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HIGH COURT, LAGOS

SOLOMON DABIRI .. .. APPELLANT

v.

INSPECTOR-GENERAL OF POLICE .. RESPONDENT

[HIGH COURT: DE LESTANG, C.J.; 4th January, 1960]
(Suit No. LD/40CA/1959)

Criminal Law—Accomplice evidence—Corroboration—Matters wrongly treated as corroboration—Misdirection—S. 38 High Court of Lagos Ordinance.

The facts appear sufficiently from the judgment.

HELD: That when apart from one matter properly treated as corroboration other matters which are not corroboration are treated as such as well there is misdirection and the Court of Appeal will quash the conviction unless it can apply S. 38 High Court of Lagos Ordinance.

D. O. Coker for the Appellant.

J. O. Ogundere for the Respondent.

DE LESTANG, C.J.:—The appellant was convicted in the Magistrate's Court, Yaba, of stealing a large quantity of motor parts from his employers, and sentenced to 18 months' I.H.L. He appeals on the ground that the learned Magistrate erred in convicting him on the evidence of accomplices without corroboration.

The evidence against the appellant was that of three persons who testified that they purchased from him large quantities of motor spare parts which were proved to have been stolen from the appellant's employers. The learned Magistrate believed the evidence of these three persons. Had he held that they were accomplices and after warning himself of the danger of acting on their evidence without corroboration nevertheless believed their evidence and convicted the appellant his decision would have been unimpeachable. He did not, however, consider them "on the whole" to be accomplices but decided to treat them as such and held that "corroboration of their evidence is necessary". He then proceeded to set out five matters as affording corroboration. Learned Crown Counsel concedes that only the third of such matters amounts to corroboration, namely the fact that certain empty packets and brake rubbers (not in packets), exhibits 'L', 'L1' and 'L2' were found in the drawer of the appellant's table.

I agree with learned Crown Counsel that the presence of these articles in appellant's desk does constitute corroboration of the accomplices' evidence. Nevertheless, the question which arises for decision is whether the conviction can stand where apart from one matter properly treated as corroboration other matters which are not corroboration are treated as such as well. In my view when this happens there is misdirection by the learned Magistrate and this Court will quash the conviction unless it can apply section 38 of the High Court of Lagos Ordinance. That section provides that "on the hearing of an appeal in a criminal case the High Court may, notwithstanding that it is of opinion that the point raised in the appeal could be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred". In my view that section can be applied in the circumstances of the present case only if the corroboration upon which the learned Magistrate properly acted was strong. Unfortunately the corroboration here was far from being strong. Having regard to the evidence of the appellant's superior officer that the articles were found in an open drawer in his table and that co-employees of the appellant had access to it I consider that the corroborative evidence cannot but be considered as trivial. That being so this Court cannot apply section 38 above quoted and the appeal must be allowed. The conviction and sentence will accordingly be set aside.

HIGH COURT, LAGOS

ALHAJI MENKANU .. .. APPELLANT

v.

RAFIU AJALA .. .. RESPONDENT

[HIGH COURT : DE LESTANG, C.J. ; 4th January, 1960]
(Suit No. : LD/100A/1959)

Landlord and Tenant—Rent Restrictions Ordinance—Possession on Ground of Personal Use—Greater Hardship—Principle applicable.

The facts appear sufficiently from the judgment.

HELD : That in an appeal against a finding on the balance of hardship the appeal Court will be slow to interfere with the decision of the trial judge but when he has held to be hardship some matter which in law is not the question of greater hardship becomes at large for the appeal Court to decide on the evidence.

Cases refered to:—

Joseph Fawaz v. J. F. Nabban, 14 W.A.C.A., 226.

I. S. Adewale for Appellant

Mrs Jinadu for Respondent.

DE LESTANG, C.J. :—This is an appeal by a tenant against a decision of the Magistrate's Court, Lagos, ordering him to give up possession of premises to which the Increase of Rent (Restriction) Ordinance applies. There is also a cross-appeal by the landlord for a variation of the decision to include an order in his favour for arrears of rent and mesne profits.

The premises, the subject matter of the suit, is a room in No. 22 Mosalasi Street, Lagos. The tenant had been in occupation of the room for the past seven years, originally paying £2-10*s*-0*d* rent per month. At some stage of the tenancy—three years ago according to the tenant—the landlord increased the rent to £2-15*s*-0*d* per month without an order of the Court and without the apparently serving the prescribed notice. In August 1959 the landlord instituted proceedings in the Magistrate's Court in which he claimed £19-5*s*-0*d* as arrears of rent from January to July 1959 at the rate of £2-15-0*d* per month, possession on the ground of arrears of rent and personal use and mesne profits until possession is given.

The learned Magistrate made an order for possession on the ground of personal use. He made no order for arrears of rent or mesne profits presumably because it appeared to him that "the plaintiff is more interested in his claim for possession on the ground of personal use than he is in the arrears of rent".

