return: on returning from the latrine he found a crowd of people outside his house, demanding the girl: that someone had put the padlock on the outside of the door: that he opened the padlock with his key: and that the people then seized him, undressed the girl and sent for the police. In cross-examination the accused said that he first saw that the girl was naked when the police pointed that out to him. Later he said that he noticed, when he first came back from the latrine, that the girl was naked, except for a cloth on her head, and was kneeling down, and that he was told to call the girl, that he did so and that she then got up.

With reference to the first charge, I am not satisfied beyond doubt that the girl was under twelve years of age. The father deposed to her being eleven, but my doubt arises from the appearance of the girl. The accused will therefore be found not guilty on that charge.

As to the second charge, I am not prepared to accept the evidence of the girl as to the circumstances in which she went to the accused's room and what occurred there, in the absence of evidence as to whether a hypnotic trance would or would not affect the memory as to preceding events. It also seems unlikely, in the absence of evidence to the contrary, that while in the trance the girl would know anything of what was going on round her. As for her sister, I am satisfied that she gave a different account of the girl's going to the accused's room when giving evidence before the Magistrate to that which she gave here, and therefore no reliance can be placed on her evidence.

I have no reason, however, to doubt the evidence of the girl's father and of the policeman as to the condition in which they found the girl. Both impressed me as truthful witnesses, whereas the accused impressed me as being the contrary. Further, the accused's admission that he was asked to call the girl is corroborative of the two witnesses mentioned. Lastly, the evidence of Dr Lambo shows that it is scientifically possible to produce a trance, such as the girl was found in, by hypnotism, and that hypnotism is practised by certain people here.

The result is that I have no doubt that the girl was found on the 8th December, 1959 in a hypnotic trance in the accused's room and that he brought her out of that trance. I also have no doubt from those two facts that the accused put the girl into the trance.

On these findings of fact I am satisfied that the second charge has been established against the accused. The evidence as to whether the accused locked the door of the room in which was the child is inconclusive but, in my judgment, if one person immobilises another in a room by hypnotism he confines that other in the room just as much as if he had locked the door of the room. As there is no evidence suggesting that the accused had any lawful authority or excuse for confining the girl to his room by hypnotism or otherwise I have no doubt that he did not have any such lawful authority or excuse. As to confining the girl against her will, the statutory words "against his will" are synonymous with "without his consent", so that it is unnecessary to prove that a person had exercised his powers of volition by deciding to leave a place of confinement but had been prevented from giving effect to that decision, and it is sufficient to prove that he did not consent to the confinement. (Cf. *Archbold* 34th Ed., p. 1127, paragraph 2938, citing *R. v. Hopkins*, [1842] C. & M. 254). As to whether the girl did consent,

I have no doubt that she did not really. Although Dr Lambo's evidence shows that hypnotism cannot be effected without the submission of the subject, the girl's submission in this case did not involve any real consent on her part, I am sure, having regard to her age and to the failure of the accused to give any evidence that he explained to her what he was about to do, but, instead, made a false denial of having hypnotised the girl (see *R. v. Harling*, [1938] 1 All E.R. 307 (C.C.A.) as to the relevancy of age to the issue of consent).

The accused will therefore be found guilty on the second charge. As to the third charge, I shall stay the trial upon it under section 180 of the Criminal Procedure Ordinance.

Accused found not guilty on first count; guilty on second count; and trial on third count stayed.

THE QUEEN

v.

THE GOVERNOR IN COUNCIL, WESTERN
NIGERIA.EX PARTE PRINCE KASALI ADENAIYA ... *Applicant*

[HIGH COURT OF JUSTICE: Charles, J., 31st December, 1960.]

Certiorari—protest made to Governor in Council against appointment of a chief—omission by Governor in Council to announce specifically his decision on such a protest before approval of the appointment—section 3 of the Administration of Justice (Crown Proceedings) Law, 1959, No. 3 of 1960, considered—section 16 (1) and (2) of the Chiefs Law, 1957, applied.

The applicant brought this application for an order of *certiorari* to quash the approval by the Governor in Council of the appointment of Sikiru Adetona as the Awujale of Ijebu-land on the ground that the Governor in Council did not announce specifically a decision upon a protest or representations made against the appointment of the said Sikiru Adetona before purporting to approve that appointment. It was argued on behalf of the applicant that the Governor in Council was bound to act judicially when deciding under the Chiefs Law, 1957, whether to approve or set aside an appointment; that to act judicially required him, in the case of a disputed appointment, to inform the parties to the dispute what was the decision on each point of dispute before approving the disputed appointment; and that such information not having been given to the applicant, the approval was void for want of jurisdiction.

Held: (1) that in approving the appointment of a chief under Part II of the Chiefs Law, 1957, the Governor in Council is bound to act judicially before making such a decision at least when the appointment has been challenged under section 16 (2) of the Law;

(2) that it is not a necessary implication of section 16 of the Chiefs Law that the Governor in Council should notify his preliminary decisions upon their representations to all persons who had made them before publishing the approval of the appointment of a Chief under Part II of the Law.

Obiter dictum: That the only implication is that the Governor in Council must give the information before, or concurrently with, or as part of the ultimate decision according to his discretion and not that he is bound to give it before making his ultimate decision.

Application refused.

Cases cited:

R. v. Manchester Legal Aid Committee, Ex Parte, R. A. Brand and Co., [1952], 1 T.L.R. 476; [1952] 2 Q.B. 213.

Hayman v. The Governor of Rugby School, (1874) L.R. 18 Eq. 28.

Lagunju v. Olubadan in Council, [1952] A.C. 387.

The Resident, Ibadan Province and Another v. Lagunju, (1954) 14 W.A.C.A. 549.
Abeokuta Civil Suit No. AB/6/60.

Olu Ayoola, for applicant.

Chief Rotimi Williams, Q.C. (Eboh, Senior Crown Counsel, with him) for respondent.

Charles, J.: This is an application for an order of *certiorari* to quash the approval by the Governor in Council of the appointment of Sikiru Adetona as the Awujale of Ijebu-land, the approval being dated the 4th January, 1960 and having been notified in the Government Gazette of Western Nigeria on the 21st January, 1960.

The application was made on three grounds, of which two were abandoned at the hearing as being untenable because of section 3 of the Administration of Justice (Crown Proceedings) Law, 1959, No. 3 of 1960. I accept the abandonment without, of course, pronouncing, either expressly or impliedly, on the validity of the reasons therefor.

The remaining ground, the one upon which the application has been argued, is that the approval mentioned is void because the Governor in Council, that is, the Executive Council, as the former term is now defined, did not announce specifically a decision upon a protest, or representations, made against the appointment of Sikiru Adetona before purporting to approve of that appointment.

The affidavits which have been filed on both sides show that by letter, dated the 2nd November, 1959, the Secretary of the Ijebu Divisional Council, the competent Council under the Chiefs Law, 1957, No. 20 of 1957, notified the Minister of Local Government that the King-makers had selected, and recommended for the approval of the Governor in Council Mr Sikiru Adetona as the Awujale of Ijebu-land: that on the 9th November, 1959, the applicant's solicitors had made representations, by letter to the Governor in Council, against approval of the appointment so notified on nine grounds relating to the validity of the appointment under the Chiefs Law, 1957: that no reply to that letter was received, or presumably was given: that the letter of protest was duly considered by the Governor in Council: and that the challenged approval was given on the 4th January, 1960, and published in the Gazette on the 21st January, 1960, the approval being a bald announcement that the Governor in Council, in pursuance of the powers conferred by section 16 (1) of the Chiefs Law, 1957, had approved of the appointment.

Mr Ayoola, for the applicant, submitted that the Governor in Council was bound to act judicially when deciding under the Chiefs Law, 1957, whether to approve or set aside an appointment: that to act judicially required him, in the case of a disputed appointment, to inform the parties to the dispute what was the decision on each point of dispute before approving of the disputed appointment: and that such information not having been given to the applicant, the approval was void for want of jurisdiction.

Chief Rotimi Williams, for the respondent, submitted that the Governor in Council acts administratively, and not judicially, in approving of an appointment under Part II of the Chiefs Law, 1957; that consequently *certiorari* does not lie in respect of such an approval: that if the approval were a judicial act, or were preceded by a judicial act, the jurisdiction of the court to grant *certiorari* in respect of the judicial act has been taken away by section 3 of the Administration of Justice (Crown Proceedings) Law, 1959, No. 3 of 1960: and that, in any event, the announcement of the approval of the appointment was sufficient announcement that the applicant's representations against it had been found by the Governor in Council to be untenable.

An executive or administrative authority is at least bound to act judicially in, or in the course of, making a decision which is of a kind which it is authorised to make and which affects in this affairs, activities or interests an individual as such and not merely as a member of the public at large, when the decision has to be based upon a determination of specific facts or has to be preceded by a consideration of proposals, or

objection or evidence. (See *Regina v. Manchester Legal Aid Committee, Ex parte R. A. Brand and Co.* [1952] 1 T.L.R. 476; [1952] 2 Q.B. 213) and other authorities mentioned in the judgment of Parker, J.) As the applicant in this case had the right, under section 16 (2) of the Chiefs Law, 1957, to make representations to the Governor in Council against the appointment in dispute, and, by necessary implication, had the right to have his representations considered, the Governor in Council was under the correlative duties to receive and consider his representations, and thereby was under a duty to act judicially, before affirming the appointment. I am unable, therefore, to accept Chief Rotimi Williams's general proposition that the Governor in Council acts administratively when deciding to approve or set aside an appointment of a chief under Part II of the Chiefs Law, 1957—he is bound to act judicially before making such a decision at least when the appointment has been challenged under section 16 (2) of the Law mentioned.

It does not necessarily follow, however, that the duty to act judicially required the Governor in Council to inform the applicant of his decision on the latter's representation as a condition precedent to approving the disputed appointment.

The essential common law requirements of the duty to act judicially are those prescribed for courts in the strict sense, and are certainly not greater for executive or administrative tribunals or authorities which are subject to that duty. No court, in the strict sense, is bound, as a condition precedent, to announce its preliminary findings of fact before giving its ultimate decision or to give any reasons at all for that decision. Consequently, such requirements cannot be regarded as essential to the process of acting judicially on the part of an executive or administrative authority and as having been imposed on the Governor in Council by the Chiefs Law, 1957 as a corollary of the duty to act judicially having been imposed upon him. (As to the absence of any obligation upon a court, tribunal or authority to give reasons, see Practice Note, 1952, 2 T.L.R. 890: *Hayman v. the Governors of Rugby School*, (1874) L.R. 18 Eq. 28, per Malins V.C. at page 68: de Smith, *Judicial Control of Administrative Action*, page 109).

The validity of Mr Ayoola's submission, that it is a condition precedent to the Governor in Council's decision to approve the disputed appointment that he notifies all representors of his preliminary decisions upon their representations, depends, therefore, upon the implication of such a condition precedent being necessary in order to give effect, to, or to prevent, the frustration of, the manifested legislative intentions or objects of the Chiefs Law, 1957.

The immediate object of section 16 of the Chiefs Law, 1957 is to make the Governor in Council the sole authority for determining chieftaincy disputes. The ultimate object of that section is to conduce to the peace, order and good government of the communities affected by such disputes, those disputes being such as relate to matters which, as has been judicially recognised, are of great importance to the communities concerned. (*Lagunju v. Ohibadan in Council*, [1952] A.C. 387 at page 399, 12 W.A.C.A. 406 at pages 410-411: *The Resident, Ibadan Province and another v. Lagunju*, (1954) 14 W.A.C.A. 549 at page 582). "Peace, order, and good government" is a phrase of the widest import and anything which is necessary for ensuring the confidence of responsible persons in the tribunals or authorities set up to determine disputes is necessarily conducive to the maintenance of peace, order and good government.

The suggested implication is obviously unnecessary in order to achieve, or to prevent the frustration of the first object: the Governor in Council will be able to determine chieftaincy disputes whether or not he has to inform, before making his ultimate decision, representors of his decisions on their representations.

The suggested implication also appears to me to be unnecessary to achieve, or to prevent the frustration of, the second object. No doubt it would be conducive to public confidence in the decision of the Governor in Council if he had to inform representatives specifically of his decisions on their representations, as they would not then be left to speculate whether the representations had been considered or had become lost in a pigeon-hole or had suffered some other bureaucratic fate. But I am unable to see how it is necessary, in order to conduce to such public confidence, that such information should be given before the ultimate decision is reached. If the giving of such information is necessary for the purpose mentioned—and the common law has not found it so necessary—it would not matter whether it were given before, or concurrently with, or as part of the ultimate decision. Consequently, if any implication has to be made on the point, it is merely that the Governor in Council must give the information at one or the other alternative times mentioned according to his discretion, and not that he is bound to give it before making his ultimate decision. Such an implication would not assist the applicant, since the failure to comply with it would not render the ultimate decision void and liable to be quashed by *certiorari*. If a remedy for breach of such an implied obligation exists, it would be by way of an order for *mandamus*, not for *certiorari*.

Mr Ayoola relied strongly upon the remarks of Lord Normand in the judgment of the Privy Council in *Lagunju v. Olubadan in Council (supra)* with reference to section 2 (2) of the Appointment and Deposition of Chiefs Ordinance, 1947. Those remarks were to the effect that under that section the Governor was bound to deal specifically with each disputed point when giving his decision. It is to be noted, however, that those remarks were *obiter dicta*. Accordingly, it is permitted to me to ask, doubtfully, whether they had been made with due consideration of the proper principle governing implications into legislation—the principle of necessity. In any case, they do not assist the applicant, as it was not suggested in them that the implied obligation of the Governor was a condition precedent to his decision. On the contrary, the basis of the *dicta* was that the implied obligation was merely to deal with each point in dispute at the time of giving the ultimate decision. It would seem, moreover, that the failure to comply with the implied obligation was regarded as perhaps invalidating the decision because the record of the decision indicated that the Governor, or his delegate, had not considered all the points of dispute and, thereby, had failed to comply with what was a condition precedent, namely, that not one, but that all, points in dispute had to be considered. There is, of course, a fundamental distinction between, on the one hand, considering and deciding upon all points in dispute and, on the other hand, pronouncing the decisions reached when all such points have been considered.

On the foregoing considerations, I am of the opinion that this application must be dismissed.

Application refused.

AUGUSTINE ONUORAH... .. *Appellant*
v.
 COMMISSIONER OF POLICE *Respondent*

[HIGH COURT OF JUSTICE: Adejumo Kester, J., 10th January, 1961.]

Criminal Law and Procedure—charge of conspiracy and stealing—conviction by Magistrate for obtaining by false pretences although no specific finding of “not guilty” of the count of stealing—conviction for stealing substituted in the appeal court—section 174 (2) of the Criminal Procedure Ordinance and section 106 (a) (ii) of the Magistrates’ Courts (Western Region) Law, 1954, No. 5 of 1955, applied.

The appellant and another person were charged before a Magistrate with conspiracy to commit a felony and also with stealing. At the close of the case for the prosecution the trial Magistrate found that no *prima facie* case had been made against the other person and he therefore discharged him. The appellant was held to have a case to answer on the count of stealing only. At the end of the trial the Magistrate, exercising his powers under section 174 (2) of the Criminal Procedure Ordinance, convicted the appellant for the offence of receiving by false pretences but without any pronouncement on the face of the record that the appellant was not guilty of stealing or words to that effect. The appellant thereupon brought this appeal on the ground that the evidence did not disclose the offence of obtaining by false pretences.

Held: that as the trial Magistrate did not specifically find the appellant not guilty of stealing and as the evidence disclosed the offence of stealing and not that of obtaining by false pretences, the appeal court would use its power under section 106 (a) (ii) of the Magistrates’ Courts (Western Region) Law, 1954, to alter the finding of the Magistrate’s Court to that of stealing.

Appeal dismissed.

Case cited:

Inspector-General of Police v. Abu Bakare, [1957] W.R.N.L.R. 123.

Warri Criminal Appeal No. W/6.CA/60.

Gbemudu for appellant.

Bada, Crown Counsel, for the respondent.

Adejumo Kester, J.: The appellant and another person were charged with conspiracy to commit a felony, namely, to steal and also with stealing. At the end of the case for the prosecution the other person was discharged on both counts, the trial Magistrate having held that he had no case to answer.

The appellant too was discharged on the count of conspiracy but held to have a case to answer on the second count, stealing. At the end of the trial the learned trial Magistrate held that the evidence before him disclosed a case of obtaining money by false pretences and exercised the powers conferred by section 174 (2) of the Criminal Procedure Ordinance and convicted the appellant for that offence and sentenced him to twelve months imprisonment with hard labour. It is against the conviction that this appeal has been brought. Two grounds of appeal were filed.

(1) “That the decision is altogether unwarranted, unreasonable and cannot be supported having regard to the weight of evidence.”

(2) "That the decision is erroneous in point of Law in that the learned Magistrate found the accused guilty of obtaining under false pretences when the promise was of a future conduct."

Ground 1: There is no substance in this ground of appeal. The learned trial Magistrate in my opinion came to the right conclusion on the evidence before him as to the guilt of the appellant. The ground of appeal fails.

Ground 2: Both the counsel for appellant and the Crown agreed that on the evidence the Magistrate should have found the appellant guilty of stealing and not of obtaining by false pretences. I agree with them. The whole evidence is one of future conduct. It was urged on behalf of the appellant that in the circumstances the appeal should be allowed since the original charge of stealing cannot be resuscitated. It was submitted that section 174 (2) of the Criminal Procedure Ordinance invoked by the Magistrate is conclusive that he did not find the appellant guilty of stealing.

There is no pronouncement on the face of the record that the learned Magistrate found the appellant not guilty of stealing or words to that effect. In the case of *Inspector-General of Police v. Abu Bakare*, [1957] W.R.N.L.R. 123 cited by counsel for the appellant, the trial Magistrate found the accused not guilty on one of two alternative charges and acquitted and discharged him on that count, but convicted him on the other count. On appeal it was discovered that the Magistrate should have convicted on the count on which the accused was discharged and that the evidence did not support the finding on the other count on which he was convicted. The appeal court refused to resuscitate the charge on which the accused was discharged and acquitted, and to convict on it. In his judgment in that case, Ademola, C.J. (Western Region), as he then was, observed that the proper course to adopt when there is an alternative count and the Magistrate is in doubt as to which of the two offences the accused person has committed, is to convict on one and to stay the other or make a mere order of discharge on that other charge. In that case the two alternative counts were stealing and obtaining money by false pretences. In the present case there was only one charge of stealing and the Magistrate came to an erroneous conclusion that the evidence disclosed a charge of obtaining money by false pretences and invoked section 174 (2) of the Criminal Procedure Ordinance, and found the appellant guilty of that offence. There was no discharge or acquittal on the charge of stealing, and in my opinion the invoking of section 174 (2) of the Ordinance is not conclusive as to amount to a finding of not guilty of stealing. It would have been a different matter if the Magistrate had said that he found the appellant not guilty of stealing, but of obtaining money by false pretences.

Section 106 (a) (ii) of the Magistrates' Courts (Western Region) Law, 1954, No. 5 of 1955, gives the appeal court the power to alter the finding of the lower court. In the circumstances the finding of the learned Magistrate is altered to one of stealing and the sentence of twelve months imprisonment with hard labour is maintained.

The appeal is dismissed.

Appeal dismissed.

THE QUEEN

v.

D. S. AZIGBO AND OTHERS

EX PARTE ESI ITIGHA

Applicant

[HIGH COURT OF JUSTICE: Adejumo Kester, J., 10th January, 1961.]

Certiorari—application for leave to apply for an order of certiorari to be accompanied by a statement—section 5 (2) of the Administration of Justice (Crown Proceedings) Law, 1959, No. 3 of 1960 and order 59, rules 3, 3 (2) and 6 (2) of the Rules of the Supreme Court in England not complied with—effect of.

When this application for the grant of an order of *certiorari* came up for hearing on 18th November, 1960, Counsel for the respondents raised a preliminary objection to the effect that since the original application for leave to apply for the order which was brought before the court on 10th July, 1960, was not accompanied by a statement setting out the name and description of the applicant and other matters laid down under order 59, rule 3 of the Rules of the Supreme Court in England this application should be struck out.

Held: that as the application for leave did not comply with the order 59, rule 3 in that there was no accompanying statement filed, and as the subsequent filing of a statement on 18th August, 1960, could not cure the defect, this application would be struck out.

Application struck out.

Warri Civil Suit No. M/17/1960.

Okandeji, for the applicant.

Egbe for respondents.

Adejumo Kester, J.: On 10th July, 1960, the applicant brought his application for leave for an order of *certiorari*. On 10th August, 1960, the court heard the application, granted the leave sought and ordered that steps be taken to serve papers on the respondents. A counter-affidavit was filed by the respondents on 18th November, 1960. When the matter came up to be heard on 23rd November, 1960, counsel for the respondents raised a preliminary objection to the application brought on 10th July, 1960, by the applicant for leave and submitted that since it was not accompanied by a statement setting out the name and description of the applicant and other matters laid down under order 59, rule 3 of the Rules of the Supreme Court in England which is the rule applicable by virtue of the provisions of section 5 (2) of the Administration of Justice (Crown Proceedings) Law, 1959 (W.R.L. No. 3 of 1960), the application should be struck out and the order made on 10th August, 1960, discharged.

The procedure to be adopted when an application for leave in these matters is brought, is laid down in order 59, rule 3 (2). It is mandatory that the application *ex parte* should be accompanied by a statement which should contain nothing more than the name and description of the applicant, the relief sought and the grounds on which it is sought; and by affidavits verifying the facts relied on. It is not enough to lodge a statement verified by affidavit (*see Annual Practice*, 1954, page 1305).

The present application does not comply with the rules laid down in that there was no accompanying statement filed. It is defective in this respect, and I do not think that the subsequent filing of a statement on 18th August, 1960, after the order was made on 10th August, 1960, can cure that defect.

The amendment envisaged by order 59, rule 6 (2) is one relating to the contents of a statement accompanying the application for leave. It does not relate to an omission as in this case.

I uphold the objection. The application is struck out and the order of this court made on 10th August, 1960, is hereby discharged.

Application struck out.

GBADAMOSI LAHAN
 (for himself and on behalf of the Ikolaba family)

Plaintiffs

v.

THE ATTORNEY-GENERAL OF WESTERN
 NIGERIA

Defendant

[HIGH COURT OF JUSTICE: Fatayi Williams, J., 12th January, 1961.]

Petition of right—claim for compensation for land acquired by Government in 1934—claim filed in 1960—whether claim barred by section 10 (2) of the Public Lands Acquisition Ordinance, Cap. 185—whether that section offended against sections 30 (1) and 30 (2) (d) of the Nigeria (Constitution) Order in Council, 1960—also whether claim barred by the Limitation Act, 1623—sections 3, 4 and 5 of the Petitions of Right Ordinance, Cap. 167, considered—section 1 (a) of the Public Authorities Protection Act, 1893, referred to.

By this petition of right which was duly endorsed with the Governor's fiat on 16th June, 1960, the plaintiffs claimed from the Attorney-General the sum of £50,000 as compensation for the acquisition by the Government in 1934 of a piece of land belonging to their family. The plaintiffs averred that at the time of the acquisition, they were paid only for the crops but not for the land; that between 1941 and 1959 they had petitioned several times for payment but to no avail; and that as a result of the failure of the Government to pay the compensation claimed, this petition was filed. In reply to the defendant's submission that the claim was statute-barred by virtue of the provision of section 10 (2) of the Public Lands Acquisition Ordinance, it was argued on behalf of the plaintiffs that that section was null and void as it offended against section 30 (1) and (2) (d) of the Nigeria (Constitution) Order in Council, 1960. It was contended on behalf of the defendant that the petition was statute-barred by virtue of the provisions of the Limitation Act, 1623. In reply it was argued on behalf of the plaintiffs that negotiations that were going on between 1941 and 1959 prevented time from running and in particular that a letter written by the Permanent Secretary, Ministry of Lands, dated 24th July, 1959, that "the matter is receiving attention" prevented time from running.

Held: (1) that section 10 (2) of the Public Lands Acquisition Ordinance, Cap. 185, did not offend against section 30 (1) and (2) (d) of the Nigeria (Constitution) Order in Council, 1960, because that section did not take away the right of access to the High Court but merely limited the time within which that right could be exercised; and mere limitation of the time during which a right could be exercised did not destroy the right unless the time limit was so short as to amount to a denial of the right to exercise that right;

(2) that the provisions of section 10 (2) of the Public Lands Acquisition Ordinance, Cap. 185, was not procedural and that in the absence of any express terms it was not retrospective in its effect and as the right to claim compensation vested as far back as 1934 when the land was acquired, the present action was not statute-barred under that section;

(3) that however the Limitation Act of 1623, applied to suits brought under the Public Lands Acquisition Ordinance and that as there was nothing in the letter dated 24th July, 1959, to prevent time from running during negotiations between the parties this action was statute-barred under the provisions of that Act.

Ministry of Lands and Labour,
Ibadan, Western Nigeria,
24th July, 1959.

Our Ref. MLL. 1642/T/10

Sir,

COMPENSATION FOR THE LAND USED BY GOVERNMENT—
CLAIMS OF

I have the honour to acknowledge the receipt of your letter dated 4th April, and to say that the matter is receiving attention. Further communications will be addressed to you in due course.

I am, Sir,

Your obedient Servant,

(Signed) K. C. Thorpe,
for Permanent Secretary (Lands Division)

A. L. Obisesan, Esqr.,
P.O. Box 773,
Ibadan".

I shall, first of all, consider the effect, if any, of section 2 (2) of the Public Lands Acquisition (Amendment) Law (now section 10 (2) of the Public Lands Acquisition Law (Cap. 105) of the Laws of the Western Region of Nigeria on the plaintiffs' claim. Section 10 (2) which came into force on 19th June, 1958 provides as follows:

"Subject to the provisions of section 20, no claim to any estate, interest or right in or to any lands in respect of which a notice has been served and published in the Gazette in accordance with section 9, or to any compensation or rent in respect of any such estate, interest or right, made after the expiration of twelve months from the publication of the notice, shall be entertained by any public officer whose duty it is to receive such claims or by any court".

Counsel for the plaintiffs has submitted that section 10 (2) is null and void and of no effect because it offends against section 30 (1) and (2) (d) of the Nigeria (Constitution) Order in Council, 1960. The provisions of section 30 (1) are as follows:

"30 (1) No property, movable or immovable, shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except by or under the provisions of a law that:

(a) requires the payment of adequate compensation therefor; and

(b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation, to the High Court having jurisdiction in that part of Nigeria".

Those of section 30 (2) (d) are as follows:

"30 (2). Nothing in this section shall effect the operation of any law in force on the thirty-first day of March, 1958, or any law made after that date that amends or replaces any such law and does not—

.....

(d) deprive any person of any such right as is mentioned in paragraph (b) of sub-section (1) of this section”.

In reply, the learned Senior Crown Counsel said that the limitation in section 10 (2) of Cap. 105 does not take away the right of access to the High Court and that it merely limits the time during which that right should be exercised. He also argued that, in any case, there is an escape clause in section 30 (3) (i) of the Order which provides that nothing in section 30 “shall be construed as affecting any general law relating to limitation of actions”.

I am unable to agree with the learned Senior Crown Counsel that section 30 (3) (i) provides an escape clause for the consequences of any infringement of the provisions of section 30 (1) and (2). To my mind, the general law relating to limitation of actions in Western Nigeria is the Limitation Law (Cap. 64 of the Laws of the Western Region of Nigeria) and not the provisions of section 10 (2) of the Public Lands Acquisition Law which makes provisions for special periods of limitation in respect of claims arising out of compulsory acquisition of land by the Crown. On the other hand, I share the view of the learned Senior Crown Counsel that section 10 (2) does not take away the right of access to the High Court, but merely limits the time within which the right can be exercised. Mere limitation of the time during which a right can be exercised does not in my opinion, destroy the right unless, of course, the time limit is so short as to amount to a denial of the right to exercise that right. I do not think that twelve months is so short a period as to tantamount to a denial of right of access to the High Court. For these reasons I hold that the provisions of section 10 (2) of Cap. 105 are NOT *ultra vires* the provisions of section 30 of the Constitution Order.

It now remains for me to consider whether the claim of the plaintiffs is caught by the provisions of section 10 (2). In the judgment of the Federal Supreme Court (delivered on 4th May, 1960) in the case *Are v. The Attorney-General, Western Region*, 1960 W.N.L.R. 108, Abbott, F.J., expressed the following views on the effect of the provisions of section 10 (2):—

“It seems to me that the important words in this section are “shall be entertained”. It is beyond doubt, in my view, that the claim in this case, represented as it is by the Petition of Right, was “entertained” by the Court on the day of its filing, namely 29th May, 1958, *some three weeks prior to the coming into operation of the amending law*. The effect of the wording of the amending law is clearly *in future*, and it is not possible to say that it could by necessary implication have the effect of putting a stop to proceedings which had already been validly commenced. To hold otherwise would be tantamount to saying that the amending Statute secured the undoing of something already done. It is a cardinal principle that unless it affects purely procedural matters (and in my view this is not such a matter) a statute cannot apply retrospectively unless it is made to do so by clear and express terms”.

In view of the above, I hold that the provisions of section 10 (2) are not procedural, and, in the absence of any express terms, it is not retrospective in its effect. The section came into force on the 19th of June, 1958. This petition was filed in the High Court on the 24th day of March, 1960, and was endorsed with the Governor’s fiat on the 16th of June, 1960.

Although the claim for compensation was made more than twelve months after the coming into operation of the provisions of section 10 (2), the right to claim compensation, in my view, vested as far back as 1934 when the land was acquired.

In the words of McCaardie, J., in *Henshall v. Porter*, [1923] 2 K.B.D. 193 at page 197, it is "the settled, recognised and beneficent rule of law that existing rights are not to be deemed to be destroyed by a statute unless there be express words or the plainest implication to that effect".

There is nothing in the provisions of section 10 of the Public Lands Acquisition Law indicating that the plaintiffs' right to claim compensation, vested since 1934, had been destroyed.

In these circumstances, I hold that the limitation provided for in section 10 (2) does not affect the existing rights of the plaintiffs notwithstanding the fact that an action to enforce the rights was brought after the coming into force of that section.

I will now consider whether the claim is statute-barred by virtue of the provisions of the Limitation Act of 1623 which is a statute of general application which was in force in England on the first of January, 1900, and which was therefore in force in the Region at the material time.

After hearing further argument, I am of the opinion that the Limitation Act of 1623 applies to suits brought under the Petitions of Right Ordinance. This view is supported by the decision in *Oloto v. The Attorney-General*, (1957), 2 F.S.C. 74 where it was held (Jibowu, Ag. F.C.J. dissenting) that the Crown can take advantage of the Limitation Act, 1623 in suits brought under sections 3 and 4 of the Petitions of Right Ordinance.

It now remains to consider whether, in view of the letter Exhibit "A", the Crown can still take advantage of the Limitation Act. After perusal, I am unable to find anything in the Act to prevent time from running during negotiations between the parties for the consideration of the claim. This is clearly a case where the Government had been slow in formulating its attitude towards a claim. The best course, to my mind, was for the plaintiffs to start proceedings so as to stop time from running. Failure to do this could not, in my view, stop the time from running against them. To hold otherwise would amount to a statement that a defendant could be estopped by a letter such as Exhibit "A" from raising a defence given him, without qualification, by statute. In this connection, I will refer to the case of *Hewlett v. London County Council* (1908) 24 T.L.R. 331 at 332. In that case, the plaintiff was injured by the negligence of the defendant's servants when driving a fire-engine in the course of their duty. A correspondence, written "without prejudice" passed between the solicitors for the parties which contained suggestions for a settlement, the sum which the plaintiff would be willing to accept, and requests for particulars. More than six months after the act complained of, the plaintiff brought an action to recover damages for the injuries sustained. The defendants pleaded that the action, not having been brought within six months as required by section 1 (a) of the Public Authorities Protection Act, 1893, would not lie. The plaintiff alleged that the defendants had waived their rights under the Act or were estopped from relying on the Act. The Act was not mentioned in the correspondence. At the trial, the jury gave judgment for the plaintiff and found that the defendants had so conducted themselves as to lead the plaintiff to believe that they were prepared to entertain the payment of reasonable compensation on the particulars being furnished, and in that way led the plaintiff or her solicitor to postpone the issue of the writ. On appeal against that decision, it was held, allowing the appeal that the defendants were *not* estopped from setting up the statute.

44 GBADAMOSI LAHAN (FOR HIMSELF AND ON BEHALF OF THE IKOLABA FAMILY)
v. THE ATTORNEY-GENERAL, WESTERN NIGERIA

Although it would appear from the facts that the plaintiff in the case cited above is on a much stronger footing than the plaintiffs in this case, the decision, nevertheless, seems to support the view that negotiations between the parties will not stop the time from running. For the above reasons, I hold, not without some difficulty, that the claim, by virtue of the provisions of the Limitation Act of 1623, is statute-barred, and must for that reason, be dismissed.

The claim is dismissed with costs.

Claim dismissed.

THE QUEEN

v.

GOVERNOR IN COUNCIL, WESTERN
NIGERIA.EX PARTE SOLOMON DADA ADEYANJU ... *Applicant*

[HIGH COURT OF JUSTICE: Madarikan, J., 13th January, 1961.]

Certiorari—application for Order absolute refused in the absence of counsel for applicant but in the presence of applicant—motion to relist application under order 26, rule 8 of High Court (Civil Procedure) Rules, 1958,—whether in application for order of certiorari counsel could be regarded as “party” under rule 8.

The applicant who was granted leave to apply for an order of *certiorari* by the Akure High Court duly filed the application through his solicitor. On the day the application was to be argued, the applicant was present but his solicitor was absent. The Court, after hearing counsel for the respondent, dismissed the application for want of jurisdiction. The present application was brought under order 26, rule 8, of the High Court (Civil Procedure) Rules, 1958, to relist the application for an order of *certiorari* because, it was argued, absence of any party in the rule, could, in applications for *certiorari*, be construed as absence of counsel as it was the practice in such applications, with few exceptions, that counsel and not the party had a right of audience.

Held: that it was the applicant who was a party to the application and not his counsel and that as the applicant was present at the hearing of the application, order 26, rule 8 would not apply; and as there was no judgment in default this application to relist would be refused.

Application refused.

Case cited:

Colonel Kynaston's Appeal, unreported, but see *Times Newspaper* for 23rd November, 1929.

R. v. Staff Sub-Committee of London County Council's Education Committee and Another Ex parte Schofield and Others [1956] 1 W.L.R. 430.

Akure Civil Suit No. AK/61/59.

Olu. Ayoola for applicant.

Adio, Crown Counsel, for the respondent.

Madarikan, J.: Having obtained leave to apply for an order of *certiorari*, Mr Ayoola filed an application for an order of *certiorari* on the 25th day of February, 1960. The application was filed by him on behalf of Solomon Dada Adeyanju, the applicant. Mr Ayoola signed as “Solicitor for applicant”.

When the application came up for hearing before Doherty, J., on the 31st day of October, 1960, Mr Ayoola was absent but his client, Adeyanju, was in Court. The Court after hearing counsel for the respondent, dismissed the application for want of jurisdiction.

The fresh application which I am now considering is for an order to relist the application which was dismissed on the 31st day of October, 1960. In arguing the motion, Mr Ayoola relied on order 26, rule 8 of the High Court (Civil Procedure) Rules, 1958 which reads as follows:

"Any judgment 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."

Mr Ayoola has presented an ingenious argument. His contention is that in matters of this nature, parties are normally represented by counsel and he went further to submit that, with few exceptions, the counsel of the party and not the party himself has a right of audience.

I am unable to find any decided case in this country which bears out Mr Ayoola's submission.

It may be profitable to examine what the practice in England is.

In *Colonel Kynaston's Appeal* which was reported in the *Times Newspaper* for 23rd November, 1929 Scrutton, L.J., observed that "the Court had made it a rule, and had acted on it for a hundred years, that persons coming to apply for the prerogative writ of *mandamus* must do so by counsel, and must be represented by counsel".

In 1947, the Divisional Court departed from this rule of practice—see Practice Note 1947, W.N. 218 which I will quote in full—

"PRACTICE NOTE

On an application made by a litigant in person for leave to move for an order of *mandamus*, Lord Goddard, C.J., said that the judges had decided that prerogative writs might be moved for by litigants in person."

This rule of practice established by the Divisional Court in 1947 was adopted by the Court of Appeal in *R. v. Staff Sub-Committee of London County Council's Education Committee and another Ex parte Schofield and others* [1956] 1 W.L.R. 430. In that case, Denning, L.J., said that "much as we value the help of the bar, we must never go so far as to refuse an applicant simply because he is in person."

The rule of practice in England is that parties are normally represented by counsel, but an applicant is allowed to argue the case on his own behalf both in the Court of first instance and the Court of Appeal.

I cannot uphold Mr Ayoola's submission that he ought to be regarded as a "party" and that as judgment was given in his absence order 26, rule 8 applies. He made the application for an order of *certiorari* on behalf of the applicant and signed as his (*i.e.*, the applicant's) solicitor. The applicant was present at the hearing and was in my view competent to argue his application. I am of the opinion that Adeyanju was a party to the proceedings and that at no time was Mr Ayoola a party, or could he rightly be regarded as such. That being my view, order 26, rule 8 does not apply as there was no judgment by default. I therefore refuse this application to relist.

Application refused.

OLABISI BECKLEY *Petitioner*

v.
BOBBY OLUFEMI BECKLEY *Respondent*

[HIGH COURT OF JUSTICE: Fatayi Williams, J., 20th January, 1961.]

Divorce—what amounts to cruelty—persistent nagging and false accusation of adultery affecting the health of petitioner.

This was a petition for the dissolution on the ground of cruelty of the marriage celebrated between the petitioner and respondent in London in 1954. The petitioner alleged that soon after their marriage the respondent started to accuse her of infidelity of a most humiliating nature, nagging her continuously about this. These repeated accusations and persistent nagging which began in 1955 continued unabated until the health of the petitioner was adversely affected.

Held: that false accusations of adultery would not constitute cruelty for the purpose of the dissolution of a marriage unless the persistence in such false charges gave rise to injury to health or reasonable apprehension of such injury; but that the persistent nagging and regular outbursts of jealousy which had a cumulative adverse effect on the health of the petitioner were sufficient acts of cruelty which entitled the petitioner to a *decree nisi* for the dissolution of the marriage.

Decree nisi for the dissolution of the marriage.

Case cited:

Atkins v. Atkins (1942), 2 All E.R. 637.

Ibadan civil suit No. I/219/60.

Rotimi-Williams, Q.C. (Ganiyu Agbaje with him) for the petitioner.

Fatayi Williams, J.: This is an undefended divorce suit and the following are the facts given in evidence by the Petitioner.

The Petitioner, Olabisi Beckley, was on 18th September, 1954, lawfully married to the Respondent, Bobby Olufemi Beckley, at the Registrar Office in the District of Kensington, London. After the said marriage the parties lived and cohabited at different places in the United Kingdom and in Nigeria. There are no issues of the marriage. Both parties are now domiciled in Nigeria where the Petitioner resides at the University College Hospital, Ibadan, while the Respondent resides at No. 2 Ora Street, Surulere, Lagos. There has been no proceedings previous to this one either in this Court or in any other Court in Nigeria or elsewhere relating to this marriage by or on behalf of either party.

As a result of the persistent cruelty of the Respondent to the Petitioner since their marriage the Petitioner has now petitioned for the dissolution of the marriage on the ground of the Respondent's cruelty, instances of which are listed hereunder:

In August 1955, and about a year after the parties were married, the Petitioner had two days off duty from the Queen Charlottes Maternity Hospital, Hammersmith, London, where she was working as a resident nurse in training. She went to spend her off duty period with the Respondent. On arrival, she told the Respondent that she had two days off but the Respondent disbelieved her, saying that she had three days off and was planning to spend the third day with another man. No amount of explanation by the Petitioner would satisfy him. Instead he went to the Petitioner's Hospital

to check the accuracy of her statement with the Assistant Matron. Following the Respondent's visit to the Hospital, the Petitioner was asked by the Assistant Matron to warn her husband not to come to the Assistant Matron's Office again for the purpose of making such a distasteful enquiry. The Petitioner was most embarrassed by this visit and from her demeanour in the witness-box, it is obvious that she felt very humiliated. The Petitioner moved from the hospital soon after this incident and went to live with the Respondent.

In spite of the move, the parties did not live happily together because the Respondent was always accusing the Petitioner of infidelity of a most humiliating nature, nagging her continuously about this. On one occasion the Respondent accused the Petitioner of committing adultery with the landlord of the house they were occupying at No. 14 Netherwood Road, Shepherd's Bush, London. An enquiry at a meeting at which the landlord, his wife, some of his relatives, the Respondent as well as the Petitioner were present disclosed that the allegation was another figment of the Respondent's imagination. The parties were ejected from 14 Netherwood Road soon afterwards and went to live at New Kings Road, Fulham.

The Petitioner was still unhappy because the allegations of infidelity continued. If the Respondent went out alone, he would on his return question the Petitioner at length as to who called and what they did. If he saw cigarette ashes around, he would question the Petitioner as to who called and smoked the cigarettes. Furthermore, anytime the Petitioner returned from work later than usual she would be subjected to a barrage of the most searching and insinuating questions.

These repeated accusations and persistent nagging affected the Petitioner's health and she could not concentrate on her work. To avoid further embarrassment, she gave up going to parties and for the rest of her stay in England she led a rather lonely life because their friends stopped calling on them.

The above was the position when the parties returned to Nigeria in January 1958, and for some time lived at Moleye Street, Yaba, with the Respondent's parents. As the Petitioner, now a qualified nurse and midwife, had to go out frequently to enquire about her application for a job at the Medical Headquarters, the suspicion and accusation continued with unabated intensity.

One day in May 1958, the Petitioner visited her cousin, one Dr Majekodunmi, now Federal Minister, at the Massey Street Dispensary where he was then the Specialist in charge. As she could not see Dr Majekodunmi until about 2.00 p.m., he took her to his house to lunch soon after. On her return home about 4.00 p.m. the Respondent accused her of having gone out somewhere to commit adultery. When asked to check up with Dr Majekodunmi whom he knew, the Respondent refused and instead asked the Petitioner to swear on the Bible that she had not committed adultery. Although the Petitioner swore on the Bible as requested, the accusation continued and the Respondent related the whole incident to the Petitioner's aunt later that day. Dr Majekodunmi who gave evidence for the Petitioner confirmed that as a member of the family the Petitioner had had lunch in his house many times. The Petitioner was most distressed by this incident and the persistent nagging which followed it.