The Principal ground of appeal is that the learned Magistrate misdirected himself on the question of the balance of hardship. By paragraph (*i*) of the Second Schedule of the Increase of Rent (Restriction) Ordinance an order for possession on the ground of personal use must not be made where having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it. It is well settled that the onus of proving greater hardship lies on the tenant so that if the Court is left in any doubt the landlord will succeed. In dealing with the question of hardship the learned Magistrate said :—

> Now to come to the Plaintiff's claim for possession on the ground of personal use. The number of persons living in the room where the Plaintiff is now is, alarming and this is not challenged by the Defendant. Moreover I find from the Plaintiff's demeanour in the witness box that his mental ability is very low and this was even shocking to almost everybody present in Court when he was giving evidence. Therefore his hardship will be definitely greater than that of the Defendant if the order for possession be refused because his bargaining power will be much less than that of the Defendant if he has to go about looking for a room.

The principles upon which a Court of Appeal acts in an appeal against a finding on the balance of hardship are well known. The Court will be slow to interfere with the decision of the trial Judge. In particular if there is some evidence of hardship on each side his decision will be final unless he has held to be hardship some matter which in law is not. *Joseph Fawaz v. J. F. Nabban*, 14 *W.A.C.A.*, 226.

It is conceded in the present case that the learned trial Magistrate did regard as hardship something which is not namely the lack of bargaining power of the landlord. He has, accordingly, misdirected himself. That being so the question of greater hardship becomes at large for this Court to decide, and to do so it is necessary to set out the circumstances affecting both sides.

The landlord is a person of low intelligence. When he became owner of the room the tenant was already in occupation. He has a wife and a daughter, and for the past four years has shared a room with them, together with an uncle and two sisters in his mother's house, free of rent. He has not been asked to leave his present accommodation but now desires to live in his own room with his wife and child.

The tenant has a wife and five children. They all live in the same room in which the tenant also carries on his trade. He has been in occupation of that room for the past seven years. He has no other premises to which he can go with his family.

In my view, if one compares the predicament of the tenant if ejected with that of the landlord, if he is not, one cannot avoid the conclusion that the balance of hardship weighs heavily in favour of the tenant. If ejected the tenant has nowhere to go with his wife and five children, and nowhere to carry on his trade. If he is not ejected the landlord will still retain the accommodation he now has and has been enjoying free of rent for the past four years. He has a wife and apparently only one child. Living accommodation for three can more readily be found than accommodation for seven for both dwelling and trading purposes. In my view, had the learned Magistrate not misdirected himself and had he considered the circumstances of both parties which he does not seem to have done, I have no doubt that he would have found that greater hardship would be caused by granting the order than by refusing it. Having come to this conclusion it is unnecessary for me to consider the cross-appeal, except to say that in my view the landlord failed to prove that any rent was due at the date of the trial. Before he instituted proceedings rent amounting to £16-5*s*-0*d* was tendered to him. He refused to accept it but eventually did so on the day of the trial. Moreover, since he admitted that he unlawfully increased the rent and received the unlawful increase for an unspecified period which the landlord put at three years, it was necessary for an account to be taken before it could be decided whether rent was due or not. For these reasons the tenant's appeal is allowed. The decision of the learned Magistrate is set aside and an order dismissing the respondent's suit substituted with costs in the Court below assessed at four guineas. The cross-appeal is dismissed. The tenant will have the costs of this appeal which are assessed at £20-0*s*-0*d*.

HIGH COURT, LAGOS

THE QUEEN .. .. PLAINTIFF

v.

DANIEL AHAMEFULA NWACHUKWU AND MACAULAY CHUKS IGWE .. .. DEFENDANT

[HIGH COURT: DICKSON, J.; 5th February, 1960]
(Suit No. LA/32C/59)

Criminal law—Committal—Validity—Trial nullity—Evidence given before committing Magistrate by Police Prosecutor.

During the preliminary investigation before the Magistrate, a Police Officer who at one stage was marshalling the evidence before that Court, entered the witness box and gave evidence on behalf of the Crown, tendering two statements (Exs. 7 and 8 made respectively by both accused. At the trial before the High Court he was called by the Crown as the fifth prosecution witness. Counsel for the first accused submitted that in those circumstances the proceedings before the Magistrate and the High Court were irregular and, therefore, the trial is a nullity.

HELD : (1) That in the proceedings before the High Court, the fifth prosecution witness was not the prosecutor and there was nothing improper in calling him as a witness.

(2) The fact that evidence which is not admissible or is given by an incompetent witness is given before a Magistrate holding a preliminary investigation does not vitiate the committal by him for trial.

PER CURIAM : Where anyone has given evidence who is not competent to do so, the proper course is for the Court to disregard his evidence.

Cases referred to :—

DUCAN *v.* TOMS (1887) 51 J.P. 631.