The cumulative effect of the depression following the above accusation was so intense that the Petitioner, in trying to calm her nerves, took what turned out to be an overdose of sleeping tablets. She was rushed to Dr Majekodunmi's Hospital in an unconscious state. This incident was confirmed by Dr Majekodunmi (1st P/W) who

treated the Petitioner. Dr Majekodunmi said that when he talked to the Petitioner after she had recovered consciousness, he got the impression that she was under a very great strain, not unconnected with her relationship with her husband, and that she was very unhappy indeed. As a result he sent for the Petitioner's father and they both went to the Respondent's house and complained to the Respondent's parents in his presence. His parents apologised and the Respondent promised that he would change his attitude. Neither the nagging nor the accusations stopped.

Eventually the Petitioner was offered appointment as a Nursing Sister at the University College Hospital, Ibadan. She accepted the appointment and went to live in Ibadan.

I accept the evidence of the Petitioner and I am satisfied that she had been badly treated by the Respondent who, from the evidence before me, appears to be insanely jealous of his wife, ventilating his jealousy in a way that is both humiliating and depressing for the Petitioner.

What remains to be considered is whether the Respondent's behaviour constitutes cruelty for the purpose of the dissolution of the marriage especially as there is no evidence of physical assault on the Petitioner by the Respondent.

False accusations of adultery will not constitute cruelty for the purpose of the dissolution of a marriage unless the persistence in such false charges gives rise to injury to health or reasonable apprehension of such injury.

In all questions of cruelty the general rule is that the whole matrimonial relationship must be considered and that rule is all the more important when the cruelty consists, not of violent physical acts but of false accusation. That was why, in *Atkins v. Atkins*, [1942], 2 All E.R., page 637, where, over a period, a wife had consistently and increasingly nagged at her husband and the court being satisfied that this conduct resulted in danger to the husband's health, it was held that this constituted cruelty injurious to the husband's health. In the words of Collins, J.:

"It is not necessary, as is quite obvious, in order to bring about that state of things that there should be violence. One knows that dropping water wears the stone. Constant nagging will become completely intolerable, and although in the course of married life you may be able to point to no single instance which could possibly be described as, in common parlance, "a row", yet nagging may be of such a kind, and so constant, that it endangers the health of the spouse on whom it is inflicted."

In my view, based on the evidence given by the Petitioner, the Respondent has, since his marriage to the Petitioner, set out on a course of conduct with the deliberate intention of humiliating the Petitioner and embarrassing her at every conceivable opportunity. Taken in isolation, his persistent nagging and his regular outbursts of jealousy may appear minor but their cumulative effect on the health of the Petitioner cannot be overestimated. I am satisfied that the Respondent has treated the Petitioner with cruelty and that for that reason she is entitled to a decree *nisi* for dissolution of the marriage.

I therefore pronounce a decree *nisi* for the dissolution of the marriage celebrated in London on 18th September, 1954 between the Petitioner and the Respondent.

Decree nisi for the dissolution of the marriage.

| | | |
|--|---|-------------------|
| OKETOYINBO AMAO EGBEDEYIN AREMU AND ANOTHER (for themselves and on behalf of the Okiri Family) | } | <i>Plaintiffs</i> |
| v | | |
| BELLO AMAO DANIEL BABALOLA | } | <i>Defendants</i> |

[HIGH COURT OF JUSTICE: Fatayi Williams, J., 27th January, 1961.]

Land Law—claim for declaration of title to land and for possession—previous suit for declaration between present defendants and other persons—present first plaintiff gave evidence for those other persons who claimed through same ancestors as present plaintiffs—plea of res judicata.

The plaintiffs in this case claimed declaration of title to a piece of land at Yemetu Ibadan, and also for possession of the piece of land from the defendants. Previously, in 1956, the present defendants instituted an action for declaration of title to a piece of land which included the land now being claimed against one Samuel Abokede, and one Alli Akinshawe in a Native Court in Ibadan. At the trial of that case the first plaintiff in this case gave evidence on behalf of the defendants. Judgment was given against these present defendants who then appealed to the High Court. After a trial *de vono* by the High Court judgment was given for the present defendants. At the High Court trial, the present first plaintiff did not give evidence any more but nevertheless continued to go to court with the defendants in that case. The defence of the defendants in that case was that they acquired title to the land through an earlier ancestor named Okiri who, according to them, was granted the land by one Olugbode. In the present case the plaintiffs claimed that they derived their title from the same Okiri who derived his title from the same Olugbode. The defendants now raised the plea of *res judicata*.

Held: that the present plaintiffs could be regarded as “parties” to the previous suit and it is immaterial that the plaintiffs in the previous suit sued in a representative capacity but are now defending in their personal capacity; that in view of the part played by the first plaintiff at the hearing of the previous suit in the Native Court and his awareness of the issues involved in the subsequent trial *de novo* in the High Court, he was bound by the result of that case; and that therefore the plea of *res judicata* succeeded.

Claim dismissed.

Cases cited:

Olabiya and another v. Sule Abiona, 1955-56 W.R.N.L.R. 126.

Ababio v. Kanga, 1 W.A.C.A. 253.

Onisango v. Akinkunmi and others, 1955-56 W.R.N.L.R. 39.

Nwalaka and others v. Agba and others, 15 W.A.C.A. 63.

Ibadan Civil Suit No. I/38/59.

Somolu (Fakayode with him) for plaintiffs.

Akinloye for defendants.

Fatayi Williams, J.: The Plaintiffs' claim against the Defendants is for declaration of title to a piece of land at Yemetu District near Adeoyo Road, Ibadan. The Plaintiffs also seek to recover possession of the said piece of land from the Defendants.

Pleadings were ordered and filed, and the following are the averments in the Statement of Claim:

"1. The piece of land which is the subject-matter of the action is situated in the Adeoyo District of Ibadan, Western Region of Nigeria and is particularly described and delineated on the map or plan filed with this Statement of Claim and is thereon edged violet.

2. About 200 years ago, the said piece of land, as part of a larger area of land also shown on the plan filed, was granted by Bale Olugbode to his two brothers, Okiri and Ademokunro, the ancestors of the Plaintiffs for an absolute gift of inheritance under Native Law and Custom.

3. Okiri and Ademokunro went into possession of the area granted and cultivated same by their slaves and members of their family; they and their families have given portions of land from time to time to grantees as absolute gifts under native law and custom from the aforesaid area granted to them by Olugbode, and one of such persons was Akabiako, the ancestor of the Defendants.

4. The Plaintiffs' families and their grantees have lived in their respective area without dispute for very many years and Akabiako never at any time till his death laid claim neither was he granted the portion now in dispute, nor at any time was he put in possession of same by the owners, the Plaintiffs' families.

5. After the death of Okiri and Ademokunro, their respective families who are now the Plaintiffs in this case continued to use the portion in dispute by farming on some areas thereof as well as using a portion of it as their family fetish grove.

6. Without the consent of the Plaintiffs' family, the defendants have taken possession of the said portion in dispute and as against the Plaintiffs' families are claiming to be the owners thereof."

In their Statement of Defence, the Defendants denied the averments in paragraphs 2 to 6 above stating that they have always been in possession as of right. According to them, the land in dispute belonged to Akabiako to whom it was granted by Bashorun Oluyole over 150 years ago. They also averred that in 1850 one Bale Olugbode acquired part of the land from Akabiako for a cattle kraal and fetish grove, that Olugbode settled Okiri, his cattle man on the land so acquired and that area is now known as Okiri Compound. They further averred that in 1955, they sued the Plaintiffs in the Native Court, Ibadan, for declaration of title to the land in dispute in Suit 70/55, that the case went on appeal to the High Court, Ibadan, where it was heard *de novo* as Suit I/44A/56, and that judgment was given in their favour. Finally, the Defendants averred that they will contend at the trial that the matter is *res judicata*.

At the hearing on 27th October, 1960, Counsel for the Defendants raised the plea of *res judicata* by way of preliminary objection. In support of the plea, he called evidence and later addressed the Court on the following points:—

(a) that the land in dispute in this case shown in the plan Exhibit "D" is the same as the one in dispute in Suit I/44A/56 as shown in Exhibit "C";

(b) that the Defendants in this case were the Plaintiffs in Suit 70/55 which later went to the High Court by way of Appeal and was re-heard as Suit No. I/44A/56; and

(c) that the first witness for the first Defendant in Suit 70/55 is the first Plaintiff in this case.

Thereafter, Counsel submitted that since the subject-matter in dispute is the same and since the Plaintiffs in this case are privy to the Defendants in the first case, the Court should hold that the plea of *res judicata* must succeed.

After reviewing the authorities, I ruled that, on the facts so far available, the submission was premature and that the hearing should therefore continue.

The Plaintiffs and their witnesses then gave evidence. This is what the first Plaintiff, Oketoyinbo Amao, said under cross-examination, with respect to the earlier case—

“I know Samuel Abokede, I also know Alli, he is the son of Ogunshilu. Samuel Abokede and Alli both went on the land in dispute in 1955. As a result Bello Amao (the Mogaji of Akabiako) and Daniel Babalola took them to the Customary Court at Oke Are. In that case I gave evidence for Samuel Abokede. Judgment was given against Belo Amao and they were warned not to go on the land in dispute Belo was not satisfied and so he appealed to the High Court. There was another hearing in the High Court but I did not give evidence. I was not called to give evidence. I did not know why Abokede and Alli did not call me to give evidence.”

The seventh witness for the Plaintiff was one Josiah Laniyonu, a licensed surveyor who prepared Exhibit “D”, the plan of the land in dispute in the present action. After comparing Exhibit “D” with Exhibit “C” (the plan filed with the Statement of Claim in suit I/44A/56) which had been tendered earlier by Sydney Foresythe, Registrar of the High Court, Ibadan, he informed the Court that, due to the alteration in the course of the Yemetu Stream, Exhibit “C” contains the whole of Exhibit “D” plus a bit more.

For the Defence, the second Defendant (Daniel Babalola) and two others gave evidence. This is what the second Defendant said in examination-in-chief in connection with the earlier case—

“We have been to court over the land in dispute before. The action was taken in the Customary Court at Oke Are in Ibadan. Samuel Abokede and Alli Akinshave were the Defendants in that case. The Plaintiffs were Bello Amao and myself. Samuel Abokede is a member of the Okiri family. I know Oketoyinbo Amao. He is the eldest in the Okiri Family today. I gave evidence in that case. Oketoyinbo also gave evidence for Samuel Abokede and Alli. The case finally went to the High Court. We won in the High Court”.

Further, he said the following under cross-examination:—

“I know the first Plaintiff. He is in court here (first Plaintiff identified). First Plaintiff gave evidence against us in the Customary Court. When the case was being heard in the High Court he was always coming to Court. We lost when he gave evidence in the Customary Court. He did not give evidence at the trial in the High Court when we won. I remember my family made a plan which was used in the case in the Customary Court.”

In view of the foregoing, I am now in a position to decide on the validity or otherwise of the plea of *res judicata* raised by the Defendants in paragraph 18 of their Statement of Defence.

On the evidence before the Court, it is common ground that the whole of the land in dispute in this case, shown on the plan, Exhibit "D" is included in the plan, Exhibit "C" admitted as the plan in dispute in Suit I/44A/56 (Ex. "B"). In view of the evidence referred to above, it cannot be disputed that the Plaintiffs in Suit I/44A/56 are now the Defendants in the present case. Lastly, the claim in both Suit I/44A/56 and this suit is for declaration of title, although in the present suit there is also a claim for possession. Although the first Plaintiff gave evidence for the Defendants in the original case before the Native Court, neither he nor the second Plaintiff appeared personally as Defendants in that suit. When the case was heard *de novo* in the High Court as Suit I/44A/56, the 1st Plaintiff did not give evidence but he was present at the hearing and was still cognisant of the issues involved.

The particulars at page 2 (Exhibit "A") (Judgment in Suit I/44A/56) show that the Defence of the Defendants was a claim to the land through an earlier ancestor named Okiri and this Okiri was, according to the Defence, granted the land by Olugbode. There is also the averment in paragraph 2 of the Statement of Claim in the present case that the title of the Plaintiffs is derived from one Okiri who derived his title from one Olugbode. The first Plaintiff confirmed this in his evidence.

In view of the above, can the present Plaintiffs be regarded as "parties" in Suit I/44A/56 so as to sustain a plea of *res judicata* in the present case?

In *Olabiya and another v. Sule Abiona*, 1955-56 W.R.N.L.R. 126, it was held that to succeed in a plea of *res judicata* the defendant must prove—

- (i) that the parties are the same.
- (ii) that the subject-matter is the same.
- (iii) that the decision between the same parties are in respect of the same cause of action.

It was also made clear by Dean, C.J., in *Ababio v. Kanga* 1 W.A.C.A. 253, that the word "parties" must be taken as including privies, a privy being a person whose title is derived from and who claims through a party.

In *Onisango v. Akinkunmi and others*, 1955-56 W.R.N.L.R. 39, it was held (i) that the term "parties" includes not only those named in the record of proceedings but also those who had an opportunity to attend the proceedings; and (ii) that all persons who are substantially interested in the result of a proceedings and are cognisant of it are bound by any judgment given thereunder.

In *Nwalaka and others, v. Agba and others* 15 W.A.C.A. 63 at 65, the following extract from the judgment of Coussey, J.A., is in point:—

"It has been repeatedly held by this Court and the Courts in England that if a person was content to stand by and see his battle fought by somebody else in the same interest, he is bound by the result and should not be allowed to re-open the case."

Applying the principles laid down in the cases referred to above, I find as a fact that the Plaintiffs and the Defendants are the same "parties" both in Suit I/44A/56 and in the present case. Although the present Plaintiff did not give evidence in the earlier case he is nevertheless a party by virtue of the decision in *Onisango v. Akinkunmi and others* (*supra*) and is therefore bound by the decision in that case. It is immaterial if the Plaintiffs in Suit I/44A/56 who sued then in a representative capacity (*see* page 419

of Exhibit "B") are now defending the present action in their personal capacity. Secondly, I find that the subject-matter of that suit and of the present action is the same. Lastly, I find that the decision in the earlier case between the same parties is substantially in respect of the same cause of action as in this case. In view of the part which Oketoyinbo Amao (first Plaintiff) played at the hearing in the Native Court and his awareness of the issues involved in the subsequent trial *de novo* in the High Court, he is bound by the result of that case and cannot now be allowed to re-open the issues already decided in that case. The Plaintiffs claim the land in dispute for themselves and on behalf of the Okiri family. It seems to me, therefore, that since the defence of the Defendant as shown in the judgment in Suit I/44A/56 (Exhibit "A") and the averment in paragraph 2 of the Statement of Claim in this case is that the land in dispute originally belonged to Okiri to whom it was given by one Olugbade, Egbedeyi Aremu (the second Plaintiff), as representative of the Okiri family, is also estopped from raising the issues already decided in Suit I/44A/56.

For the above reasons, I hold that the two Plaintiffs, suing for themselves and on behalf of the Okiri family, are estopped from asking for the same declaration of title asked for by the present Defendants in Suit I/44A/56. I find that the plea of *res judicata* is well founded and the Plaintiffs' claim must be dismissed.

Claim dismissed.

I. A. MORAKINYO (Appellant)

v.

IBADAN DISTRICT COUNCIL (Respondent)

[HIGH COURT OF JUSTICE: Quashie-Idun, C.J., 30th January, 1961.]

Claim for gratuity and pension—jurisdiction of the Court to entertain the claim—regulations 7 and 17 of the Western Region (Local Government Staff) (Retiring Benefits) Regulations, 1956 considered—Workmen's Compensation Act, 1906, and Superannuation Act of 1859 referred to.

The appellant claimed from the respondent in the Ibadan Chief Magistrate's Court the sum of £478 18s 6½d being pension and gratuity due to him from the respondent. The Magistrate struck out the claim holding that he had no jurisdiction to entertain the claim which was based on an alleged right to the gratuity and pension conferred on the appellant by regulations 7 and 17 of the Western Region (Local Government Staff) (Retiring Benefits) Regulations, 1956. In this appeal it was argued that the respondent, the Ibadan District Council, was a corporate body distinct from the Crown; that there was evidence that a pension was awarded to the appellant; that there was no evidence that a resolution not to pay the pension and gratuity had been passed by the Council; and that therefore the question of reviewing the decision of the Council did not arise. It was also submitted on behalf of the appellant that as the appellant was entitled to a pension and gratuity by virtue of the Regulations the appellant was entitled in law to institute the action to enforce the payment of the pension and gratuity.

Held: that while the Western Region (Local Government Staff) (Retiring Benefits) Regulations, 1956, are meant to confer benefits on retired officers, no legal right is conferred on the officers to sue to enforce those benefits.

Appeal dismissed.

Cases cited:

Considine and another v. McNerney, [1916] 2 A.C. 162.

Nixon and Others v. the Attorney-General, [1931] A.C. 184.

Holloway v. Poplar Corporation, [1940] 1 K.B. 173.

Ibadan Civil Appeal No. I/9A/60.

Akinjide for the appellant.

Ganiyu Agbaje for the respondent.

Quashie-Idun, C.J.: The Plaintiff/Appellant filed the following claim before the Chief Magistrate's Court, Ibadan, namely:

"The Plaintiff's claim against the defendant is for the sum of £478 18s 6½d being the gratuity and pension due to the Plaintiff from the defendant's employment.

"The defendant refused and still refuses to pay either the said gratuity or pension despite Plaintiff's repeated demands.

PARTICULARS OF CLAIM

| | £ | s | d |
|--|------|----|----|
| 1. Gratuity due to the Plaintiff | 392 | 12 | 1 |
| 2. Pension for May, June, July, August, September, October, November, December, 1958 and for January, February, March and April, 1959, all at £7 17s 0½d per month ... | 86 | 6 | 5½ |
| Total | £478 | 18 | 6½ |

The appellant was employed by the respondent on the 1st August, 1931, and retired from the service of the respondent on the 6th May, 1958. He claimed that he was awarded the sum of £392 12s 1d as a gratuity on his retirement and a pension of £94 4s 6d per annum and that both the gratuity and pension were due to him as from the 6th May, 1958. At the close of the plaintiff's case, Counsel for the defendant submitted that the award of pensions is a privilege and not granted as of right and that it was a matter within the discretion of the Council to grant or withdraw payment of pensions or gratuity to retiring officers. Counsel for the defendant also expressed a doubt as to whether or not the Chief Magistrate's Court had jurisdiction in the matter.

In his judgment, the Chief Magistrate held that he had no jurisdiction in the matter, which in his view, was a review of the administrative act of the Council. He therefore struck out the plaintiff's claims.

The plaintiff has appealed to this Court. The main ground of appeal is that the learned trial Magistrate erred in law in holding that he had no jurisdiction to entertain the plaintiff's claim.

In support of the ground of appeal, Mr Akinjide, Counsel for the appellant has submitted that as the Ibadan District Council is a corporate body created by the Local Government Law, 1957, No. 12 of 1957, the Council is distinguished from the Crown; that there was evidence that a pension was awarded to the appellant which was due and payable and that as there was no evidence that the Council had passed a resolution not to pay a pension and gratuity to the appellant the question of reviewing the decision of the Council did not arise. Mr Akinjide's submission was that as the appellant was entitled to a pension and gratuity by virtue of the Western Region (Local Government Staff) (Retiring Benefits) Regulations of 1956, the appellant was entitled in Law to institute the present action to enforce the payment of the pensions and gratuity.

Mr Agbaje, Counsel for respondent has submitted—

(a) that the Magistrate's Court had no jurisdiction to try the case;

(b) that the appellant could not enforce the claim founded on the construction of the provisions of the Western Region (Local Government Staff) (Retiring Benefits) Regulations of 1956, made under the Western Region Local Government Law, 1952.

The relevant regulations of the Local Government Staff (Retiring Benefits) Regulations (W.R.L.N. 223 of 1956) are regulations 7 and 17.

Regulation 7 reads as follows:

"A council official who has completed ten years or more continuous service may be granted, on his retirement,an annual pension at the rate of one-seven hundred and twentieth of his pensionable emoluments for each month of continuous

service completed prior to the 1st January, 1946, and at the rate of one-six hundredth part of his pensionable emoluments in respect of each month of continuous service completed subsequent to the 31st of December, 1945....."

Regulation 17 reads as follows:

"Gratuities may be granted subject to the provisions of regulations 19, 20 and 21, to any council employee provided that he has completed not less than five years continuous service; and provided further that in calculating years of continuous service for the purpose of assessing gratuities no account shall be taken of service under the age of eighteen years."

In the case of *Cosidine and another v. McInerney*, [1916] 2 A.C. 162, an attendant of a lunatic asylum was employed subject to the regulations of the Civil Service Commission. He was permanently incapacitated by an injury sustained in the course of his employment and was retired at the age of forty-five years. He was entitled to expect on retirement at the age of sixty or before that age in the case of bodily or mental infirmity, a superannuation allowance and a lump sum by way of gratuity, but had no legal right to these payments. On his retirement he duly received a superannuation allowance and gratuity. Upon a claim for compensation under the Workmen's Compensation Act, 1906, it was held by the Court of Appeal that the superannuation allowance and gratuity were payments, allowances and benefits to which regard should be had in fixing the amount of weekly compensation payable to the plaintiff.

The House of Lords reversed that decision, and held that although the plaintiff was entitled to expect payment of allowances, the expectation, though it might be relied on with full certainty was none the less not a legal right and that no claim for it could be enforced by any legal proceedings.

I quote hereunder, the words of the Earl of Loreburn in the judgment of the House of Lords:—

".....With all respect to the Court of Appeal, I think the arbitrator was right. The employer was not obliged by statute to pay it, and in my opinion, it would have made no difference had he been so obliged. It is an error to say that the workman contributed towards the pension. It came wholly out of the employers' pocket."

In the case of *Nixon and Others v. The Attorney-General*, [1931] A.C. 184, four retired civil servants claimed to be entitled as of right to have superannuation allowances calculated on the full amount of their annual salaries and emoluments, including a bonus granted by the Treasury to civil servants and in accordance with the scale provided by the Superannuation Act of 1859 as amended by the Act of 1909. Two of the appellants entered the civil service on the faith of a statement contained in a Treasury circular to the effect that all persons appointed subsequent to the passing of the act were to be held entitled to the retiring allowances. The Lords Commissioners of the Treasury, acting in accordance with a Treasury circular, awarded to each of the retired officers a superannuation allowance calculated on a basis differing from and less favourable to him than that provided by the Act of 1859 as amended by the Act of 1909.

The retired civil servants sued and having lost, appealed to the Court of Appeal which affirmed the decision of the Court of first instance.

The plaintiff appealed to the House of Lords which held that the appellants had no legal right enforceable in a Court of Law. In the case of *Holloway v. Poplar Corporation*, [1940] 1 K.B. 173, the facts were as follows: By a Local Act, a borough Council

was empowered in certain cases to grant to an officer a gratuity calculated on particular basis and payable on his retirement. The Council resolved that a gratuity of £268 16s 10d be granted to the plaintiff who had retired from its employment and that the distribution thereof should be at the rate of 10s per week. After a number of weekly payments had been made, the Plaintiff brought an action claiming the whole balance alleging that the resolutions prescribing payment of the gratuity by instalments was *ultra vires*. It was held by the Court that the Act merely empowered the Council to make a gratuitous payment, but conferred no right on the plaintiff in respect of it and that even if the plaintiff had any enforceable right, the direction for payment by instalments was *intra vires*.

It is clear from the authorities I have referred to in this judgment that employers in each of the cases were empowered by enactments to grant pensions and gratuities to their retired officers in the same manner as the Western Region (Local Government Staff) (Retiring Benefits) Regulations of 1956 confer authority on the Local Government Council in respect of its retiring officers. But all the authorities establish that while the Acts or regulations are meant to confer benefits on retired officers, no legal right is conferred on the officers to sue to enforce those benefits. I can find no provision in the Western Region (Local Government Staff) (Retiring Benefits) Regulations which confers any legal right on retiring officers to enforce those benefits. I hold therefore that the plaintiff's claim is not enforceable in any Court of Law. The appeal is accordingly dismissed. No order as to costs.

Appeal dismissed.

MIROSLAV PRICHLIK
 (member and shareholder of Nigerian Rubber Company Limited).

Plaintiff

v.

1. EDWARD LOVEL MARSH
2. BARLOW BROTHERS LIMITED LAGOS
3. SIR JOHN D. BARLOW, Bart.
4. THOMAS B. BARLOW, agents for Nigerian Rubber Company Limited.
5. NIGERIAN RUBBER COMPANY LIMITED

Defendants

[HIGH COURT OF JUSTICE, Thomas, J., 31st January, 1961]

Company Law—appointment of Director of a company contrary to its Articles of Association—validity of resignation of a director who has resigned in accordance with the Articles of Association—termination of appointment of a servant of a company by the company's agent—Director who signed a company's balance sheet cannot retract from admissions in it of his personal liability to the company—public policy—section 74 of Companies Ordinance, Cap. 38, clause 94 of Table A of the First Schedule to the Ordinance, section 180 of the Companies Act, 1948, and Clause 105 of Table A of the First Schedule to that Act considered.

The Plaintiff and the first defendant were shareholders in the fifth defendant company. At a meeting on 5th October, 1956, in which only one Director was present the first defendant was appointed a director of the company and also as the chairman of the Board of Directors. In a letter dated 15th May, 1957, the plaintiff wrote to resign his office as Director in accordance with article 21 (1) of the Articles of Association of the Company. In the contract of service of the plaintiff with the fifth defendant it was stipulated that he would work under instructions from the first defendant and that his appointment could be terminated by three months' notice given either by himself or by the fourth defendant acting as agent of the fifth defendant. No reasons needed be given. It would appear that the first defendant gave to the plaintiff notice of termination of his appointment and signed the notice as Managing Director of Barlow Brothers, agents for fifth defendant. In a statement of account of the fifth defendant company dated 30th September, 1953 it was shown that the Directors were owing the company the sum of £5,907 10s, and the supporting schedules to this statement indicated clearly that the plaintiff's portion of the debt was £2,080. This statement of account was signed by the plaintiff and his personal account also reflected this debit balance. The plaintiff's personal account with the company indicated that on the 30th June, 1958, the plaintiff was still owing the fifth defendant company the sum of £1,609 18s 9d. The plaintiff in his evidence stated that he did not check the account of 30th September, 1953, and that he merely signed as a Director. By the present action the plaintiff claimed: (1) against the first and fifth defendants a declaration that the appointment of the first defendant as a director of the fifth defendant on 5th October, 1956, was null and void; (2) against the first defendant an order of injunction to restrain him from acting as a director of the fifth defendant; (3) and (6) against the first, third, fourth and fifth defendants a total debt of £1,090 1s 3d lawfully due from the fifth defendant to him; (4) against the first and second defendants £10,000 as damages for breach of his contract with the fifth defendant which breach was induced by the two defendants; and (5) against all the defendants a declaration that he was still a Director of the fifth defendant company.

Held: (1) that the court would grant the declaration that the meeting of 5th October, 1956, was null and void because only one Director of the Company was present contrary to article 24 of the Articles of Association of the Company;

(2) that the resolution passed at the meeting of 5th October, 1956, was null and void for the same reasons;

(3) that as the alleged appointment of the first defendant was contrary to the provision of article 24 of the Articles of Association of the Company it was not only that his appointment was defective but that he was originally never appointed; that therefore the court would order an injunction against the first defendant restraining him from continuing to act as a Director of the Company;

(4) that after considering the evidence of the plaintiff together with the exhibits tendered there was no doubt that the plaintiff dealt with the first defendant as the *de facto* agent of the fifth defendant and accepted the notice to him as valid; that therefore the services of the plaintiff were properly terminated;

(5) that by reason of the letter dated 15th May, 1957, in which the plaintiff wrote to resign his office as Director in accordance with article 21 (1) of the Articles of Association, the court would not grant a declaration that he was still a Director;

(6) that it would be contrary to public policy for a Director of a company to sign a balance sheet as required by the Companies Ordinance and later be allowed to wriggle out of an embarrassing situation by denying reading the Balance Sheet; that as the plaintiff in this case signed the Balance Sheet showing that he was personally indebted to the fifth defendant company which debt was also reflected in his personal account, the plaintiff could not now be heard to say that he was not indebted to the fifth defendant; that therefore his claim that the fifth defendant was indebted to him must fail.

Judgment for the plaintiff on the first, second and fifth claims; third, fourth and sixth claims dismissed.

Cases cited:

Dawson v. African Consolidated Land and Trading Co. [1898] Ch. 6.

Tyre Mutual Steamship Insurance Association v. Brown. [1896] 74 L.T. 283.

Morris v. Kanssen and others, [1946] Ac. 459.

Benin Civil Suit No. B/9/58.

Idigbe, for plaintiff.

Izuora, for defendants.

Thomas, J.: "1. Against the first and fifth defendants, the plaintiff seeks a declaration that the appointment of the first defendant as a Director of the Nigerian Rubber Company Limited by a resolution of the Board of Directors of the said Company of the 5th day of October, 1956 is null and void and invalid.

2. Against the first defendant, the plaintiff seeks an order of injunction restraining the first defendant from acting as a Director of the fifth defendant company.

3. Against first, third and fourth defendants, the plaintiff seeks to recover the sum of £690 1s 3d being money lawfully due to the plaintiff from the fifth defendant but payment of which first defendant acting on behalf of the third and fourth defendants as agents of fifth defendant has unlawfully withheld.

Alternatively: The plaintiff claims from the fifth defendant the sum of £690 1s 3d being money lawfully due to the plaintiff from the fifth defendant company.

4. Against the first and second defendants the plaintiff claims the sum of £10,000 as damages for in that the second defendant by its Agent the first defendant wrongfully interfered with and induced a breach of his contract with the fifth defendant company during 1957.

5. Against the defendants the plaintiff seeks declaration that he is still a Director of the fifth defendant company (Nigerian Rubber Company Limited.)

6. Against the fifth defendant the plaintiff claims the sum of £400 being salary due from fifth defendant and payable to plaintiff as Manager of the Benin Branch of the Nigerian Rubber Company Limited, for the month of October 1957 to January 1958 and the plaintiff claims from the fifth defendant the monthly salary of £100 until the present suit is disposed of.

Alternatively: The plaintiff claims from the fifth defendant the sum of £400 being general damages for breach of his contract of employment as Managing Director of the fifth defendant company in June 1957."

As regards the initial declaration sought by the plaintiff, this court grants it as paragraph 7 of the statement of defence states as follows:

"The defendants admit that the meeting referred to in paragraphs 8 and 9 of the Statement of Claim was invalid and of no legal effect."

As regards the second item of the claim, the plaintiff states that a meeting of Directors was held on the 5th day of October, 1956, Exhibit "Lawrence D" refers, when, the following resolutions were passed *viz*—

- (1) The appointment of E. L. Marsh, first defendant as Director.
- (2) The appointment of Mr N. Girling to act as alternate Director.
- (3) The appointment of E. L. Marsh as Chairman of the Board of Directors.

The plaintiff contends that this particular meeting was invalid and that the resolutions passed were of no effect in that there was only one Director present contrary to article 24 of the Articles of Associations "Derner A" which is as follows:

"The Quorum necessary for the transaction of the business may be fixed by the Directors, and unless so fixed shall be two."

I must uphold this contention of plaintiff's counsel.

Paragraph 6 of the Statement of Defence states—

"Paragraph 8 of the Statement of Claim is admitted subject to the explanation that the record was made in error and not wilfully."

The defendants have tendered the minutes of the 24th October, 1957, to show that the appointment of Mr Marsh, first defendant, as a Director and that his acts as Director since the 5th October, 1956, were confirmed and ratified.

I have also seen the minutes of the meeting of the Board of the 21st October, 1957, referring to the fact that it had been discovered that first defendant was disqualified as a Director under section 74 of the Companies Ordinance—

"for the reason that he had not taken a qualification share as required by regulation 17 of the company's Articles of Association."

Counsel for defendants has pointed out to me that his clients in pursuing this course were covered by the provisions of clause 94 of Table A (First Schedule) of the Companies Ordinance.

This would have been so if the only reason for the disqualification was as given in the minutes of the 21st October, 1957.

These points have been dealt with under the Companies Act, 1948, section 180 and clause 105 of Table A.

An illustration of the effect of section 180 of the Act is the case of *Dawson v. African Consolidated Land and Trading Co.* [1898] Ch. 6. One of the Directors making a call on shares was disqualified, having disposed of his qualification shares for a short time and then reacquired them, but without having been formally re-appointed to the board. Held that the call was valid.

In *Tyne Mutual Steamship Insurance Association v. Brown*, [1896] 74 L.T. 283, however, it was held that the section was not effective to validate the acts of Director, who continued to act after their term of office had expired, for this was not a mere defence in appointment but a cessation of their term of office. Again in *Morris v. Kaussen and others* [1946] A.C. 459, the House of Lords held that the section, and Articles of Association on the same lines, being designed to deal with cases of defective appointment cannot be utilised for the purpose of ignoring or overriding the substantive provisions relating to appointment.

In the instant case, it was not the fact that the appointment of Mr Marsh, the first defendant, was defective but that he was originally never appointed, as the meeting of the Board of the 5th October, was contrary to the provisions of article 24 of the Articles of Association of the company.

The order of Injunction against the first defendant continuing to act as a Director of the company is hereby granted.

As regards the fifth claim that the plaintiff is still a Director of the company, it is my considered opinion that this claim must fail.

Article 21 (1) of the Articles of Association in respect of disqualification of Directors states:

“(21) The office of Director shall be vacated—

If by notice in writing to the company he resigns the office of Director.”

On the 15th May, 1957, the plaintiff wrote to the Board of Directors, Exhibit “Prichlik H. 1”

“I wish therefore to tender herewith my resignation from the Board of Directors and enclose my certificate of shares, issued to me. I am sure that there will be no difficulties with the transfer of these shares, as Messrs Thomas Barlow and Brothers of Plantation House, Mincing Lane, London, E.C. 3 are already since December 1953, in possession of a blank transfer, duly signed by me.”

This letter and share certificate No. 4 for 1,300 shares which had been allotted to the Plaintiff were acknowledged by the Plaintiff.

Moreover in Exhibit “Davies 4” a letter written to the 5th defendant Company, on the 20th September, 1957, the Plaintiff wrote *inter alia* as follows:

"I note from your letter that you are still using my name as a Director, although I ceased to be a Director on the 27th June this year. Kindly make necessary arrangements to cancel my name from all company's letter headings, invoices and other forms immediately."

I am unable to grant the declaration sought that the plaintiff is still a Director of the fifth defendant Company.

In respect of the fourth head of claim that the first defendant by his Agent the second defendant wrongfully interfered with and induced a breach of his contract wherefore plaintiff claims £10,000 damages, I have to refer to the terms of the contract between the parties Exhibit "1" of the 17th July, 1956, sub-paragraph G:

"You will work under instructions from Mr E. L. Marsh and will transfer your activities to Sapele, Benin or elsewhere as he directs."

Plaintiff's counsel has argued that the Notice in respect of the termination of the appointment of his client is not valid in that it did not emanate from Barlow Brothers acting as Agents for the fifth defendant company. I would not deny that there is some force in this argument. But sub-paragraph (d) of the Agreement states—

"Termination of your employment with the Nigerian Rubber Company Limited is subject to three months notice either by you or ourselves; acting as Agents for the Nigeria Rubber Company Limited. No reason need be given by either side for termination of the agreement."

Under cross examination plaintiff testified as follows:

"I do not know whether Barlow Brothers are the Nigerian Agents of the fifth defendant company. I was not informed that Barlow Brothers Limited Lagos were Agents of the fifth defendant in Nigeria. I had received no communication to that effect. I received letters from Mr Marsh. He sometimes issued instructions on plain paper or paper headed Barlow Brothers or Nigerian Rubber Company Limited. Mr Marsh was to give me instructions. I took it that he was acting for Thomas Barlow Brothers of London who were the Agents of the fifth defendant's company and he was the Agent of my employers. Barlow Brothers Limited had no right to give me notice as by my contract fifth defendant or Thomas Barlow Brothers London only could terminate my appointment."

Plaintiff admitted writing the letter dated 23rd July, 1957, Exhibit "2". This letter was addressed to E. L. Marsh, Esq., Barlow Brothers Limited, Benin City. In this letter the plaintiff requested leave to be absent from duty for a few days.

It should be noted that when Mr Marsh, first defendant, signed the Notice he did so as Managing Director of Barlow Brothers Limited as agents for Nigeria Rubber Company Limited.

After considering all the evidence of the plaintiff and the exhibits tendered in this case I am of the opinion that the plaintiff dealt with Mr Marsh as the *de facto* Agent of the fifth defendant and accepted the Notice to him as valid and that his services were properly terminated according to the Agreement, Exhibit 1.

I will deal with plaintiff's claim against the defendants for the sum of £400 and £690 1s 3d together. In Exhibit "3" statement of account as at 30th September, 1954, the Balance Sheet indicates that the Directors were owing the fifth defendant company the sum of £5,907 10s. The supporting Schedules for Accounts for the same period indicated clearly that plaintiff's portion of this debt was £2,080. This

debit balance is also reflected in his personal Account with the fifth defendant as at the 30th September, 1953. The plaintiff signed the Balance Sheet for the period at page 2 of Exhibit "3". I have noted his explanation that he only signed as Director, but did not check the supporting Schedules. I am unable to accept this explanation. It would be contrary to public policy for a Director of a company to sign a Balance Sheet as provided by the Companies Ordinance and later make such an explanation to wriggle out of an embarrassing situation. Surely, he must have seen the Debit Balance in his personal Account as far back as 30th September, 1953. He did not protest against it.

The Agreement of employment of the plaintiff Exhibit, "1", sub-paragraph (b) states—

"You will be entitled to six weeks leave on full pay after thirteen months work in Nigeria; return Air tourist passage for your wife and self to this country being provided at the end of this period."

Sub-paragraph (d) states:

"Termination of your employment with the Nigerian Rubber Company Limited is subject to three months notice either by you or ourselves; acting as Agents for the Nigerian Rubber Company Limited. No reasons need be given by either side for termination of the agreement."

"In the event of either party giving notice of termination it is agreed that the three months salary still to be earned at the date of notice may, in part or whole, be applied against any outstanding debts which may be owed by you to the Nigerian Rubber Company Limited at the time of your giving notice."

In paragraph 7 of Exhibit "Prichlik C" under the Heading "your Statement of Account" Mr Marsh, the first defendant, intimated the plaintiff of the fact that the fifth defendant company was going to exercise its right in that respect.

In the same Exhibit, first defendant informed plaintiff that his account would be credited with the sum of £125 in respect of five weeks leave pay.

The copy of plaintiff's personal account was attached to Exhibit "Prichlik E", letter dated 22nd January, 1958, by defendants' solicitor. This account indicated that on the 30th June, plaintiff was owing the fifth defendant Coy a sum of £1,609 18s 9d.

The two items of Account, *viz.*, £300 and £125 have been reflected in plaintiff's personal account, Exhibit "Davies 3", showing a debit balance of £1,284 18s 9d in the Account.

The plaintiff in his evidence stated that the only items of the Accounts in dispute are the sums of £700 and £1,300 reversed by the fifth defendant company. I now propose to deal with these two items.

Paragraph 9 of the Statement of Defence is as follows:

"In or about the month of July 1951 the then Directors of the fifth defendant company purported to vote themselves a bonus of £2,000 each out of the alleged profits. In or about January 1954 the plaintiff in consideration of his employment being continued with the fifth defendant undertook to repay to the fifth defendant the said £2,000 but has ever since failed and neglected to do so. Subject to the aforesaid explanation paragraph 12 of the Statement of Claim is denied."

I will now refer to "Prichlik B", Statement of Account as at 30th June, 1951. The first item under Current Liabilities is European Bonuses £8,000. This Balance Sheet bears the date 28th January, 1952. The Auditor's Report of the same date *inter alia* states—

"Share Capital £2. The Issued Share Capital is in Agreement with the Statutory Books. A further issue of 5,200 shares has been made during the year ending 30th June, 1952, the issue being met out of the proceeds of the European Bonuses mentioned under the heading of Current Liabilities."

The report then stated that the sum of £8,000 was shared equally by four individuals, including the plaintiff and then further stated that "£5,200 of this sum has been used to meet the issue of 5,200 shares mentioned above."

It follows then that it is not true as the plaintiff wants this court to believe that he provided the sum of £1,300 for the payment of the 1,300 shares issued to him.

The Statement of Account attached to the letter of the 22nd January, 1958, Exhibit "Prichlik E", which was forwarded to plaintiff's solicitor shows that on the 30th September, 1953 the following entries were made:—

| | | | | | | | | | |
|----------------------------|-----|-----|-----|-----|-----|-----|-----|---|-------|
| "To bonus 1950-51 reversed | ... | ... | ... | ... | ... | ... | ... | £ | 700 |
| To bonus reversed | ... | ... | ... | ... | ... | ... | ... | £ | 1,300 |

These entries are reflected in plaintiff's personal Account, Exhibit "Davies 3", at the Company's office in the District where the plaintiff was employed. There is no evidence that he protested about these reversals in the Account. He signed the Balance Sheet for the 30th September, 1954, Exhibit "3", which showed that the Directors including himself owed the Company a sum of £5,907 10s. His share of that debt was shown in the supporting Schedules at page 3 of Exhibit "Lawrence G" as £2,080. This sum is also reflected in his Personal Account, Exhibit "3" at the 30th September. The entries appear to be simultaneous.

I will now refer to Exhibit "Prichlik M" where Plaintiff in his letter of the 23rd July, 1957, *inter alia*, wrote as follows to the Principal Immigration Officer:

"While in hospital in Benin City a three month's notice of termination as from 1st July has been given to me by Mr Marsh together with a copy of letter of 27th June informing you about this fact. The Manager of Bank of West Africa, Benin was instructed to stop crediting my account with my salary as from 1st July, in order to settle my outstanding account with the company, caused by withdrawal of money for income tax on bonuses, which were later reversed. This tax overpayment, amounting to about £370 previously signed over by me to the company against my debt, was until now not yet collected by the Company, and was refused by the Company to hand over the necessary documents back to me as to enable me to speed up and collect the refund.

In addition to this the permission to use the Company's car has been withdrawn and also the installation of telephone to my residence, for which an application has been made previously, was stopped, unless I would pay personally.

My wife is now six months pregnant (*see* attached copy of certificate) and we have no means to contact quickly the doctor in case of emergency especially as our residence is not situated in the European Reservation and the doctor's residence is in a considerable distance.

Threats have been also made to withdraw further amenities relating to living accommodation (*see* attached copy of notice, paragraph 3), although steps have been made to close the station and dismiss employees without whom the requested task is impossible to achieve.

Mr Marsh further refused to pay the cost of drugs recommended by the Medical Officer to be taken unless a detailed statement is first obtained in respect of the nature of illness. He remarked that if anybody should need medical treatment and drugs here, then he should not be in this country. I have been in Nigeria already eleven years and this is the first time I needed medical attention and drugs to clear a slight kidney infection and malaria attack. Even during this my illness Mr Marsh refused to pay the medical expenses until the nature of my illness was disclosed to him in writing by the medical officer under protest and contemplated to deduct from the Hospital bill some amount, covering my food expenses in hospital.