R. v. Norfolk Quarter Sessions ex parte Brunson (1953) 1 All E.R. 346

J. O. Williams, Pupil Crown Counsel, for Crown.

A. L. A. L. Balogun for the 1st Accused.

2nd accused in person.

(NOTE : Application by both accused for leave to appeal against conviction and sentence was dismissed by the Federal Supreme Court.)

DICKSON J. :—The information preferred against the two accused persons contains seven counts charging them jointly in each count. The first charges them with having conspired together and with others unknown, between the months of October 1957, and February 1958, to steal money contained in postal matter. The

second, charges them with stealing postal order No. 074086, valued 20*s.* 0*d.* The third, charges them with stealing postal order No. W6/79 403315, valued 20*s.* 0*d.* The fourth and sixth charge them with forging the postal orders mentioned in the second and third counts respectively; and the fifth and seventh counts charge them with uttering the same postal orders.

The facts of the prosecution's case are briefly these: Both accused are friends. The first accused was at the material time a postal clerk at the Yaba Post Office whose duties were to accept registered packets from members of the public and see to their despatch. During the material time that he performed these duties, many postal orders contained in registered letters which he received for transmission, did not reach their destination but were subsequently cashed at Ebute Metta and Mushin Post Offices.

On the 12th October, 1957, both accused went to the Ebute Metta Post Office during the lunch interval, and there the first accused introduced the second accused to the postal officer in charge of encashment of postal orders. The first accused introduced the second accused as his brother who was a teacher at the Colony Public School, Ebute Metta, and who was entrusted with the encashment of postal orders for the school; and said that the second accused would be coming to the post office from time to time to transact business. The first accused requested the postal officer to assist the second accused whenever required in these matters, as he, the first accused, was no longer posted at Ebute Metta. All this was said in the presence of the second accused. On that very afternoon, the second accused returned to the Ebute Metta Post Office and presented five postal orders (Exhibits 12/1-4) to the same postal officer for encashment. These are made payable to Macaulay C. Igwe (second accused) at Ebute Metta. The second accused was asked to sign that portion of the postal order intended for the signature of the recipient. He did so, and was paid. On the 18th day of the said month, the second accused again visited the Ebute Metta Post Office and presented four postal orders (Exhibits 10/1-3) to the same officer for encashment. These were marked payable to Brown Johnson. He was paid. Among these is postal order 074086, the subject matter of counts two, four and five. On the 5th December, 1957, the second accused paid yet another visit to Ebute Metta Post Office and presented eighteen postal orders (Exhibits 6/1-17) to the same officer for encashment. They were cashed after having signed the receipt on each. Among these is postal order W6/79 403315, the subject matter of the third, sixth and seventh counts.

During the investigation of the case by the Investigation Branch of the Posts and Telegraphs Department, the second accused admitted encashing postal orders in the Exhibits 9, 10, 11, 12 and 14 series, and Exhibits 13 and 15. He says they were given to him by the first accused in payment of a debt. The name of the second accused is inserted as the payee on the postal orders in the Exhibits 10, 11, 12 and 14 series, and on Exhibits 13 and 15.

It is the prosecution's case that the first accused extracted the postal orders from several letters and that both accused acted in concert and embarked upon the crime by the device of erasing names of payees on the postal orders and substituting either the name of the second accused or a fictitious person.

Evidence has been led which fully establish that on the 7th October, 1957, the 1st prosecution witness handed in ninety-four packets containing postal orders to the first accused for registration and transmission to various parts of Nigeria outside the Federal Territory of Lagos. Exhibit 2 shows receipt by the first accused of this packets. Two of these letters were tampered with and part of the contents removed. The witness's evidence shows that Exhibit 10/1, postal order No. 074086, was contained in the letter addressed to E. Ovbiagele, Oka. He deposed that the name E. Ovbiagele was written on the postal order in the appropriate space intended for the name of the payee. He did not fill in the name of the post office. Counterfoil retained by the witness with the name Ovbiagele was produced and marked Exhibit 1. He added that the incident of the 17th October was not an isolated case, and said that there were five such cases. It is to be observed that Exhibit 10/1, like the rest in the Exhibit 10 series, was cashed by the second accused on the day following the date of registration by the first accused. The 1st prosecution witness was not cross examined by Counsel for the first accused. It has also been equally established that on the 5th December, 1957, the 3rd prosecution witness on behalf of the 2nd prosecution witness, his father, handed in to the first accused at Yaba Post Office an envelope Exhibit 5, containing eighteen 20*s*-0*d* postal orders addressed to one Augustine Chimeke at Enugu, for registration. Receipt is acknowledged by the first accused on Exhibit 29. This is also shown in Exhibit 20. The registration number is 78. These postal orders are in the Exhibit 6 series, and they were cashed by the second accused at Ebute Metta Post Office on the same day of posting. The witness has deposed that before handing in the letter for registration he filled in the name of the payee and the post office of payment in the relevant spaces on the postal orders and also filled in the counterfoils. The counter-

foils with the name A. O. Chimeke and the post office of payment have been produced and marked Exhibit 4/1-17. The 4th prosecution witness, Chimeke, deposed that when he received the registered letter it contained no postal orders.