Due to the fact that the large bonuses in the past have been reversed by the Company I am left without any money on my bank account."

The plaintiff cannot now be heard to say that he was not aware of the reversal and did not approve of it. There is no evidence from any source that he protested at the reversal; rather the evidence from the accounts, including his personal one, the Balance Sheet of 1954, Exhibit "3", and his letter Exhibit "Prichlik M" point to the contrary.

The Profit and Loss Account as at 31st March, 1960, shows that the plaintiff is indebted to the fifth defendant company in the sum of £1,284 18s 9d which is the figure in his Personal Account.

The Books kept by the fifth Defendant have consistently shown that Plaintiff was all the time indebted to them.

I find as a fact from a view of all the evidence tendered, that the defendants are not indebted to the plaintiff in any sum whatsoever.

Judgment for the plaintiff on the first, second and fifth claims; third, fourth and sixth claims dismissed.

ZAHAVA ADAMS (Plaintiff)

v.

IBADAN DISTRICT COUNCIL (Defendant)

[HIGH COURT OF JUSTICE: Doherty, J., 1st February, 1961].

Tort—claim for damages for negligence—defendants' conservancy lorry parked at an angle across in the middle of unlighted road at night—lorry unlighted while loading night soil—running into by plaintiff's car—contributory negligence—expenses recoverable as special damages—consideration for awarding general damages.

On the 6th March, 1960 at about 9 p.m. the plaintiff's husband was driving her with their three children along Stadium Road, Ibadan; the road was unlighted. The plaintiff and one of the children sat in front of the car with her husband who was driving the car. The road was under repairs both sides of it having been dug up and the sand excavated therefrom heaped on both sides of it. As the plaintiff's husband drove along the road he saw the lights of an on-coming lorry. The driver of the on-coming lorry dipped his lights and the plaintiff's husband also dipped his. But as he was about passing the on-coming lorry, the plaintiff's husband suddenly became aware of a dark object in the middle of the road a few yards ahead. In trying to avoid a head on collision with this dark object which turned out to be a conservancy lorry belonging to the defendants which had parked there by the defendants' servants (who were removing night soil) without any form of lights on, the plaintiff's husband swerved his car to the right, but nevertheless the car collided with the stationary lorry and as a result the plaintiff was seriously injured. She was taken to the University College Hospital, Ibadan, where she received treatment until the 15th of April, 1960, when she was transferred to a hospital in Israel for rehabilitation treatment. She was accompanied by her doctor on the plane because she needed frequent injection of morphine to relieve her pain. She returned to Ibadan in July 1960 but she had to continue treatment for a long time after. Medical evidence put her percentage of disability at 75 and revealed that the pain in her left leg was unlikely to disappear completely and that any improvement that might take place would be a matter of years rather than of months. There was evidence that the plaintiff worked as a ticket conductor on the railways in Israel before coming down to Nigeria which involved work standing all the time, and also that in Nigeria she was a seamstress which involved the use of her legs for pressing the motor of her machine. There was evidence also that as a result of the injuries to her legs she could not sit down for a long time in one place and she had to engage a cook or steward. On these facts the plaintiff instituted this action claiming £10,000 as special and general damages from the defendants. On behalf of the defendants it was argued that even if the defendants were negligent, the plaintiff was also guilty of contributory negligence.

Held: (1) that on the following facts namely, that the lorry of the defendants was not properly parked on the road which was under repairs and that there was no light on it, front or back, the collision between the two vehicles was caused by negligence on the part of the defendants;

(2) that it cannot be said that where there is an unlighted obstruction in the roadway, a careful driver of a motor vehicle is bound to see it in time to avoid it and must therefore be guilty of negligence if he runs into it, as the circumstances may be such

that a prudent and careful driver proceeding at a proper pace and exercising the care which everybody ought to exercise may be unable to observe it in time to stop before he reaches it; and that on the whole of the evidence in this case the plaintiff was not guilty of contributory negligence;

(3) that a plaintiff can recover as special damages expenses reasonably incurred for medical treatment even though it transpired that the expert's advice upon which he acted was mistaken and the treatment was in fact unnecessary; that on this principle the plaintiff could recover as special damages the following: cost of treatment at the University College Hospital, Ibadan, fare of return journeys to Israel of the plaintiff and her doctor, her doctor's expenses in Israel, cost of plaintiff's treatment in Israel and costs of fruits and other necessaries for the plaintiff;

(4) that in assessing general damages the court would take into consideration the fact that the plaintiff could not use her legs either for the work of ticket conductor or as seamstress, that she could not sit down for long in one place, and that she had to engage a cook or steward; that she was also entitled to compensation for her pain and suffering but that the court would not take into account any table for expectation of life because no evidence was led on either side touching upon the expectation of life of the plaintiff.

Plaintiff awarded £1,060: 17s 8d as special damages and £2,500 as general damages.

Cases cited:

Tidy v. Battman, [1934], I.K.B. 319.

Stewart v. Hancock, [1940], 2 All E.R. 427.

Rubens v. Walker, [1946] S.C. 15.

Clippens oil Company Limited v. Edinburgh and District water Trustees [1907] S.C. (H.L.) 9; [1907] A.C. 291.

Ibadan Civil Suit No. 1/191/60

Akinloye, for the plaintiff.

Warren, for the defendant.

Doherty, J.: In this action the plaintiff is claiming a sum £10,000 as special and general damages for injuries sustained by her as a result of a collision between her husband's car No. WA 4984 and a conservancy lorry No. 00A 1558 belonging to the defendants on the 6th of March, 1960, at Stadium Road, Ibadan. Pleadings were ordered and filed. The plaintiff claims that the collision was caused by negligence on the part of the defendants in that the driver of their said vehicle parked the same in the middle of the road at about 9.30 p.m. and without any parking light. Further particulars of negligence as well as particulars of injuries sustained by the plaintiff and also particulars of special damage are stated in her Statement of Claim. Along with their Statement of Defence and in paragraph 12 thereof, the defendants counter-claim for a sum of £6 1s 8d being the cost of repairs of the damage done to their lorry.

In support of her claim the plaintiff averred that about 9 p.m. on the night of the 6th of March, 1960, she together with her husband, Tuvia Adams, and their three children left their house on the Links Reservation, Ibadan, for a drive in their car. They were going to see a man with whom Mr Adams had an appointment. He lives off Stadium Road. The husband was the driver. The plaintiff and her little son—a boy of six years—sat in front with her husband while their two girls sat at the back. The car was a pick-up Volkswagen. At Oke Ado the car turned to Stadium Road. The witness said she saw on a hill the lights of a vehicle which was coming towards

them from the opposite direction. The driver of this vehicle dipped his lights and her husband in turn dipped the lights of their car and also slowed down. The road was not lighted. Moreover, it was under repairs and sand which had been excavated from the drains from both sides of the road were heaped on both sides of the road, leaving only the middle of the road to be used by traffic. After a little time Mrs Adams said she did not see the lights of the approaching vehicle any more. Her car proceeded up the hill and suddenly she saw in front of her about ten yards away something which loomed up as a black wall. On seeing this object her husband turned the car to the right. A few seconds later she heard a crash. The front left side of their car where she sat was pushed in by the impact and pinned down her two legs. She later observed that the black object which she saw in front of her was the back of a lorry. It was stationary on the road but was at an angle across the road. There were no lights on it. The front left side of the plaintiff's car collided with the right side of the lorry at the back. The plaintiff's car was right-hand driven, she sat on the left and so was nearest to the point of impact. She was severely injured, suffered great pains and nearly fainted. Some people went to the aid of her husband and with their united effort the plaintiff was after some time extricated from the wreck and rushed to University College Hospital for treatment. After forty days there she was flown to her home country, Israel, for further medical treatment. She returned to Ibadan in July and has been attending University College Hospital since for treatment.

Mr Tuvia Adams, the plaintiff's husband, is a Superintendent of Works for the firm of Nigersol, Ibadan. He said on the night of the incident he drove his car, a Volkswagen kit-car No. WA 4984, with his family to Oke-Ado. It was about 9 p.m. He turned to Stadium Road and was going to see a Mr Weinberg, the Chief Engineer of their firm, at Adeniyi Avenue which is a turning off Stadium Road. He was going to arrange about work for the following day which was Sunday. When he entered Stadium Road from the junction of Oke-Ado he observed that the road was in full darkness, there were no street lamps or any other kind of lights on it. The drains on both sides of the road had been dug up and sands excavated therefrom were heaped on both sides of the road. He had therefore to drive in the middle of the road. He was travelling between 20 and 22 miles per hour. Proceeding on the road he saw the lights of a vehicle which was coming towards him from the opposite direction. The driver of the on-coming vehicle dipped his lights and the witness did the same. Continuing, he said he suddenly saw about six or seven yards ahead of him, a dark object in the middle of the road, he therefore swerved full to the right to avoid colliding with it and at the same time applying his brakes. This dark object was a conservancy lorry, No. OOA 1558, belonging to the defendants. It was stationary and was parked across the road with the left front wheel facing the drain on the left side of the road. There were no lights on the lorry and it had no rear light. When Mr Adams swerved to the right a hook (for mirror) on the left hand side of his car got caught by a hook on the back of the lorry at the right hand side. This, according to this witness, was the cause of the accident. There was a crash, the left front side of the car collided with the right hand side of the lorry at the back. The left front door of the car where the plaintiff sat was wedged in and could not be opened. Mr Weinberg was the driver of the vehicle which was coming from the opposite direction. He went to the aid of Mr Adams after the collision. The plaintiff was severely injured and was pinned down in the car. After some time and with the assistance of some neighbours she was finally extricated from the damaged car and taken to University College Hospital by Mr Weinberg. Someone phoned for the police and sergeant Bernard Oguanyasi of the Motor Traffic Division later arrived and met the witness at the scene. This sergeant, who was the

seventh witness for the plaintiff, said he received a report of the accident about 9.30 p.m. that night while he was on patrol duty of the township of Ibadan. He proceeded to the scene and saw the two vehicles involved in the accident. They obstructed the road, he therefore cleared a space for other vehicles to pass. He also sent for the "accident" policemen who would conduct the investigations. According to this witness, the front part of the lorry was facing a gutter and back was at an angle to the road. The vehicle was not parked straight and there were no lights on it. There were also no lights in the street. There were drains on either side and the road was under repairs. The driver of the lorry was not at the scene of accident when the sergeant arrived but returned later and met him there. Constable Akintola, eighth witness for the plaintiff, who conducted the investigations met the sergeant on the spot and in his presence prepared a sketch of the scene. Constable Akintola confirmed the evidence that the rear light of the lorry was not lit and that the back of the lorry jutted out a bit on the road so that it inclined on the road.

Mr Alexander Weinberg, ninth witness for plaintiff, confirmed that he had an appointment with Mr Adams at the former's house in Adeniyi Avenue that night. Mr Adams was to give him certain report about some work. As Mr Adams did not arrive in time and it was getting late the witness decided to go to the house of Mr Adams. He said when he turned to Stadium Road and was proceeding to Oke-Ado he saw the lights of a vehicle which was coming towards him from the opposite direction. He therefore dimmed his head lights and the on-coming vehicle did the same. Soon after he heard the noise of a crash and hurried to the spot. He found that the car of Mr Adams had collided with the back of a lorry. He removed the three children into his own car, but when he tried to remove the plaintiff he found that the door on her side had been wedged in and could not be opened. The husband pushed the car back a bit but still the door remained fast. Eventually, when aid arrived Mrs Adams was released from the wreck and taken by the witness to University College Hospital for treatment. The witness said he did not see any lights on the lorry, front or back, and also confirmed that the road was under repairs.

For the defendants three laboureres gave evidence of the occurrence as follows; Aiyepodasa, their second witness, was the driver of the conservancy lorry No. OOA 1558 which was involved in the accident. He said on the night in question he drove the lorry to Stadium road and stopped at the scene of accident. He cleared to the left and stopped the vehicle to collect buckets of night soil. The rear light of the lorry was lit and he also lit a hurricane lantern which was used inside the lorry to load and off-load buckets. He said he sat in his place at the driver's seat in front and his front lights were on. About thirteen minutes after, he saw the lights of a vehicle which was coming towards him, and at the same time he saw the lights of another vehicle which was coming behind him.

He said the on-coming vehicle was the one which had the right of road but the vehicle behind was travelling at such a high speed that it could not stop as it should but crashed into the back of his lorry. At that time the on-coming vehicle had already reached the kerb of his lorry. At the impact he struck his head against the steering wheel of his lorry, and it bled. He also fell down and nearly fainted. The force of the collision also pushed the lorry forward pushing the two front tyres into a drain. He left the scene and went to report to the police.

The second labourer was Tiamiyu Ashamu, third witness for the defendants. He said he stood at the back of their lorry when it stopped at Stadium Road. He saw two vehicles approaching at the same time but from opposite directions, one from the

Stadium and the other from Oke-Ado. This latter, he said, was travelling at a very high speed, so he jumped from the road into the bush. When he looked back he observed that it had crashed into their lorry and as a result of the impact two labourers who were inside the lorry were thrown to the ground and the lorry was pushed into a ditch. The two men were injured and taken by the police to University College Hospital. The driver of the lorry was also injured. The rear light of the lorry was lit and there was also a lighted hurricane lantern which was placed at the tail board of the lorry to enable labourers to see what they were doing on the ground.

Under cross-examination the witness said the two approaching vehicles did not dim their lights.

The third labourer, Ade Agunloye, fourth witness for the defendants, said he was the headman of the labourers working that night. At the time of the collision he and another labourer were working inside the lorry and were about to receive a bucket which was being handed to them from the ground when there was suddenly a crash and both of them were thrown to the ground and were injured. The police took them to hospital but were not treated. They were told to go and treat themselves at home.

I am not impressed by the evidence of these three labourers of the Defendants and I am satisfied from their demeanours that they are not truthful witnesses. First, I do not believe that the front lights of the lorry were lighted as the driver said otherwise Mr Weinberg would have seen them. The lights which he saw were those of a vehicle which was moving towards him, not a stationary one. Secondly if the rear light of the lorry was lit and there was also a lighted lantern at its tail board, Mr Adams would have seen them a long way off in the pitch darkness of Stadium Road and avoided colliding with the lorry. I cannot imagine why a responsible person like Mr Adams with his entire family in the car, would take the risk to continue driving on a road which was under repairs when he saw that a two-ton lorry was blocking his way and that another vehicle was coming towards him from the opposite direction. Besides, although I agree that from his seat in front the driver could see the glare of the lights of a vehicle coming behind the lorry, I cannot agree that he could from his seat gauge the speed at which such a vehicle may be travelling. I therefore do not believe his evidence that the car of Mr Adams was travelling at a high speed immediately before the collision. I also do not believe the evidence of Tiamiyu Ashamu on this point. Another reason why I was not impressed by the evidence of these three labourers was the fact mentioned by them that three of them were injured as a result of the accident. One of them said the police took two injured people to the hospital, but, surprisingly, they were not treated, but were sent home to treat themselves. Exhibit H which was the Police report of the accident mentioned that Mrs Adams and two of her children were the only persons injured. If the story of these labourers is true, it has not been explained why the names of none of them was mentioned in this report. Again, some of the labourers said that the impact of the collision pushed their lorry into the ditch on the left. This evidence on the face of it cannot be true because the plaintiff's car is the smaller and lighter of the two vehicles and the driver of the lorry said the lorry was in gear at the time of the collision. It is not therefore, in my opinion, possible for a light car to push the lorry into a drain under those circumstances. Apart from this, the sketch plan made by Constable Akintola as confirmed by his evidence did not indicate that any of the front tyres of the lorry was in the drain. The constable said positively that the two tyres of the lorry were on the road. Again, the driver of the lorry said the gear was damaged as a result of the impact of the collision, but this obviously is a lie because Mr Frank

Plant, the first witness for the defendants, in his evidence mentioned the parts of the lorry which were damaged as a result of the collision but he did not say that there was anything wrong with its gear.

For these reasons, I have no hesitation whatsoever in accepting the evidence of the plaintiff as well as those of her husband and Mr Weinberg as to the details of the events of the collision and in rejecting those of the three labourers of the defendants. Wherever there is a conflict in the two sets of evidence, I prefer the evidence of the plaintiff to that of the defendants. It follows therefore that I find—

- (a) that the road on the night in question was under repairs;
- (b) that the lorry of the defendants was not properly parked on the road; and
- (c) that there was no light on the lorry, front or back.

I therefore find that the collision between the two vehicles was caused by negligence on the part of the defendants.

Mr Warren, the learned counsel for the defendants, submitted in his final speech that even if the defendants were negligent the plaintiff was also guilty of contributory negligence. I cannot on the evidence agree with the proposition. This case is similar in some of its aspects to the case of *Tidy v. Battman* (1934), 1 K.B. 319. The following passage occurs in the judgment of Macnaghten, J., in the Divisional Court in that case (page 321):—

“It cannot, I think, be said that where there is an unlighted obstruction in the roadway, a careful driver of a motor vehicle is bound to see it in time to avoid it, and must therefore be guilty of negligence if he runs into it. The circumstances may be such that a prudent and careful driver proceeding at a proper pace and exercising the care which everybody ought to exercise, may be unable to observe it in time to stop before he reaches it.”

I respectfully agree with this dictum and consider it an adequate answer to Mr Warren's contention.

It is to be noted that the principle laid down in that case was at a later date approved by the Privy Council in the case of *Stewart v. Hancock*, [1940] 2 All E.R. 427.

I now come to the consideration of the question of damages.

According to the learned authors of “*Kemp and Kemp*” on the “*Quantum of Damages*” (1954 edition) at page 16, a plaintiff is entitled to recover damages in respect of all expenses caused by his injuries. Thus he can recover expenses reasonably incurred for medical treatment, etc. Giving evidence as to the injuries received by the plaintiff, Dr Blesovsky said as follows:

“It was obvious that she (plaintiff) has had a serious accident. She had lost some blood, she is pale, her blood pressure was low and her pulse rate fast. Her main injuries were fractures of pelvis in two places, one going through the left hip joint. The left hip was dislocated, this was in a backward direction and it was causing paralysis to the main nerve of the left leg. The left tibia and fibula were broken at the upper end and the right femur was also broken. She has some cuts on the leg and face but these were of a minor nature. Her treatment consisted of giving her blood until her blood pressure became normal. As soon as she was well enough the dislocation of the hip was reduced, the left leg was put in plaster of Paris, and the right leg in a splint. Two days later I operated on the right femur and inserted a nail into it to keep it in position. She recovered movement in her left

leg but she was left with pain along the course of the nerve and with increased sensitivity in the foot. This pain became more and more severe and on 15th April, she was transferred to a hospital in Israel for rehabilitation treatment. I accompanied her on the plane because she needed frequent injection of morphine for the pain. The pain in the left leg is unlikely to disappear completely. Any improvement that may take place would be a matter of years rather than months. The percentage of disability is 75. She returned to Ibadan from Israel in July last year. She has been coming to the hospital since. She has been having exercises in the physiotherapy Department and heat treatment by electricity".

Under cross-examination, the doctor stated that the fracture of the femur has not yet united. He further explained that by 75 per cent disability he meant that the plaintiff has only 25 per cent ability to use her legs as compared with having a 100 per cent ability to use her brain. Under this head, Mr Warren for the defendants submitted that all expenses relating to the trip to Israel should be ignored because the trip was unnecessary and showed lack of faith on the part of the doctor in his own hospital where there are seven surgeons and also a physiotherapy unit. The law, however, on the point is very clear and it is that the plaintiff can recover as special damages, expenses reasonably incurred for medical treatment even though it transpires that the expert's advice upon which he acted was mistaken and the treatment was in fact unnecessary. This was decided in the case of *Rubens v. Walker*, [1946] S.C. 15, cited on page 16 of "*Kemp and Kemp*". There Lord Patrick said as follows:

"In a former and very similar case, I followed the dictum of Lord Collins in *Clippens Oil Company Case* [1907] S.C. (H.L.) 9 at page 14, where he said the wrong-doer is not entitled to criticise the course honestly taken by the injured person on the advice of his expert even though it should appear by the light of after events that another course might have saved loss. The loss he has to pay for is that which has actually followed under such circumstances upon his wrong."

On this principle, therefore, the plaintiff is entitled to recover as special damages such of the items of expenses in her list of special damages which the Court may consider to be reasonably incurred and duly authenticated. On this basis and on the evidence of Mr Moise Alkahanati, the Accountant of Nigersol Construction Limited and second witness for the plaintiff, I will allow the claim of £60 in respect of item (a) on the list of special damage. Item (b) which is a claim for £554 13s 0d relates to the expenses of the return journey to Israel and back of the plaintiff and Dr Blesvosky. I will allow it because it is supported by exhibit B. The claim for £50 in item (c) is backed up by exhibit D and I will allow it. The Accountant said he credited the firm of Solel Boneh in Israel with the sum of £212 17s 4d to cover plaintiff's expenses on her return journey from Israel to Nigeria. Exhibit C is the bill. But on this bill "air ticket" was charged for Mrs Adams and also "travelling tax"—whatever that may mean. It was not explained in evidence what relation (if any) this bears to the return fare of the plaintiff which was already accounted for by exhibit B. Even if the bill was received the day before it was tendered in evidence as alleged, some evidence could be given as to whether or not some items contained therein bore any reference to other expenses incurred by the plaintiff, so as to avoid duplication. This was not done and, for that reason, I am unable to allow the claim.