On looking at Exhibit 10/1 and the postal orders in the Exhibit 6 series, it will be seen that the names of the payees do not correspond with those on the respective counterfoils, and in the case of Exhibit 10/1 the space intended for the insertion of the post office of payment, which was left blank, has been filled in with the place name Ebute Metta. The 10th prosecution witness, Johnson Ijoma, the handwriting analyst, expressed the opinion that the handwriting on postal orders in the Exhibits 6, 10, 11, 12 and 14 series, also postal orders Exhibits 13 and 15, is that of the second accused. This witness was subjected to very rigid cross examination. I have examined the documents myself and having compared the writings in the Exhibit 22 series (standard handwriting), I am satisfied that the second accused wrote the names of the payee and the post office on the postal orders in the Exhibits 6 and 10 series as deposed by the 10th prosecution witness. It is to be observed that in his statement to the police the second accused has not denied encashing postal orders in the Exhibit 10 series and in his evidence before this court he admits presenting Exhibit 10/1 to the 12th prosecution witness at Ebute Metta and receiving cash in return. In his statement to the police he did not refer to having received those in the Exhibit 6 series. I will advert to the other postal orders later.

The generally accepted definition of conspiracy is given by Willes, J ; in Mulachy *v.* R (1890) 24 Q.B.D. 422. There are two points which I should like to mention specifically, and these are they :

> First, a person may be charged and convicted of conspiracy to commit a crime of which he could not, if stood alone be convicted. *See* judgment of Lord Coleridge, C.J. ; in Regina *v.* Whitchurch (1868) 3 H.L. at page 317. Secondly, the gist of conspiracy lies not in doing the act, or affecting the purpose for which conspiracy is formed, but in the forming of the scheme or agreement between the parties. See Majekodunmi *v.* The Queen 14 W.A.C.A. 64 at page 66. It was said by Bruce, J ; in Rex *v.* Plummer, "The external or overt act of the crime is concert by which mutual consent to a common purpose is exchanged".

I mention these points because, it has been submitted by Mr Balogun, for the first accused, that the conspiracy and stealing counts must fail because if what the prosecution alleges is true it

would be shown that it was through fraudulent representation money was paid to the second accused. With respect to Mr Balogun, he does not appear to have fully appreciated the tenor of the counts dealing with conspiracy and stealing. I do not see in what way false representation comes into the matter. As I understand it, the first count charges both accused with conspiring to steal money, that is to say money's worth, namely the postal orders contained in the letter. In other words the felonious extraction of postal order from postal matter, that is to say letter. Reference to the definition of "money" and "postal matter" in the Criminal Code would assist had it been necessary, to give a clear understanding of the true meaning of the particulars of offence in the first count. "Money" is defined as including bank notes, bank drafts, cheques and other orders, warrants or requests for payment of money. Therefore "money" would include postal orders. "Postal matter" is defined as including any letter, newspaper or thing, authorized by law to be transmitted by post which has been received at a post office for delivery or for transmission by post, etc.

There can be no uncertainty as to the meaning of the counts charging stealing. In no mistaken terms, both accused were charged with stealing certain postal orders valued at 20*s*-0*d*.

The prosecution has taken care of the fraudulent representation by means of other counts mainly the counts of forgery and uttering.

Now, to prove conspiracy it is necessary that an agreement expressed or implied should be proved to the satisfaction of the court. It is hardly necessary for me to say that as a rule persons wishing to commit a crime do not seek an audience and announce their intentions. There is a very old saying that the devil himself knoweth not the thought of man. The law recognizes the difficulties, and therefore provides for the proof of existence of a conspiracy from the proof of certain circumstances. In other words, conspiracy may be proved by presumptive evidence. It is stated in Archbold 34th Edition, paragraph 4073, that :

> Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.

The evidence of the 12th prosecution witness is of importance, he is the postal officer at Ebute Metta to whom it is alleged the first accused introduced the second accused and who subsequently cashed the various postal orders. It has been submitted by