With regard to item (d)—Treatment in Israel, £346 4s 8d, the Accountant said this amount was paid on behalf of his firm by Messrs Solel Boneh in Israel. But no document was tendered by him in support of the transaction. Giving evidence however,

on the point, Mr Adams said he signed two bills in respect of the treatment of his wife in Isreal and tendered in evidence exhibit C which is a copy of a letter written to him on 18th October, 1960, by the firm of Solel Boneh. In the letter the firm stated that they had paid the sum of £1,313 (Israeli pounds) to Levenstein Health Institute and also that they hold an invoice from Beilinson Hospital for the sum of £432 (Israeli pounds). It is plain from an earlier letter of the firm to Mr Adams which was dated 11th September, 1960 (*i.e.*, exhibit G.1) that the two hospitals have been giving medical treatment to Mrs Adams. There is no direct evidence before me that these two amounts which were paid in Israeli pounds are equivalent in sterling currency to the sum of £346 4s 8d which is claimed under this head.

I am prepared however to assume that they are. I will therefore allow the claim. Next, on the evidence of the Accountant, the sum of £50 claimed in item (e) and which was paid by two instalments to Mr Adams appears to me to be justified if one takes into account the seriousness of the injuries of the plaintiff. I will therefore allow the claim.

A sum of £130 is claimed under item (f) for double household expenses. But no particulars were supplied as to how the figure was arrived at and no proof was given either in the evidence of the plaintiff or of Mr Adams. In my opinion, this is a head which should more appropriately be considered under general damages. I therefore do not allow the claim. Lastly, a sum of £200 is claimed under item (g) for time spent by Mrs Adams out of work, use of car, driver, etc., here too, the evidence is not in my view satisfactory because no details were given. In her evidence the plaintiff asserted that she earned before the accident approximately between £20 and £25 a month as net income from her trade as a seamstress. But she does not indicate in the claim under this head how much she is claiming for loss of earning or for how many months. It is also neither stated nor proved how much is being claimed for use of car or driver under the head. But in any event I would not be disposed to allow any claim for loss of earning having regard to the evidence of the husband on the point. He said the plaintiff started dressmaking only about a fortnight before the accident. In these circumstances, I must hold that the item is not proved. I accordingly disallow the claim.

To sum up: I award under special damages the following:—

| | £ | s | d |
|---|----------|--------------|-------------|
| (a) Treatment by University College Hospital | 60 | 0 | 0 |
| (b) Fare of return journeys to Israel of Mrs Adams and Dr Blesovsky | 554 | 13 | 0 |
| (c) Dr Blesovsky's expenses in Israel | 50 | 0 | 0 |
| (d) Treatment of Mrs Adams in Israel | 346 | 4 | 8 |
| (e) Cost of fruits and other necessaries for Mrs Adams | 50 | 0 | 0 |
| Total | £ | 1,060 | 17 8 |

General Damages.—Under this head, the plaintiff is in my view entitled to damages for physical disability resulting from the accident, by this I mean the 75 per cent disability to use her legs. In particular, I have in mind that portion of the medical evidence which stated that the pain in her left leg is unlikely to disappear completely and that any improvement that may take place would be a matter of years rather than months. She worked as a ticket conductor on the Railway in Israel before coming out

to Nigeria. She started work here on her own as a seamstress shortly before the accident. She has now decided to return home to Israel permanently, but because her former job as a ticket conductor involved standing all the time, she can no longer go back to it owing to her injuries. For the same reason she said she could not continue with her work as seamstress because she has to press the motor of her sewing machine with her legs. Also, because of her injuries she could not sit down for long in one place. Added to this is the fact that she now has to engage a cook or steward or someone to do her household work for her. In my opinion, all these matters must be taken into account in assessing damages under this head. The plaintiff is also entitled to compensation for pain and suffering. I cannot, however, take into account the table for expectation of life which is at page 351 of Leonard Bingham's book on *Motor Claim Cases* (3rd edition) to which plaintiff's counsel referred in his final speech, because, as Mr Warren correctly observed, no evidence was led on either side during the proceedings on the expectation of life of the plaintiff.

Some examples are given on pages 404 and 405 of "*Kemp and Kemp*" of the amount of damages which had been awarded for leg and foot injuries. But unfortunately, none of them is comparable with the present case. Bearing in mind, however, all the matters which I have mentioned under this head, and having regard to the age and status in life of Mrs Adams, I consider that a sum of £2,500 would be adequate compensation, and I accordingly award that amount as general damages.

In the result, the plaintiff will have damages assessed as follows:

| | £ | s | d |
|-----------------|-----|-------|--------|
| Special damages | ... | ... | ... |
| General damages | ... | ... | ... |
| Total | £ | 3,560 | 17s 8d |

There will be judgment, therefore, for the plaintiff for the sum of £3,560 17s 8d and costs. The counter-claim of the defendants is dismissed with costs.

Plaintiff awarded £1,060 17s 8d as special damages and £2,500 as general damages.

SAMSON OSHODIN (Petitioner)

BEN O. E. OSAGIE AND TWO OTHERS ... (Respondents)

[HIGH COURT OF JUSTICE: Madarikan, J., 11th February, 1961.]

Election petition—voter committing election offence—no proof that he was candidate's agent—proof of bribery at an election—more ballot papers in ballot boxes than the number of voters—Parliamentary Electoral Regulations, 1960, W.R.L.N. 227 of 1960.

In this election petition the petitioner sought the order of the Benin High Court to declare the election of the first respondent to the Western House of Assembly null and void on the following grounds:—

(1) that in one ward it was discovered that a voter had in his possession three ballot papers at the polling station on the voting day but there was no evidence that the voter was the agent of the first respondent;

(2) that before voting began it was discovered that 12 ballot papers were missing from a booklet of ballot papers although there was no evidence as to how they got missing;

(3) that a total of 415 ballot papers were found in the ballot boxes of the contesting candidates although only 403 voters were supposed to have voted; and

(4) that the first respondent's son and agent acting with the first respondent's knowledge and consent bribed some of the registered voters.

The petitioner had 4,345 votes cast for him while the first respondent had 5,026 votes.

Held: (1) that the voter who had in his possession three ballot papers was a stranger to the first respondent and was not acting as his agent; that therefore although there might be proof that an election offence had been committed by the voter, yet that would not be good ground to avoid first respondent's election;

(2) that the Court would not draw the inference that the Presiding Officer had issued the twelve ballot papers before voting began from the fact that he had discovered that the twelve ballot papers were missing from a booklet before voting began;

(3) that notwithstanding the fact that 415 ballot papers were found in the three ballot boxes of the candidates although only 403 voters voted, the Court, bearing in mind the fact that the first respondent had 5,026 votes and the petitioner 4,345, was satisfied that the election was really and in substance conducted in accordance with the principles of the Parliamentary Electoral Regulations, 1960, and that the result of the election, that is, the success of one candidate over the remaining two was not and could not have been affected by aforementioned matters; that the election would therefore not be avoided on this ground;

(4) that although bribery at an election may be implied from the circumstances of the case and although the Court is not bound by the strict practice applicable to criminal cases but may act on the uncorroborated evidence of an accomplice yet clear and unequivocal proof is required before a case of bribery can be held to have been established; and there being not such clear and unequivocal proof of bribery in this case this petition would be dismissed.

Petition dismissed.

Cases cited:

Norwich Case, Birbeck v. Bullard, (1886), 54 L.T., 625; 4 O'M. and H.84.

Blackburn, (1869), 1 O'M. and H.202.

Wakefield, (1874), P.P. 1874.

Lichfield Case, (1869) 1 O'M. and H. 22.

Ipswich Case, (1857) Wolf and D. 173.

M'Clory v. Wright, (1860) 10 I.C.L.R. 514.

Benin Civil Suit No. B/32/60.

Erimona (Ahyi with him) for the petitioner.

Efuaye for the first respondent.

Bada, Crown Counsel, for the second and third respondents.

Madarikan, J.: This election petition was presented by Samson Oshodin under the Parliamentary Electoral Regulations, 1960 (hereinafter referred to as the Electoral Regulations) in respect of a parliamentary election held in Benin West II Constituency on the 8th day of August, 1960, for the return of a member to the Western House of Assembly.

The first respondent was a candidate at the said election, and the second and third respondents were the Electoral Officer and Returning Officer respectively.

The three respondents in their replies admitted the allegations set out in paragraphs 1 and 2 of the petition which read as follows:

"(1) Your petitioner Samson Oshodin is a person who voted, had a right to vote and was a candidate at the above election for Benin West 2 Constituency.

(2) And your petitioner states further—

(a) that the election was held on the 8th day of August, 1960, when Ben Omodaro Edo Osagie (otherwise described in the voters list for Benin West Constituency as Osagie Omokaro Ben Edo), Samson Oshodin (Your petitioner and Patrick Ehigiator Adonri were candidates and Major S. Hellings was the Electoral Officer for Benin West Constituency.

(b) That Ben Omodaro Edo Osagie scored 5,026 votes, Samson Oshodin scored 4,345 votes and Patrick Ehigiator Adonri scored 2,321 votes.

(c) and that the Returning Officer returned the said Ben Omokaro Edo Osagie as being duly elected."

On the 19th day of November, 1960, I ordered that paragraph 3 and lines 2 to 11 of paragraph 4 of the petition be struck out. I also ordered the petitioner to give certain particulars and the order was complied with.

At the hearing of the petition, the petitioner and his witnesses gave evidence in support of the allegations contained in paragraphs 1, 2, 4 (a) (b), (c) and (f) of the petition.

The evidence with regard to paragraphs 1 and 2 of the petition stands uncontradicted and I accept as proved the several matters set out therein.

Paragraph 4 (a) of the petition reads—

"At Udo village in Udo Ward 9 A.A. one Benjamin Aideyan was found in possession of three ballot papers at the polling station. The presiding officer searched the person of Benjamin Aideyan and recovered the said ballot papers. Benjamin Aideyan was handed to the Police Officer present".

The ninth witness for the petitioner was the presiding officer in Udo Ward 9 A.A. during the election. He saw one Benjamin Aideyan at the polling station and acting on suspicion, he searched Benjamin Aideyan and found three ballot papers in his left pocket. He made a report to the Police. The evidence of the ninth witness was confirmed by the sixth, tenth and eleventh witnesses. The case was however refused by the police as false. On the evidence before me, I find as a fact that Benjamin Aideyan was found in possession of three ballot papers at the polling station on the 8th day of August, 1960. I believe and accept the evidence of the first respondent that he does not know Benjamin Aideyan.

The question that I have to consider is what effect could this have on the election?

Norwich Case, Birbeck v. Bullard (1886), 54 L.T. 625; O'M. and H. 84, was a case in which a candidate sent out a circular to voters asking for their votes and also asking them to "enter heartily into the contest". Denman, J., held that if any person, acting upon the circular, set to work immediately after he had given his own vote, and went about doing a quantity of illegal things, such person would not thereby become an agent of the candidate.

In *Blackburn* (1869) 1 O'M. and H. 202, Willes, J., when dealing with election agency described an agent as a person who has been set in motion by the candidate to conduct the election or canvass voters on his behalf.

Grove, J., in *Wakefield* (1874) P.P. 1874 No. 374, p. 157 gave the following definition of the expression "election agency":—

"Accordingly, a wider scope has been given to the term "agency" in election matters, and a person is responsible generally, you may say, for the deeds of those who to his knowledge for the purpose of promoting his election, canvass and do such other acts as may tend to promote his election, provided that he has reasonable knowledge, or that his alleged agents have reasonable knowledge, that those persons are so acting with that object."

Having taken all the circumstances of this case into consideration, I hold that Benjamin Aideyan was a complete stranger to the first respondent and that he was not acting as the first respondent's agent. That being so, although there may be proof that an election offence has been committed by Benjamin Aideyan, yet that will not be good ground to avoid the first respondent's election.

I shall now deal with paragraph 4 (b) of the petition which reads—

"In Iguobo village, in Iyekovia (Usen K) A Registration Area, the presiding officer A Igbinedion was discovered to have issued 12 ballot papers from a ballot paper booklet before voting began on 8-8-60. The attention of the Electoral Officer was drawn to this and the matter was reported to the Police."

The evidence led does not in my view support the allegation in paragraph 4 (b). Seventh and eighth witnesses gave evidence that about 8 a.m. on 8th August, 1960, the Presiding Officer at Iyekovia (Ward 37) discovered that 12 ballot papers were missing from a booklet. He was surprised. Evidence was not led to the effect that the

Presiding Officer issued 12 ballot papers before voting began. This paragraph can only be regarded as proved if I am prepared to draw the inference that the Presiding Officer had issued the 12 ballot papers in question before voting began. On the evidence before me, I am not prepared to draw any such inference. I therefore hold that paragraph 4 (b) of the petition has not been proved.

In paragraph 4 (c) of the petition it was alleged that at Iguobo village in Iyekovia (Usen K) A Registration Area, 403 voters voted but 415 ballot papers were found in the ballot box. The petitioner's polling agent was the eighth witness. He said that as each voter went to vote he ticked off his name on Exhibit A, and that according to his record only 403 voters voted. Exhibit B which was the official ballot paper account supports the evidence of the eighth witness and I have no hesitation in finding as a fact that 403 voters voted and 415 ballot papers were in the three ballot boxes. Here again, I have to ask myself what effect this could have on the election. The law relating to avoidance of election on grounds similar to this is set out fully on pages 507-511 of *Schofield's Parliamentary Elections* (3rd Edition). It is to be remembered that at the election the first respondent had 5,026 votes, the petitioner had 4,345 votes and Adonri had 2,321 votes. On the evidence before me, I am satisfied that notwithstanding the allegations in paragraph 4 (c) of the petition, the election was really and in substance conducted in accordance with the principles of the Electoral Regulations, and that the result of the election, that is, the success of the one candidate over the remaining two was not and could not have been affected by the matters complained of in paragraph 4 (c) of the petition.

The last complaint was one of bribery and it is contained in paragraph 4 (f) of the petition which reads—

“At Ugbokun village in Uguobo Ward KA, one Lasisi Osagie, first respondent's son and agent acting with the first respondent's knowledge and consent bribed the villagers with two bundles of corrugated iron sheets for roofing their common idol house in the village in order that they might vote for the first respondent at the election.”

The second, third and fourth witnesses for the petitioner in their evidence said that the first respondent promised to give the villagers of Ugbokun two bundles of iron sheets if they would vote for him. Later two bundles of iron sheets were sent to the second witness. The iron sheets were removed by Ebegbodin subsequently recovered by the police in the bush.

The second witness said the iron sheets were brought to him five days after the election in the afternoon after lunch and that it was after this that he called a meeting of all the villagers and asked them to vote for the first respondent. This does not make sense to me.

The third witness said the iron sheets were brought a day before the election at about 9 a.m. The fourth witness, wife of second witness, said they were brought after breakfast but before lunch. The first respondent denied that he promised to send iron sheets to the people of Ugbokun, and further said that he never sent iron sheets through any one to second witness.

The law on proof of bribery in election petition is settled. Clear and unequivocal proof is required before a case of bribery will be held to have been established, suspicion is not sufficient. *Lichfield Case* (1869) 1 O'M. and H. 22 at page 28. Bribery may be

implied from the circumstances of the case and the court is not bound by the strict practice applicable to criminal cases, but may act on the uncorroborated evidence of an accomplice. *Ipswich Case* (1857) Wolf and D. 173 at page 178. *M'Clory v. Wright* (1860) 10 I.C.L.R. 514.

Having observed the demeanour of the second, third and fourth witnesses for the petitioner and having taken into account the contradictions in their evidence, I have not the slightest hesitation in coming to the conclusion that second, third and fourth witnesses for the petitioner are strangers to truth. They were lying when they said that the petitioner promised to and did send iron sheets to the villagers. I reject in its entirety their evidence that any such promise was made by the first respondent. I also reject their evidence that two bundles of iron sheets were sent by the first respondent to the second witness. Having held that there was neither a promise to bribe nor was there bribery, it is unnecessary for me to deal with the question of agency raised in paragraph 4 (f) of the petition.

The petition is dismissed.

Petition dismissed.

BULI ADISA (Appellants)

v.
COMMISSIONER OF POLICE (Respondent)

[HIGH COURT OF JUSTICE: Quashie-Idun, C.J., 16th February, 1961].

Criminal Law and Procedure—charge of forgery and uttering forged document and stealing—admissibility of statement of accused—possibility of other persons committing the offence—reasonable doubt—prima facie case not made out after close of case for the prosecution—duty of trial Magistrate to discharge.

The appellant and another person were charged jointly before a Magistrate's Court in Ibadan for forgery and uttering of a vehicle licence whilst the appellant was also charged alone with stealing the sum of £12 property of the other accused person (first accused). The evidence led before the Magistrate established the fact that on discovering that the vehicle licence attached to a lorry No. WA 1610 was forged, the police contacted the first accused who told the police that it was the appellant who assisted him in obtaining the licence. The police also gave evidence that the first accused also alleged that the appellant took from him £12 for the licence. When contacted by the police, the appellant denied any knowledge of the transaction. The application form upon which the genuine licence which was later forged was issued was tendered in evidence but no evidence was led by the police to establish that the writing and signature were those of either the first accused or the appellant, neither was it proved that the alteration on the licence was made by the accused persons. There were discrepancies in the evidence of an important witness for the prosecution.

Held: (1) that the statement made by the first accused was admissible against him only and that the trial Magistrate was wrong in not warning himself that the evidence was not admissible against the appellant, but that as it was not the only evidence against the appellant the appeal would not be allowed on this ground;

(2) that the trial Magistrate ought to have considered the possibility that some person other than the appellant had the opportunity of committing the offence particularly as the application form was not proved to have been filled by the appellant nor was the licence proved to have been forged by him; and that if the learned trial Magistrate had done this he would have been in a position to consider adequately the question of reasonable doubt;

(3) that as there was not sufficient case made against the appellant to warrant his being called upon to make his defence at the close of the case for the prosecution, the trial Magistrate was wrong to have called on him to make his defence even though no submission was made on his behalf and to have convicted him on the evidence subsequently given".

Appeal allowed.

Cases cited:—

R. v. Harris, [1927], 20 Cr. A.R. 144.

Inspector-General of Police v. Solomon Ogunshowobo and others, 1958 W.R.N.L.R. 23.

Rashidi Costa and others v. Commissioner of Police (unreported but see Ibadan Criminal Appeal No. I/26CA/58).

R v. Charles Clement Abbot, (1955) 39 Cr. A.R. 141.

Ibadan Criminal Appeal No. I/51CA/60.

Akinloye, for the appellant.

Rotimi George, Assistant Director of Public Prosecutions for the respondent.

Quashie-Idun, C.J.: The appellant was charged jointly with one *Tiamiyu Ishola* before the Senior Magistrate for having forged a Vehicle Licence. *Tiamiyu Ishola* was also charged with having uttered the forged licence. The appellant was also charged with stealing the sum of £12 the property of the first accused *Tiamiyu Ishola*.

The facts of the case for the Prosecution were as follow:

The Police, on inspection found a vehicle licence attached to an Austin Lorry No. WA 1610. It was found that the genuine licence which had been issued for the quarter for a Morris Car No. LC. 161 had been forged.

The Police contacted the first accused, *Tiamiyu Ishola*, who told the Police firstly that the second accused (the appellant) had assisted him to obtain the licence. The first accused added that he had met the appellant in the Licensing Office, obviously implying that the arrangement was made at that office. Later the first accused stated that the appellant came to his house and collected £12 for the licence. The Police contacted the appellant who denied any knowledge of the transaction. At the trial before the learned Magistrate, evidence was given that the licence was forged by altering figures £2 10s to £12 and other writings on it.

In the course of the investigations by the Police an application Form E upon which the Licensing Authority issued the genuine licence for the quarter was discovered. That document was tendered in evidence as Exhibit "A". It purported to have been signed and prepared by on *T. Ishola*. No evidence was led by the Police to establish that the writing and signature were those of either the first accused or the appellant, neither was there any evidence led to prove that the alteration on the vehicle licence was made by the accused persons. One *Karimu Ajadi*, the fourth prosecution witness, gave evidence in respect of the payment of £12 to the appellant by the first accused for the licence which the prosecution alleged was stolen by the appellant because he did not obtain the licence.

The officer who issued the genuine licence which was subsequently forged said in his evidence that he used to see the appellant outside the office but that he brought no work for him.

The first accused gave evidence and repeated his statement that the licence was obtained for him by the appellant to whom he had paid £12. He also stated that he did not sign Exhibit "A" (the application Form) and that the licence now alleged to be forged was brought to him by the appellant. The appellant also gave evidence and repeated his denials. He said he did not know the first accused's house and that he did not receive any money from him.

In his judgment, the learned trial Magistrate stated as follows:

"I find as a fact that second accused received the £12 and for a specific purpose to take out quarter licence for WA 1610. Having found so far it is crystal clear that only £2 10s reached the licensing office and that £9 5s was never paid. It followed therefore.....that second accused as a bailee in fact converted the money to his own use. To cover up his act, mischief was let loose and he did forge Exhibit "B" to give it a look foreign and sufficiently representative of a genuine licence for £12. The circumstantial evidence is so irrefutably strong that second accused in fact forged or was actively a participant to the alleged forgery....."

The trial Magistrate also found the first accused guilty on the second count of altering the forged licence. The first accused has not appealed but the appellant has appealed on the following additional grounds filed, *viz*:—

1. The learned trial Magistrate erred in law in admitting inadmissible evidence on page 2, lines 36-41 and which unduly influenced his decision.
4. The learned trial Magistrate erred in law in failing to consider the possibility of another person other than the second accused committing the offence.
5. The decision is unwarranted, unreasonable and cannot be supported having regards to the weight of evidence.

On ground (1), Mr Akinloye submitted that the learned trial Magistrate was influenced in his judgment by inadmissible evidence in that he accepted the evidence of a Police Constable who stated that the first accused told him that he gave £12 to the appellant and that the appellant gave the first accused a licence now proved to have been forged. To submit that the evidence is not admissible in Law is wrong. The constable was giving evidence of a statement made to him by an accused person and it was admissible against the person who made it although not admissible against the appellant who was not present at the time it was made. See *R. v. Harris*, (1927) 20, C.A.R. 144. The trial Magistrate while admitting the evidence should have warned himself that the evidence was not admissible against the appellant. It does not appear on the record of proceedings that he did so and the learned counsel is justified in submitting that the learned trial Magistrate was influenced by the evidence in arriving at his decision against the appellant. If that evidence had been the only one against the appellant, I would have been bound to agree that it was a serious error in Law on the part of the trial Magistrate.

There was, however, evidence given by the fourth prosecution witness Karimu Ajadi and by the first accused which was the only evidence connecting the appellant with the offences. It is clear from the trial Magistrate's judgment that he convicted the appellant solely on the evidence given by the two persons and not on the evidence of the constable. It is for this Court to say whether or not the learned trial Magistrate was justified in doing so.

This brings me to the fourth and fifth additional grounds.

As to ground (4) namely that the learned trial Magistrate erred in failing to consider the possibility of another person other than the appellant committing the offence of forgery. I think that having regard to the evidence led by the prosecution, the trial Magistrate should have considered the possibility that some person other than the appellant had the opportunity of committing that offence. If this had been done the learned trial Magistrate would have been in a position to consider adequately the question of reasonable doubt. I would refer to the judgment of Ademola, C.J., in the case of *Inspector-General of Police v. Solomon Ogunshowobo and others*, 1958, W.R.N.L.R., page 23 which was followed by me in the case of *Rashidi Costa and others v. Commissioner of Police* in my judgment dated on the 27th October, 1958. (Criminal Appeal No. I/26CA/58). This point is important particularly as the application Form E was not proved to have been filled by the appellant neither was the licence proved to have been forged by him. There was also no evidence that the appellant presented the form which enabled the genuine licence later forged, to be issued by the Licensing Authority. The evidence and the circumstances in the two cases cited

which warranted the courts to come to the decision are somewhat similar to those in the present case as far as the charges of forgery and uttering are concerned. I hold therefore that this ground has been sustained and that on this ground alone the conviction of the appellant on the count of forgery cannot stand.

In support of the fifth ground, namely, that the decision is unwarranted, unreasonable and cannot be supported having regard to the evidence, Mr Akinloye has submitted that the joint trial of the first accused and the appellant was prejudicial to the appellant. As I have stated earlier in this judgment, the fourth prosecution witness was the only person called by the prosecution to prove that the first accused gave £12 to the appellant for the purpose of obtaining the motor licence for the first accused. The name of the fourth Prosecution witness had been mentioned by the first accused to the Police as being present when the money was handed to the appellant for the licence. In his evidence before the learned trial Magistrate, the witness said that after some discussion by the first accused and the appellant in the presence of the witness, first accused gave the appellant £12. Witness said he did not know what the first accused and the appellant were discussing and he did not know for what purpose the first accused paid the money to the appellant. The witness was cross-examined by counsel who was appearing for the first accused; and he then stated in answer to questions put to him that first accused gave the appellant £12 for licence for vehicle No. WA 1610.

The appellant, who at that time was not represented cross-examined the witness who again said that first accused gave £12 to the appellant at first accused's house. The Police Constable whose evidence I have already referred to had stated that the first accused had told him at first that he had met the appellant in the Licensing Office where he had apparently handed the money to the appellant and that later, the first accused had said that he gave the money to the appellant in first accused's house.

At the close of the case for the prosecution, it was clear that the evidence led could not support the charges of forgery and stealing the sum of £12 preferred against the appellant in view of the fact that there was no evidence to support the charge of forgery and also of the evidence of the fourth Prosecution witness on cross-examination which enabled the witness to alter the evidence he had given in examination in chief. I am surprised that the learned trial Magistrate held that he entertained no doubt as to the payment of the money to the appellant for the licence in view of the discrepancies in the evidence of this rather important witness called by the Prosecution. In deciding to accept the testimony of the witness in spite of its unsatisfactory nature, the learned trial Magistrate stated as follows:

“He had no axe to grind and he showed a total impartiality with leaning specially for the second accused which he could not sustain when cross-examined by defence counsel for the first accused.....”

As I have already stated, it is surprising why the witness's conflicting testimony was accepted. The position then at the close of the case for the prosecution was that a *prima facie* case had not been made out sufficiently to warrant the appellant being called upon to make his defence. Admittedly, no submissions were made by the appellant's counsel to that effect. But, my view is that the position was still the same, namely that the prosecution's case was unsatisfactory and that the appellant should not have been called to make a defence on any of the charges preferred against him.

However, the first accused and the appellant made their defence. Each of the accused gave evidence and was subject to cross-examination by the counsel for the

other accused person. The appellant contended that he did not receive any money from the first accused, that he did not obtain a motor licence and did not forge any motor licence as alleged by the prosecution.

It is obvious from the judgment of the learned trial Magistrate that he attached some importance to the evidence of the first accused who said that he gave money to the appellant to obtain the licence for him. The trial Magistrate's conclusion that it was the appellant who obtained the genuine licence, forged it and handed it to the first accused is based upon the testimony of the first accused supported by the evidence of the fourth prosecution witness which contained serious discrepancies.

As I have already stated, the appellant should not have been called upon to make a defence after the close of the case for the prosecution. It was after the first accused had given evidence and not before then that it seemed that the appellant had a case to answer; in other words he was bound to refute the evidence given against him by the first accused.

As the appellant had no case to answer up to the time the first accused went into the witness box to give evidence, I hold the view that the learned trial Magistrate was wrong in convicting the appellant. I would refer to the case of *R v. Charles Clement Abbot*, (1955) 39, C.A.R. 141. In that case the appellant was indicted and tried with another person for forgery. At the close of the case for the prosecution, it was submitted on behalf of the appellant that there was no case to go to the jury. The Judge, however, allowed the case to go to the jury, whereupon the other accused person gave evidence against the appellant. The appellant and the other accused person were both convicted. The appellant appealed and it was held that as there was no evidence against the appellant at the close of the case for the prosecution, it was the duty of the judge to withdraw the case against him from the jury and that the conviction of the appellant must be quashed.

For the reasons I have stated, I think the conviction of the appellant cannot stand.

The appeal is accordingly allowed and the conviction of the appellant set aside. He is acquitted and discharged.

Appeal allowed.

THE QUEEN

v.

THE GOVERNOR IN COUNCIL, WESTERN
REGION OF NIGERIA

THE HONOURABLE THE MINISTER OF

LOCAL GOVERNMENT

THE SECRETARY TO THE PREMIER AND
EXECUTIVE COUNCILTHE CARE-TAKER COMMITTEE OF THE
IFE DISTRICT COUNCIL

IN RE JOSEPH ADEGBOYEGA ADENIJI ...

} Respondents

} Applicant

[HIGH COURT OF JUSTICE: Quashie-Idun, C.J., 19th February, 1960.]

Certiorari—dissolution of a local government council—whether necessary for Governor in Council to hold enquiry before ordering dissolution—whether order of dissolution could be properly signed by the Secretary to the Premier and Executive Council instead of being signed personally by the Governor—appointment of Committee of Management in place of dissolved council stated in the order to continue until further notice—whether this was valid as not stating the term of office of the Committee as required by section 86 (2) of the Local Government Law, 1957 Law No. 12 of 1957—whether action of the Governor in Council in ordering dissolution of the local government council was purely an executive one—sections 85 and 86 of the Local Government Law, 1957, and rule 3 of Order 59 of the Rules of the Supreme Court in England considered.

The applicant had obtained an order *nisi* on 14th January, 1960, directed against the respondents to show cause why a writ should not issue to remove to the High Court for purpose of being quashed an order made by the Governor in Council on the 5th day of October, 1959, dissolving the Ife District Council which order was signed by the Secretary to the Premier and Executive Council. When the application for the issue of the order absolute came to be argued, counsel for the respondents took a preliminary objection that the matter was not one in which a writ of *certiorari* would lie. It was argued that the order to dissolve the council was made under the Local Government Law, No. 12 of 1957, and that in coming to the decision to dissolve the council the Governor in Council was not requested to act judicially. For the applicant it was argued that *certiorari* would lie against inferior courts which had been held to include Ministers of the Crown and that judicial matters did not necessarily mean court matters or procedure. It was also submitted that even if the act complained of was administrative it must be *bona fide* and that a writ of *certiorari* would lie if *mala fide*. It was further submitted on behalf of the applicant that under section 86 (2) of the Local Government Law, the term of office of the Committee should have been stated in the order; that the order should have been signed by the Governor and not by the Secretary to the Governor and the Executive Council; that under section 85 of the Law a judicial enquiry must have been contemplated by the Law and that that section should be read together with section 86 under which the Governor in Council purported to have acted.

Held: (1) that the provisions of sections 85 and 86 of the Law were distinct and that it was not incumbent on the Governor in Council to hold an enquiry before deciding to dissolve a local government council;

(2) that the order dissolving a local government council need not be signed by the Governor himself but that it was sufficient compliance with the Law if it was signed by the Secretary to the Premier and Executive Council;

(3) that as it was clearly stated in the order of dissolution of the council that the Committee should remain in office until further notice, this was sufficient satisfaction of section 86 (2) of the Local Government Law, 1957, as that Law did not state that the term of office of the Committee should be specified in the order;

(4) that as there was nothing in the provisions of the Law which lay it down that the Governor in Council must hear evidence or constitute itself a tribunal before deciding to dissolve a local government council, the action of the Governor in Council was purely an executive act which was not subject to review by the court by means of an order of *certiorari*.

Application refused.

Cases cited:

Nakkuda Ali v. Jayaratne, [1951] A.C. 66.

R. v. Statutory Visitors to St Lawrence's Hospital, ex parte Pritchard [1953] 1 W.L.R. 1158.

R. v. Minister of Transport, ex parte Upminster Services Limited [1934] 1 K.B. 277.

R. v. Minister of Health, ex parte Villiers [1936] 2 K.B. 29.

Hetherington v. Security Export Co. [1924] A.C. 988.

Ibadan Civil Suit No. I/19/60.

Fani-Kayode (Oloyede with him) for applicant.

Rotimi Williams, Q.C. (Adedipe, Senior Crown Counsel, with him) for respondents.

Quashie-Idun, C.J.: This is a ruling in an application for the issue of a writ of *certiorari* directed to the respondents to remove into the Court for quashing an order made by the Governor in Council on the 5th day of October, 1959, dissolving the Ife District Council. The application was supported by an affidavit sworn to by the applicant.

The grounds upon which the writ of *certiorari* is sought are—

- (1) that the order made by the Governor in Council was in excess of jurisdiction;
- (2) that the said order was contrary to Natural Justice;
- (3) that the said order was made without jurisdiction; and
- (4) That the said order was made *mala fide*.

On the 14th January, 1960, this Court made an Order *nisi* and directed that the respondents should be served for them to show cause why a writ should not issue accordingly. On the 8th day of February, 1960, the Principal Assistant Secretary, Ministry of Local Government, swore to an affidavit in reply to the allegations made by the applicant. The affidavit contained the following:—

Paragraph 6—“That I am informed by the Honourable Minister of Local Government and I verily believe that the Governor in Council considered that as the same persons having the majority in the Ife Divisional Council also controlled the Ife District Council and as the Governor in Council after due consideration, considered

that these persons were not discharging their duties under the Local Government Law in a manner conducive to the welfare of the inhabitants of the area of the Council's authority as a whole, the Ife District Council should be dissolved."

When the matter came up for hearing Mr F. R. A. Williams, Q.C., who appeared for the respondents submitted that the matter was not one in which a writ of *certiorari* will lie. He submitted that the order to dissolve the Council was made under the Local Government Law, No. 12 of 1957 as amended by Local Government Law, No. 40 of 1958 and that in coming to the decision to dissolve the Council the Governor in Council is not requested to act judicially. He submitted that it is only in matters where an authority has to "hear a case" before exercising its power, that it is required to act judicially; that in this matter only executive function, and not judicial or quasi-judicial function is vested in the Governor in Council. Learned Counsel referred the Court to the following authorities: *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66; *Regina v. Statutory Visitors to St Lawrence's Hospital, ex parte Pritchard* [1953] 1 W.L.R. 1158 and to de Smith's *Judicial Review of Administrative Action*, pages 281-282.

Mr Kayode in answer to Mr Williams' submission has contended that while agreeing that a writ of *certiorari* lies against inferior Courts, such Courts have been held to include Ministers of the Crown and that judicial matters do not necessarily mean Court matters or procedure. He has submitted that even if the act complained of is administrative, it must be *bona fide* and that a writ of *certiorari* will lie if *mala fide* is proved. He has referred to a number of authorities and to the *Annual Practice*, order 59, rule 3. He has also submitted that under section 86 (2) of the Local Government Law, No. 12 of 1957, as amended by Law No. 40 of 1958 the term of office of the Committee should have been stated in the order; that the order should have been signed by the Governor and not by the Secretary to the Governor and Executive Council; that under section 85 of Law No. 12 of 1957 a judicial enquiry must have been contemplated by the Local Government Law and that section should be read together with section 86 under which the Governor in Council purported to have acted. Further, learned counsel has submitted that when all the circumstances have been considered this Court should hold that a writ of *certiorari* lies.

I have carefully considered the authorities cited by both counsel and the provisions of the Local Government Law which are material to this matter.

In connection with section 85 which Mr Kayode contends should be read together with section 86, I am unable to hold that it is incumbent on the Governor in Council to hold an enquiry before deciding to dissolve a District Council. It is my view that the two sections are distinct and separate.

Section 85 of the Local Government Law reads as follows:

Sub-section (1)—"The Governor in Council may cause such inquiries to be held at such times and in such places as he may consider necessary or desirable for the purposes of this Law."

Section 86 (1) (b) reads as follows: "Where the Governor in Council is satisfied that a Council is not discharging its functions under this Law in a manner conducive to the welfare of the inhabitants of the area of its authority as a whole, he may by order—

(2) direct that the seats of the President and all members of the council shall become vacant and appoint a Committee of Management."

The contention that the order should have been signed by the Governor himself also has no substance. The submission that the term of office of the Committee appointed should have been stated also has no substance; because in section 3 of the Order, W.R.L.N. 502 of 1959 it is clearly stated that the Committee shall remain in office until further notice. It is my view that this is sufficient to satisfy the Law as the Law does not state that the term of office of the Committee should be specified in the order.

Having dealt with the circumstances which Mr Kayode submits should be considered in order to come to the conclusion that *certiorari* would lie, I now consider the authority to which learned counsel have referred. It is unnecessary in my view to deal with each of the authorities in this ruling. In order 59, rule 3 of the Annual Practice to which Mr Kayode has referred to the following passage appears:—

“The prerogative writ of *certiorari* lay to remove proceedings from Inferior Courts to the High Court for a variety of purposes, sometimes at common law, sometimes by Statute and sometimes at common law as restricted by Statute. The most important function of the Order is that by it, in the exercise of the supervisory capacity by the High Court over Inferior Courts judgments, orders, convictions or other proceedings of Inferior Courts whether civil or criminal made without or in excess of jurisdiction may be moved into the High Court to be quashed..... Excess of jurisdiction is not shown merely because the Inferior Court has decided contrary to the facts or without evidence to justify the decision, but only where in the circumstances, it has no jurisdiction.”

In support of his contention that the Governor in Council exceeded its powers when it made the order, Mr Kayode has referred to the case of *R. v. The Minister of Transport, Ex Parte Upminster Service Ltd.* [1934], 1 K.B., page 277 and to *R. v. Minister of Health, Ex Parte Villiers* [1936], 2 K.B. page 29. A perusal of the authorities referred to show that the person against whom the writ was applied for had judicial or quasi-judicial functions to perform in the actions which brought about the proceedings; and that the question of *bona fides* or *mala fides* only came in the matters where the persons concerned had failed to discharge a function of a judicial nature.

At page 281 of de Smith's *Judicial Review of Administrative Action* to which both counsel have referred the Court the following passage appears:—

“Judicial acts must be distinguished from legislative and administrative or executive acts. *Certiorari* will not issue to quash the order of a body that has acted in a purely ministerial capacity, notwithstanding that its ministerial order may have been preceded by a determination of a judicial character by another body.”

See Hetherington v. Security Expert Co. [1924] A.C., page 988. In the case of *Regina v. Statutory Visitors to St Lawrence's Hospital, Ex Parte Pritchard*, [1953] 1 W.L.R. 1158, Lord Goddard, C.J., stated as follows in his judgment:

“It will be observed that the persons must have authority to determine, and they must be persons who have a duty to act judicially. Their orders if they act in excess of their authority, can be reviewed by this Court under the order of *Certiorari*, but it is essential to remember that there must be something that can be called a determination which will affect the right of the party and there must be a tribunal whose duty it is to act judicially. It is not easy to give a definition of exactly what is meant by 'act judicially' but in my opinion for this purpose the expression refers to a body which

is bound to hear evidence from both sides. Although there need not be anything strictly called a 'Lis', it must be a body which has to hear submissions and evidence and come to a judiciary decision in approximately the way that a Court must do."

In the case of *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66 where a Comptroller of Customs cancelled a licence of a textile dealer on the ground that the Comptroller had reasonable grounds to believe that the dealer was unfit to hold a licence it was held by the Privy Council that the Comptroller was not acting judicially and therefore a writ of *Certiorari* did not lie to quash the order.

There is nothing in the provisions of the Local Government Law which lays it down that the Governor in Council must hear evidence or constitute itself a Tribunal before deciding to dissolve a District Council. In the absence of such provision I hold that the action of the Governor in Council was purely an executive act which is not subject to review by this Court by means of a writ of *Certiorari*. It is my view that if such were the case every executive act of the Governor in Council would be brought before the Court upon a writ now applied for whether the Governor in Council acts judicially or not. For the reasons stated, I uphold the submissions of counsel for the respondents and set aside the Order *Nisi* on the ground that a writ of *Certiorari* does not lie in this matter.

Application refused.

ANDREW OKOJIE AND FOUR OTHERS ...

Appellant

v.

COMMISSIONER OF POLICE, WESTERN
REGION*Respondent*

[HIGH COURT OF JUSTICE: Thomas, J., 6th March, 1961.]

Criminal Law and Procedure—Customary Courts messengers charged jointly for assault on a man, contrary to section 355 of the Criminal Code, Cap. 42—whether charge was bad for misjoinder—offences committed after execution of Court warrant—indemnity of officers of Customary Courts—section 15 of the Customary Courts Law, Cap. 31—evidence by a dispenser as evidence of an expert—plea of justification need not be considered if no evidence in support—section 155 and 179(2) of the Criminal Procedure Ordinance, Cap. 43 and sections 286 and 351 of the Criminal Code, Cap. 42, considered.

The appellants who were all officers of a customary court were charged before a Benin Magistrate's Court for assault occasioning harm, contrary to section 355 of the Criminal Code, Cap. 42. The first appellant was convicted on that charge whilst the other appellants were convicted of common assault contrary to section 351 of the Criminal Code, the Magistrate exercising his powers under section 179 (2) of the Criminal Procedure Ordinance, Cap. 43. The evidence before the trial Magistrate established that the appellants purporting to act under the warrant of a customary court arrested the complainant and took him to the court hall where the first appellant ordered the other appellants to beat the complainant whilst the first appellant himself hit the complainant on the head with a piece of stick which broke the flesh. The second appellant spat on him, the third appellant kicked his chest with his foot, the fourth appellant stood at the gate to prevent people from entering the hall and the fifth appellant slapped him. They then all dragged him to the cell. At the trial a dispenser was called who deposed that complainant was brought to his dispensary for treatment but in his judgment the trial Magistrate said that he was disregarding this evidence in so far as it purported to show that it came from an expert.

In this appeal it was argued on behalf of the appellant; that they were wrongly charged together; that the trial Magistrate erred in law in not taking into consideration the provision of section 15 of the Customary Courts Law, Cap. 31; that the trial Magistrate erred in law in discarding the evidence of the dispenser; and that the decision of the Magistrate was erroneous in law in that the appellants were justified in using force in the lawful execution of their duty.

Held: (1) that the appellants were properly jointly charged and that the facts were in keeping with the circumstances envisaged in section 155 of the Criminal Procedure Ordinance, Cap. 43;

(2) that the appellants, though court officers, were nevertheless subject to the rules of law and the immunity envisaged by section 15 of the Customary Courts Law, Cap. 31, could not be applied to the circumstances of this case as the appellants were not sued in respect of the execution of a warrant or carrying out of the order issued by a lawful authority but were charged for an alleged unlawful assault of the complainant committed after the execution of a customary courts' warrant of arrest;

(3) that the trial Magistrate was right in exercising caution by disregarding the evidence of the dispenser in so far as it was meant to be the evidence of an expert witness;

(4) that the trial Magistrate was correct in his consideration of section 286 of the Criminal Code and that as the appellants tendered no evidence before the trial Magistrate as to whether the use of such force as was in evidence before him was justifiable in the lawful execution of their duty or not and as the defence of the appellants was an absolute denial, the trial Magistrate was right in not considering the defence of justification.