counsel for the first accused that he is an accomplice. The 12th prosecution witness admitted under cross examination by Mr Balogun that he paid out money on the postal orders in the Exhibits 6 and 30 series (the latter put in by the first accused's counsel through the 12th prosecution witness) notwithstanding that the name of the second accused did not appear thereon as the payee. He said he did so because he had been introduced to him as a teacher at the Colony Public School, and of his explanation, namely, that the parents of the students had paid the school fees by postal orders in the names of the respective students and their respective class teachers would cash them and pay over to the headmaster. The witness admitted quite readily without any hesitation that where monies are paid on postal orders presented by some person, other than the payee, that he should obtain the name and address of the person receiving at the back of the postal orders. He had not done so on Exhibits in the 6 and 30 series. The 9th prosecution witness Mr Anibaba, the postmaster in charge of the Lagos district and postmaster at Yaba, who was recalled, in answer to Mr Balogun, said that it is within the discretion of the postal officer whether he obtains the name and address. He, however, said that he personally would have obtained the name and address of the person but added that each person had a different way of doing things. I must say I thought the 12th prosecution witness frank and honest in giving the answer he did. It is to be noted that in the first set of postal orders cashed (Exhibit 12 series) he not only asked the payee to append his signature on the appropriate space on the face of the postal orders, but also inserted the post office box number of the Colony Public School. No doubt, when confidence had been instilled there might have been a tendency on the part of the 12th prosecution witness to become less rigid. I see no reason why the 12th prosecution witness should be regarded as an accomplice. The first accused has not given evidence, and the line of cross examination by his counsel suggests of course that the first accused knows nothing of the introduction of the second accused. As a matter of fact, knows nothing about the matter. He made two statements to the police, in the first he outlines his duties, and in the second he says in effect he has nothing to add to what he has said previously. The second accused in his evidence before the court admits an introduction, but says it was not done in the way and for the purpose suggested by the prosecution. I accept the evidence of the 12th prosecution witness.

The evidence of the 12th prosecution witness coupled with the fact that certain postal orders which had been handed to the first accused in the course of his duties and intended for transmission elsewhere, found their way to the 12th prosecution witness at Ebute Metta, shows an agreement and is not a matter of coincidence. There was also a telegram (Exhibit 38) sent from Lagos by the first accused to the second accused who was then on a visit to the Eastern Region, to the effect that things were hot and suggesting a delay in returning to Lagos until advised. Apart from the telegram I would still find that there was an agreement between the two accused. The first witness called by the second accused deposed to a close association between both men.

The postal orders in the Exhibits 12 and 14 series and Exhibits 13 and 15 were also issued at the Yaba Post Office, during the period that the first accused was in charge of registration of postal packets, all these, as we have seen, along with the postal orders in Exhibits 10 and 11 series are admitted by the second accused as having been cashed by him at Yaba. The second accused's defence is that he received the postal orders, he admits receiving as payment of a debt owed by the first accused, he fixes the amount at £28. I do not for one moment accept the story that the postal orders were in discharge of a debt, but accept that he received them from the first accused.

The 10th prosecution witness has also deposed that the handwriting on the postal orders in the Exhibits 11, 12 and 14 series and Exhibits 13 and 15 is the handwriting of the second accused.

The postal orders in the Exhibit 21 series were issued at Yaba on the 23rd October and paid at Mushin on the 25th of October. The 10th prosecution witness expressed the opinion that the handwriting on the Exhibit 21 series is similar to the first accused's handwriting in Exhibits 23/1-2. I must say that observing the standard and disputed handwritings and the comparison chart, the writing on the postal orders in the Exhibit 21 series appear unmistakable. The name along the line intended for the name of the payee on Exhibit 21/1 appears as if the surface has been disturbed and the same can be said of Exhibits 2 and 3 in the same series, but it is more obvious in Exhibit 1 of the series. The question to be asked is : why should the first accused make a postal order payable to Benson Eze, at Mushin, and at the same time cashes it as Benson Eze, for that is what the signature indicates. The surfaces on which

the name of the payee Macaulay Igwe appears in Exhibits 10/1-3, 11/1-9, 12/1-4, Exhibits 13 and 15 appear to have been disturbed. Similarly, in Exhibit 30/1-10, put in by the first accused, the name George Okowobi occurs. The second accused has admitted under cross examination that by looking at the exhibits in this series he would say that there had been previous writing along the name or post office lines.

The evidence of the 9th prosecution witness deals in the main with the duties of the first accused at Yaba and the procedure adopted in transmitting registered packets to Lagos. It is quite clear from evidence that the first accused handles these packets, until at least when they are finally placed in the outer bag and remains to see that that bag is sealed. The 9th prosecution witness deposes that it is the practice at the Yaba Post Office for the first accused to see that the bag is placed in the van. One witness under cross examination who does not work at Yaba, deposes that the practice at the branch offices on the island of Lagos is for the registration clerk to leave the mail section immediately the outer bag has been sealed and return to his counter. The 11th prosecution witness, a subordinate of the 9th prosecution witness, says in cross examination that it is not the duty of the clerk in charge of registered letters to see that the mail bag containing registered letters is put in the van. If anyone had to choose between the evidence of the 9th and 11th prosecution witnesses the first reaction would be to accept the evidence of the former. He has been an officer of the Posts and Telegraphs Department for 35 years and has risen to a responsible high post. I think his evidence on the whole to be unbiased and would find it difficult to disbelieve him. Of course, an honest witness may eventually lapse.