Appeal dismissed.

Cases cited:

John Molloy, 15 C.A.R. 170.

Charles Wilmot, 24 C.A.R. 63.

Benin Criminal Appeal No. B/65CA/60.

Giwa-Amu, for the appellants.

Bada, Crown Counsel, for the respondents.

Thomas, J.: The appellants were all charged with assault occasioning harm *contra* section 355 of the Criminal Code.

At the conclusion of the trial the learned Magistrate convicted the first appellant on the charge and sentenced him to three months imprisonment with hard labour and under section 179 (2) of the Criminal Procedure Ordinance found the others guilty of common assault contrary to section 351 of the Criminal Code and inflicted various terms of imprisonment with the option of a fine on each of them.

Against their convictions and sentences the Appellants have appealed on several grounds; amongst them are the following additional grounds:—

(1) That the charge is bad in law in that all the accused persons were charged in one count with isolated acts of alleged assault.

(2) That the learned Magistrate erred in law in not taking into consideration section 15 of the Customary Courts Law.

(3) That the learned Magistrate erred in law in discarding the evidence of the fifth prosecution witness.

(4) That the decision is erroneous in law in that the appellants were justified in using force in the lawful execution of their duty.

(5) That the decision is altogether unreasonable, unwarranted and cannot be supported having regard to the evidence.

There is no substance in the first of the additional grounds filed.

The appellants were all court messengers and had gone to arrest the complainant who testified *inter alia* on page 3 as follows:

"In the evening, about 5.30 p.m. four court messengers came to my house. They are now in the Court. They are the second, third, fourth and fifth accused persons. They told me they came to arrest me for inciting people not to pay rates. I said I had paid my own rates. That I had been charged to the Court with failing to pay rates and instructing people not to pay and that on 28th February, 1960 I was discharged. I asked them in respect of which person I was arrested, they told me they came with a warrant of arrest. I followed them from Igueben to Ekekhen about one mile and a half. Someone followed me to bail me. The messengers refused to allow me on bail. The first accused is their Corporal. He told me there

was no bail for me. I told him I had a surety. The first accused told me that I should shut up. He said I should call on Hausas to bail me as I said I was a member of the Northern People's Congress. The first accused then ordered his men to beat me. He himself hit me on the head with a piece of stick. The flesh there broke and I was seriously injured. (Accused shows a scar to the Court. This is on the left side of the forehead. It takes the form of a "bracket clocked"). This was done in the Court hall. The second accused spat on me. The third accused kicked my chest with his foot. The fourth accused stood at the gate to prevent people from entering the Court hall. The fifth accused slapped me. They all dragged me to the cell."

The facts are, in my view, in keeping with the circumstances envisaged in section 155 of the Criminal Procedure Ordinance, Cap. 43, and all the appellants were charged jointly and there was nothing improper in the charge. The decisions in *John Molloy*, 15 C.A.R. 170 and *Charles Wilmot*, 24 C.A.R. 63 are not applicable in the present case. In the former, the charge was bad for uncertainty in that it charged two alternative offences in one count and on a review of the evidence, it was found that the appellant could not be convicted of simple common law larceny, and there was no evidence here on which the jury could find that he was the severer of the fixtures. For these reasons the conviction was quashed.

In the latter case the conviction was quashed as the count was bad for duplicity.

The appeals must fail on this ground.

The second additional ground of appeal is as follows:

"That the learned magistrate erred in law in not taking into consideration section 15 of the Customary Courts Law."

Section 15 provided: "No officer of any Customary Court or other person bound to execute lawful warrants or orders issued or made in the exercise of jurisdiction conferred by this Law shall be liable to be sued in any Court for the execution of any warrant or order which he would be bound to execute, if the person issuing the same had been acting in the exercise of lawful authority".

The immunity envisaged by the above section of the Customary Courts Law could not be applied to the circumstances of this case. The appellants were not sued in respect of the execution of a warrant or carrying out of the order issued by a lawful authority. They had executed the Warrant and the charge against the appellants was in respect of an alleged unlawful assault of the complainant in putting him into a cell.

The defence of each of the appellants was a complete denial. They did not plead justification, in that it was necessary in all the circumstances of the case, for them to use force against the complainant in executing the Warrant or carrying out the orders of the Court. Such defence, if made at all, should have been made *bona fide*.

With reference to the third ground of appeal, I must point out that the learned Magistrate stated in his judgment, *inter alia*, as follows:

"The fifth prosecution witness dispenser deposed that the first prosecution witness was brought to his dispensary for treatment on 10th of March, 1960. I am to remark however that this evidence is superfluous because the Court can convict even without the evidence of this witness. The Court is therefore disregarding the evidence in so far as it purports to show that it comes from an expert."

The emphasis in my view is on the words "in so far as it comes from an expert". The learned Magistrate adopted this view only out of an abundance of caution. It did not mean that he rejected the whole of the evidence of the witness.

The appeal therefore fails on this ground also.

I have considered the fourth ground of appeal. The learned Magistrate was right in his consideration of section 286 of the Criminal Code. He pointed out that the defence of the appellants was an absolute denial. The appellants tendered no evidence to the court that could have formed a basis for its consideration as to whether the use of such force as was in evidence before it was justifiable in the lawful execution of duty.

The appeal fails on this ground also.

There is no substance in the other grounds of appeal.

The appellant, though they may be Court Officers must nevertheless realise that they are subject to the "Rule of Law".

The sentences are not manifestly excessive.

The appeal of each appellant is hereby dismissed.

Appeal dismissed.

THE QUEEN

v.
GOVERNOR IN COUNCIL, WESTERN
NIGERIA.

EX PARTE ADEJUWON ODUBOTE (Applicant)

[HIGH COURT OF JUSTICE: Fatayi Williams, J., 7th April, 1961.]

Certiorari—order of approval and recognition of a chief—allegation that order was made without jurisdiction—whether section 3 of the Administration of Justice (Crown Proceedings) Law, 1959, No. 3 of 1960, ousted jurisdiction of the courts—sections 2, 7 (3), 8 and 37 of the Appointment and Recognition of Chiefs Law, 1954, and section 21 (1) of the Constitution of the Federation of Nigeria as set out in the Second Schedule to the Nigeria (Constitution) Order in Council, 1960, considered—sections 107 and 115 of the County Courts Act, 1959, referred to.

This application for an order of *certiorari* to quash the order of approval and recognition of the appointment of one Adebayo Soile as the Oturba (Olomu) of Omu dated 11th April, 1956 followed the grant of an order *nisi* granted on 9th February, 1960. The main grounds upon which the application was made were that the order dated 11th April, 1956 was made without jurisdiction owing to the absence of the essential conditions precedent to the exercise by the Governor in Council of his powers under section 37 (3) of the Appointment and Recognition of Chiefs Law, 1954, in that there was no appointment to a chieftaincy to which Part II of the Law applied; also that there was no dispute as to an appointment to such a chieftaincy; and in that there was no report submitted within the meaning of and as required by section 37 (3) (a) of that Law. It was also contended on behalf of the applicant that the order and the proceedings relating thereto were *ultra vires* having violated the provisions of sections 7 (3) and 8 of the Law. The only defence relied upon by the respondent was that notwithstanding the irregularities alleged, any act done or omission made under the said Law could not be questioned by way of an application for an order of *certiorari* in any court by virtue of section 3 of the Administration of Justice (Crown Proceedings) Law, 1959, No. 3 of 1960.

Held: that where a statute seeks to take away the jurisdiction of a superior court, that privative provision will not be effective when the inferior court or body exercising judicial or quasi-judicial functions has acted in violation of the statute or has acted without jurisdiction; and that in this case as the Governor in Council had given approval and recognition under the Chiefs Law to an appointment to a chieftaincy to which the Law had not been applied at the time the holder was appointed chief, an order of *certiorari* would be issued in spite of the privative provision of section 3 of the Administration of Justice (Crown Proceedings) Law, 1959.

Quaere: whether the provisions of section 3 of the Administration of Justice (Crown Proceedings) Law, 1960 have been invalidated by the provisions of section 21 (1) of the Constitution of the Federation of Nigeria, Second Schedule to the Nigeria (Constitution) Order in Council, 1960.

Order nisi for certiorari made absolute.

Cases cited:

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

R. v. Minister of Health, [1939] 1 K.B. 232.

R. v. Minister of Health, ex parte Davis, [1929] 1 K.B. 619.

R. v. Governor, Western Nigeria, ex parte Alasan Babatunde, 1959 W.R.N.L.R. 44.

R. v. Husrst ex parte Smith, [1960] 2 W.L.R. 961.

Ex parte Bradlaugh, (1878) 3 Q.B.D. 509.

R. v. Worthington-Evans, ex parte Madan, [1959] 2 Q.B. 145 [1959] 2 All E.R. 457.

R. v. Medical Appeal Tribunal, ex parte Gilmore, [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498.

Ibadan Civil Suit No. M/19/59.

Olu Ayoola, for the applicant.

Eboh, Senior Crown Counsel, for the respondent.

Fatayi Williams, J.: This is an application for an order of *certiorari* to issue directed to the Governor in Council, Western Nigeria, to remove to this court for the purpose of being quashed the following order dated 11th April, 1956, made by the Governor in Council:—

“*Western Regional Notice No. 416—Appointment and Recognition of Chiefs Law, 1954 (No. 1 of 1955)*).

In exercise of the powers conferred by section 37 (3) (b) of the Appointment and Recognition of Chiefs Law, 1954, the Governor in Council has approved and recognised the appointment of S. Adebayo Soile as the Otunba (Olomu) of Omu.

A. HOLDEN,
*Acting Secretary to the Premier
and Executive Council*

11th April, 1956”.

Section 37 of the Appointment and Recognition of Chiefs Law, 1954 (No. 1 of 1955) (hereinafter referred to as the “Law”) provides as follows:

“37. (1) Where a person is appointed to a chieftaincy after the application of Part II to the chieftaincy but before the making of a declaration relating to that chieftaincy, the Governor may approve the person so appointed.

(2) Any person—

(a) whose appointment is approved under sub-section (1) of this section; or

(b) whose appointment to any chieftaincy was approved under the provisions of section 2 of the Appointment and Deposition of Chiefs Ordinance and who holds that chieftaincy immediately before the application to it of Part II; or

(c) who is notified by the Governor by notice in the Gazette to have been the holder of any chieftaincy immediately before the application to it of Part II, shall be deemed to have been approved and recognised in his appointment under the provisions of Part II.

(3) (a) Where it appears to the Governor in Council that there is a dispute as to the appointment to any chieftaincy to which Part II applies and in respect of which no declaration has effect he may require the local government inspector or provincial adviser for the area of the council to submit a report on the dispute to him.

(b) After considering the report submitted under paragraph (b) of this sub-section the Governor in Council may give his decision with respect to the appointment in dispute and any such decision shall be final and shall not be open to question in any court.

(c) Where the Governor in Council requires a local government inspector or provincial adviser to submit a report in accordance with paragraph (b) of this sub-section no declaration made by the competent local government council shall be registered until the Governor in Council has given his decision or notified the competent local government council that a dispute no longer exists.

(d) A local government inspector or provincial adviser required to submit a report under this sub-section may delegate his functions with respect to such report to an assistant local government inspector or divisional adviser".

The grounds on which the application is made are as follows:

(1) that the order was made without jurisdiction owing to the absence of the essential conditions precedent to the exercise by the Governor in Council of his powers under section 37 (3) of the Law, there being—

(a) as a matter of law and fact no "appointment to a chieftaincy to which Part II applies";

(b) as a matter of law and fact no "dispute as to an appointment to a chieftaincy to which Part II applies".

(2) that the order sought to be quashed was made without jurisdiction there being no "report" submitted within the meaning of and as required by section 37 (3) (a) of the Law which is a condition precedent to the exercise of the power vested under section 37 (3) (b) of the Law.

(3) that the Order and the proceedings relating thereto are *ultra vires* and should be quashed having violated the provisions of sections 7 (3) and 8 of the said Law.

An application for an order *nisi* was granted on 9th February, 1960.

From the affidavits filed by both parties it would appear that until February 1955, the Otunba (Olomu) Chieftaincy was not a chieftaincy within the Law. This is because the Law which came into force on 13th January, 1955, was not applied to the chieftaincy until 23rd February, 1955, as shown in W.R.L.N. 14 of 1955 and item 95 in W.R.L.N. 61 of 1955. On the other hand Exhibit "B" which is attached to the affidavit sworn to by Otunba (Olomu) shows that the Otunba (Olomu) was appointed chief on 25th September, 1954, that is, before the Law came into force.

Since a "chief" to whom the provisions of the Law apply means a person who holds a chieftaincy to which Part II of the Law has been applied, Mr Ayoola for the applicant has submitted, quite rightly in my view, that before the 23rd of February, 1955, the Otunba (Olomu) Chieftaincy was not a chieftaincy within the meaning of the Law under which the approval which the applicant now seeks to quash was made.

In fact, as late as July 1955, the Permanent Secretary, Ministry of Justice and Local Government, realising the irregularity wrote the following letter to the Local Government Inspector, Ijebu Province:—

"27248/14/158.

The Local Government Inspector,
Ijebu Province,
Ijebu.

July 1955

THE OTUNBA OF OMU CHIEFTAINCY DISPUTES

I am directed to refer to my letter No. 27248/14/130 of the 24th March, 1955 and to say that as the Western Region Local Government Law has now been

applied to the Ijebu Division and since the present holder of the Otunba (Olomu) of Omu title has not yet been recognised the Ijebu Southern District Council is required to make and record a declaration of traditional custom concerning this title under section 3 of the Appointment and Recognition of Chiefs Law. In this connection the attention of the Council should be drawn to the provisions of the Western Region Appointment and Recognition of Chiefs (Amendment) Law published in the *Western Region Gazette* of 23rd June.

2. After making the declaration the Council should proceed in accordance with the provisions of the Appointment and Recognition of Chiefs Law although it is appreciated that the time limit of 30 days specified in section 8 of the Law is not applicable."

As a result of the above letter, the Ijebu Southern District Council proceeded to make the necessary declaration which was eventually registered in November 1958. It should be noted, however, that when the Order which is now being challenged was made, the Council passed the following resolution on 9th June, 1956:—

"Resolved, that a protest be made, for record purposes, against the attitude of the Western Region Government to the Council, in the Otunba (Olomu) of Omu chieftaincy dispute; it was recalled that the Council's decision was based on the contents of a letter No. 27248/14/158 of 12th July, 1955, from the Permanent Secretary to the Ministry of Justice and Local Government requesting that a declaration be made in respect of the chieftaincy by the Council and which was yet being performed when the Governor's recognition of the appointment was announced".

It seems to me that before final approval and recognition can be given under section 37 of the Law, the following steps must be taken:—

(a) There must have been an appointment to a chieftaincy to which Part II of the Law applies.

(b) Where there is a dispute as to that appointment; a report on the dispute must have been submitted to the Governor in Council by the Local Government Inspector for the area concerned. Having received and considered the report the Governor in Council will then come to a decision with respect to the appointment in dispute.

It is obvious in this case that these steps have not been taken before the order made under section 37 (3) (b) of the Law and which is now being challenged was made by the Governor in Council. The power of the Governor in Council is to give approval to appointments to which the Law applies. In this case, the Governor in Council has given approval and recognition under the Law to an appointment to a chieftaincy to which the Law had not been applied at the time the holder was appointed chief. It is quite clear, therefore, that the condition necessary for the exercise of his power does not exist. It would therefore appear that the Governor in Council had not acted in accordance with the provisions of the Law. On the contrary, it acted in complete disregard of the provisions of sections 2 and 37 of the Law. In the circumstances, I hold that the order of the Governor in Council, made on 11th April, 1956, approving the appointment of S. Adebayo Soile as the Otunba (Olomu) of Omu, was made without jurisdiction. It now remains to consider whether his court can entertain the application for an order of *certiorari*.

Mr Ayoola for the applicant submitted that as the Governor in Council had acted without jurisdiction, an order of *certiorari* lies.

The learned Senior Crown Counsel, in reply, conceded that the approval given by the Governor in Council under section 37 (3) (b) of the Law is, considering the circumstances, irregular, and expressed the view that a fresh appointment to the chieftaincy should have been made after that Law came into force on 13th January, 1955. He submitted, however, that, notwithstanding the irregularity, any act done or omission made under the said Law cannot be questioned by way of an application for an order of *certiorari* in any court. In support of this submission he referred to the provisions of section 3 of the Administration of Justice (Crown Proceedings) Law (W.R. Law No. 3 of 1960) which state as follows:

"3. (1) The High Court shall not have jurisdiction to issue an order of *mandamus*, an order of prohibition or an order of *certiorari* to the Governor or to the Governor in Council in respect of—

(a) the approval or setting aside of the appointment of any chief;

(b) the suspension or deposition of any chief;

(c) any decision of the Governor or the Governor in Council in a dispute with regard to the appointment to a chieftaincy;

(d) any other thing done or required to be done by the Governor or the Governor in Council;

under any enactment relating to chiefs.

(2) In this section 'enactment relating to chiefs' includes the Appointment and Deposition of Chiefs Ordinance, the Western Region Appointment and Recognition of Chiefs Law, 1954 (as from time to time amended), and the Chiefs Law, 1957 (as from time to time amended).

(3) For the further avoidance of doubt it is declared that the provisions of this section extend to things done or omitted to be done before as well as after, the commencement of this Law".

It is, in my view, settled law that where a statute seeks to take away the jurisdiction of a superior court, that private provision will not be effective where the inferior court or body exercising judicial or quasi-judicial functions has acted in violation of the statute or has acted without jurisdiction. Some of the cases on this proposition are the *Bank of Australia v. Willan* 30 L.T., p. 237 at page 238; the *King v. Minister of Health* [1939] 1 K.B., page 232; and the *King v. Minister of Health, ex parte Davis*, [1929] 1 K.B. page 619. Furthermore, although section 34 (2) of the Appointment and Recognition of Chiefs Law, 1954, expressly stated that *certiorari* would not lie, *Jibowu, C.J.*, nevertheless, held in the *Queen v. Governor, Western Region ex parte Alasan Babatunde* (1959) W.R.N.L.R. p. 44 at page 49, that *certiorari* would still lie in spite of that section. Finally, I would refer to *Regina v. Hurst, ex parte Smith* [1960] 2 W.L.R., page 961, where it was held that, notwithstanding the provisions in the County Courts Acts, 1959, that *certiorari* will only lie to remove proceedings commenced in a county court to the High Court for hearing and determination and not otherwise, *certiorari* will still lie where there is an absence of jurisdiction. The following observations of Lord Parker, C.J., at pages 967 to 968 are in point:—

"It has, however, been pointed out that section 107 of the County Courts Acts, 1959, provides: "Subject to the provisions of any other Act relating to county courts, no judgment or order of any judge of county courts, nor any proceeding, brought before him or pending in his court, shall be removed by appeal, motions *certiorari* or otherwise into any other court whatever, except in the manner and according to the provisions in this Act mentioned". Section 115 provides: "(1) The

High Court or a judge thereof may order the removal into the High Court, by order of *certiorari* or otherwise, of any proceedings commenced in a county court, if the High Court or judge thereof thinks it desirable that the proceedings should be heard and determined in the High Court." Looking at those two sections, it is to be observed that the only remedy by way of *certiorari* dealt with is in regard to the removal of the proceedings from one court into another, and not for the purposes of quashing. Notwithstanding, that I am quite satisfied that *certiorari* will lie in this case. The leading case on the matter is *ex parte Bradlaugh*, [1878] 3 Q.B.D. 509 where Mellow, J., put the principle in these few words: 'It is well established that the provision taking away the *certiorari* does not apply where there was an absence of jurisdiction, and went on: "The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question.' To the same effect are a number of cases including, coming to quite recent times, *Regina v. Northington-Evans*, *ex parte Madan*, [1959] 2 Q.B. 145; [1959] 2 All E.R. 457 and *Regina v. Medical Appeal Tribunal*, *ex parte Gilmore*, [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498. I am quite satisfied, that *certiorari* will lie against a county court judge if he has acted without jurisdiction, notwithstanding the provisions of the County Courts Act, 1959, to which I have referred. Accordingly, it seems to me that in this case it would be right for the court to grant the order to quash the directions given by the judge on February 12".

In these circumstances, I hold that an order of *certiorari* lies, and for that reason the order *nisi* will be made absolute.

Should my view of the law be wrong, it is still doubtful whether the jurisdiction of this Court could be ousted now either by the provisions of section 37 (3) (b) of the Law or by the provisions of section 3 of the Administration of Justice (Crown Proceedings) Law (W.R. Law No. 3 of 1960). The applicant was one of the candidates for the chieftaincy and for that reason his rights are affected by the decision of the Governor in Council. It is therefore arguable that, on the ground of inconsistency, these provisions have now been invalidated by the provisions of section 21 (1) of the Constitution of the Federation of Nigeria as set out in the Second Schedule to the Nigeria (Constitution) Order in Council, 1960. Section 21 (1) provides as follows:

"21. (1) In the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality:

Provided that nothing in this sub-section shall invalidate any law by reason only that it confers on any person or authority power to determine questions arising in the administration of a law that affect or may affect the civil rights and obligations of any person".

As I have already held on another ground that *certiorari* lies, it is, therefore, unnecessary to express any opinion about this point in the present application.

Order nisi for certiorari made absolute.