Counsel for the first accused is endeavouring to establish that anything could have happened to the bag after the clerk returned to his counter. He suggests the seals could have been broken. It would seem to me, if the practice was for the bag to remain in the letter room until it was collected by the van, without the person concerned being present, there would be virtually no security for it might then be possible for any member of the staff to tamper with the bag, by first breaking the seal of the outer bag then the inner bag in which the registered letters are. The next step would be to extract the registered packets and in turn deal with the packets themselves. But all this would be time consuming, and the risk of detection great. As I understand the evidence of the 9th prosecution witness there is no interval between the sealing of the bag and

it being put on the van. This witness also made it clear that if any bag was found tampered with when it reached Lagos he would be notified. During the period in question he received no notification to that effect nor was there any report of missing mail bags.

The envelope (Exhibit 5) in which Exhibits 6/1-17 were placed appears to have signs of disturbance. The 5th prosecution witness points out that the top vertical blue line on the flap is thicker than its continuation, and also than the horizontal line.

It is my judgment that both accused were acting in concert. It is clear from the evidence that postal orders 074086 (Exhibit 10/1) and W6/79 403315, charged in the second and third counts, never reached their destination. It is my view that they were extracted by the first accused. This being so he would be guilty of stealing as charged in both counts. In virtue of section 7 of the Criminal Code the second accused would be equally guilty. *See* Archbold 34th Edition, paragraph 4143. In The Queen *v.* James (1890) 24 Q.B.D. 439, it was stated that a person who induces a servant of the Post Office to intercept and hand over a letter, which is in the course of transmission by the post is either guilty of larceny as a principal felon or an accessory before the fact to the larceny committed by the servant of the Post Office, and in either view can be convicted on an indictment charging him with larceny of the letter.

It is clear from the evidence that Exhibit 10/1 was made payable to E. Ovbiagele, but what do we find—the name Macaulay Chuks Igwe. The second accused bears that name and has not denied cashing it. The 14th prosecution witness has deposed that a microscopic examination of the postal order revealed disturbed fibres which indicated erasure. The postal orders in the Exhibit 6 series were made payable to A. O. Chimeke but what do we find—a name other than the intended payee. The second accused, as we have seen, has not included this exhibit in the list of money orders he admits receiving from the first accused. The 12th prosecution witness deposes that he cashed them. I must say that looking at the postal orders in this entire series, it is not obvious to the untrained eye that anything had been written in the space intended for the payee before the name Brown Johnson was written. Be that as it may, even if nothing had been written and someone who was not entitled to them wrote his name or the name of any other person as payee, so as to make it appear that he was the payee with a view to getting money to which he was not entitled he would be guilty of forgery.

It is my judgment that on the evidence the first accused is guilty of forgery and uttering as charged in counts four, five, six and seven. By virtue of Section 7 of the Criminal Code the first accused is also found guilty on these counts. It is also my judgment that both accused are guilty of conspiracy as charged in the first count.

Mr Balogun has raised the point that since the 5th prosecution witness, Lance Corporal Offia, during one stage of the preliminary investigation gave evidence and at the same time prosecuted before the Magistrate, the proceedings before the Magistrate and before this court are irregular and therefore the trial is a nullity. By virtue of Section 28 of the Police Ordinance, Chapter 172, any police officer is authorised to conduct in person all prosecutions before any court whether the information is laid in his name or not. In Duncan *v.* Toms (1887) 51 J.P ; 631, it was held that an informant or complainant in summary cases is entitled to conduct the case and to examine and re-examine his own witnesses, and to cross examine witnesses called for the defence, and also that his right is not affected by his giving evidence as a witness. In the instant case the 5th prosecution witness was the 1st prosecution witness before the Magistrate. His evidence on that occasion consisted only in tendering two statements, one made by the first accused and the other by the second accused. In this court, he tendered those statements as Exhibits 7 and 8 respectively. The statements were not objected to. Exhibit 7 is dated 30th April, 1957, and all that the first accused said then was that he had no statement to make apart from the one which he made originally. In Exhibit 8 the second accused said that he did not know that the postal orders valued £28 which he cashed at the Ebute Metta Post Office were not the property of the first accused. What injustice could have been done to both accused by the admission of the evidence given in this court ? It is true he was cross examined by counsel for the first accused and the second accused himself but not on matters appertaining to the statements. The point here, is that in the trial before the High Court the 5th prosecution witness was not the prosecutor. As I understand it, where anyone has given evidence who is not competent to do so, the proper course is for the court to disregard his evidence. To disregard the evidence of a witness under circumstances like these might very well cause hardship. The submission of counsel has no substance, and can be dismissed by referring to the headnote in *R. v. Norfolk Q.S. Ex parte Brunson* (1953) 1 *All E.R.* 346, which reads :

The fact that evidence which is not admissible or is given by an incompetent witness is given before examining justices does not vitiate the committal by them of the defendant for trial.

Lord Goddard, C. J., said in that case :

> But no court has suggested that, because justices in taking depositions admit some evidence that is not admissible or hear a witness to whom, it turns out, objection could be taken on some point or another, that vitiates the committal.

There are a few things left to be mentioned. Whatever the second accused said in his statements is only evidence against him and not against the first accused, but what he has said on oath is evidence against the first accused. I would have arrived at my decision against the first accused independently of what the second accused said about receiving the postal orders. Had I found the 12th prosecution witness an accomplice even after warning myself I would still have found the first accused guilty of the charges. In passing it might be mentioned that section 177 (1) of the Evidence Ordinance provides that a conviction is not illegal merely because it proceeds upon the corroborated testimony of an accomplice. The proviso, however, provides that in the case of a trial with a jury the necessary warning should be given. It has also been held in *Abotgyang v. The Queen*, 14 *W.A.C.A.* 584, that where evidence of a co-accused implicates another, in view of section 177 (2) of the Evidence Ordinance, that corroboration is not required.

There has been a deliberate scheme worked out to defraud persons of postal orders intended for them. It is a mean and despicable act, for the people who are likely to suffer are the poorer classes of the community.

Both accused are commited on the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th counts.

No previous convictions against any of the accused.

Allocutus

Balogun. 1st accused : Young man—aged 24, living honest life since left school. Accused has aged mother.

2nd accused : Ask for leniency. In custody from April 1959 to September 1959. Married. Have small brother.

Court :

I have already said that the circumstances surrounding these offences are despicable. It is very sad, that intelligence cannot be put to more profitable use. Frauds of one kind or another are really prevalent in Lagos and no one seems to be deterred from committing them, in this case a workman at the railway had sent £18 to his relative in Enugu and it all disappeared. It is not the wealthy who suffer—it is the poor man. One wonders, why do people not think of their families when they are about to commit offences of fraud—it is only after conviction that the plea is made for leniency on the grounds of family responsibilities. The best service any man can render to his family, is to live an honest and clean life.

The offences are regarded by the legislature as serious. The penalty for stealing as charged is life imprisonment.

In answer to the Court Crown Counsel says about £70 involved.
Sentence :

Each accused is sentenced to 4 years I.H.L. on each count. Sentences to run concurrently.

Accused persons are informed of their right to appeal within fifteen days hereof.

JOSEPHINE ADUKE OSHINLOYE .. RESPONDENT

v.

FOLORUNSHO ADEWALE OSHINLOYE .. APPELLANT

[HIGH COURT : DICKSON, J. ; 9th February, 1960]

(Suit No. WD/15/1959)

Marriage and Divorce—Prayer for Maintenance—Non-Compliance with Rule 4 (2) *of the Matrimonial Causes Rules*, 1957.

A wife, in her petition for dissolution of marriage, prayed for maintenance. Her pleading, however, did not contain a statement in general terms of the husband's property and income, in so far as they are within her knowledge and belief.

HELD : That the Court could not, when making an order of *decree nisi* in favour of the petitioner, grant the ancillary relief prayed, because the petition, although containing a claim for maintenance, did not contain a statement in general terms of the husband's property and income, in so far as they are within the petitioner's knowledge and belief, as is required by Rule 4 (2) of the Matrimonial Causes Rules, 1957.

Miss M. Maja for Petitioner.

DICKSON J. :—The petitioner has prayed for dissolution of the marriage on two grounds, namely : cruelty and desertion. She has given testimony of acts connoting cruelty. If what she says is true, in my view, the acts have been directed to the petitioner, and in my judgment would amount to cruelty. The Divorce Court likes to have corroboration of a petitioner's testimony, but it would seem not to be an absolute requirement of law. In *Kafton v. kafton* (1948) 1 *ALL E.R.* 435, at page 437 Tucker, L. J. ; as he then was, pointed out that it is true that in cases of cruelty it is the practice of the court to require corroboration, and not a rule of law ; and it has never been decided that the court is not entitled in a proper case, where it is in no doubt where the truth lies, to act upon the uncorroborated testimony of the petitioner. At page 438, Cohen, L.J. ; pointed out that the need of corroboration is necessarily greater in an undefended case than in a defended case, where the evidence of the petitioner, though uncorroborated, is tested by cross examination and can be measured against the evidence given on the other side.

In the instant suit, I think it is safer not to find in favour of the petitioner on cruelty. Corroborative evidence, could have been had if so desired, but would have been costly, as the procedure of obtaining the testimony of witnesses resident outside the jurisdiction would have had to be invoked.

I am fully satisfied that desertion has been proved and I accordingly pronounce a *decree nisi* in favour of the petitioner on that ground. The respondent will pay thirty guineas costs to the petitioner.

The court makes no order as to maintenance at this stage, as the petition although containing a claim for maintenance, the pleading does not contain a statement in general terms of the husband's property and income so far as they are within the petitioner's knowledge and belief. *See* Rayden 7th Edition at page 666. In other words, the court cannot make an order for maintenance as prayed in the petition, as Rule 4 (2) of the Matrimonial Causes Rules, 1957, has not been complied with.

GILBERT OYENOLA OGUNRO .. .. PLAINTIFF

v.

DR FOLARIN OGUNRO
LAGOS BUILDING SOCIETY LTD.
OSHODI AND APENA LIMITED
NATIONAL BANK OF NIGERIA LTD.
KHALIL & DIBBO TRANSPORT LTD. } DEFENDANTS

[HIGH COURT : ONYEAMA, J. ; 24th March, 1960]
(SUIT NO. LD/48/1958)

Mortgage —Equity of redemption Mortgaged—Notice to first Mortgagee—Mortgagor paying off the Mortgage debt—duty of first Mortgagee with notice of Mortgage of the equity of redemption in respect of the title deeds—sale of part of Mortgaged property as consideration for the debt—Validity.

The first defendant secured a debt owed by him to the second defendants by a mortgage over his real property. In order to raise further loans, he mortgaged the equity of redemption on the first mortgage to the plaintiff who gave notice of this to the first mortgagee and registered the mortgage. The first defendant borrowed money from the third defendants and paid off the second. The second defendants thereupon reconveyed the mortgaged property to the first defendant who then executed a mortgagge in favour of the third defendants. The first defendant next took a loan from the fourth defendants to pay off the third and took a reconveyance from the third defendants ; he then gave a mortgage to the fourth defendants. The fourth defendants eventually exercised their powers of sale contained in the deed of mortgage and at the sale the fifth defendants bought the property. The mortgage to the plaintiff contained the proviso that "the said equity of redemption shall be re-assigned to the Assignor by the Assignee if and when the Assignee (*a*) repays back to the assignor a sum of five hundred pounds (£500) sterling and (*b*) conveys in fee simple to the Assignee an area of land measuring 60 feet front by 100 feet side lying at the back of the building of the said property and forms portion of the parcel of land already described."

On a claim that the sale be set aside and for an order that an area 60 feet by 100 feet be conveyed by the first defendant to the plaintiff and against the defendants 2 to 4 damages for loss of rents.

HELD : That since the defendants 3, 4 and 5 had no notice of the equitable mortgage the sale was valid and could not be disturbed. The registration in the Land Registry did not constitute notice to the world. Anifowoshe *v.* Onasanya Federal Supreme Court Suit No. 216.

(2) The convenant that part of the mortgage property was to be conveyed to the mortgagee was a clog on the equity of redemption and was illegal and unenforceable.

(3) There was no contractual relationship of landlord and tenant between the plaintiff and the 3rd, 4th and 5th defendants, and as the plaintiff was an equitable mortagagee (or a mortgagee of the equity of redemption) he was not entitiled to rents. An action for loss of rents, therefore, did not lie.

(4) The claim for mesne profits could not succeed as it was based on the assumption that the plaintiff was entitled to the plot 60×100.

Cases referred to :—

Kinnard v. Trollope, 39 *Ch. D.*636.

Coote's Treatise on the law of Mortgages, *9th ED. VOL. II page* 995.

Corbett v. National Provincial Institute 17 *T.L.R.* 5.

Banks v. Whittall, 1 *De G. & S.* 542.

Anifowoshe v. Onasanya Federal Supreme Court Suit No. 216 *of* 1958.

Archibald MacFarlan for the Plaintff.

A. O. Bickersteth for the 1st Defendant.

J. G. Bentley for the 2nd Defendants.

B. A. Agusto for the 3rd and 4th Defendants.

O. Moore for the 5th Defendants.

ONYEAMA, J. :—By his writ, as amended, the plaintiff claims the following relief :

(*i*) That the sale of the property in question to the fifth defendants be set aside ; and

(*ii*) As against the 1st defendant, an Order to execute a conveyance to the plaintiff of the plot of land 60 feet by 100 feet mentioned in the above-mentioned deed dated the 26th day of May, 1950, and to repay the sum of £500 ; and

(*iii*) As against the 2nd, 3rd and 4th defendants jointly and severally the sum of £1,900 damages in respect of loss of rent from the 5th of March, 1955, to the date hereof together with Mesne profits up to the date of judgment herein.

Pleadings were directed and duly filed and delivered. No plan of the plot of land in question was filed, but there appears to be no dispute as to its extent or its location.

The facts of the case are thoroughly complicated and consists in short of several mortgages of the first defendant's property to the second, third and fourth defendants as successive mortgagees, and finally the sale of the property to the fifth defendant by one of the mortgagees in exercise of his statutory and contractual powers ; the first defendant's equity of redemption was, in the meantime, mortgaged to the Plaintiff.

I think it is necessary to set out in some detail the various transactions affecting the property.

The property in question, 42 King George Avenue, Yaba, originally crown land, was acquired by the first defendant, having been conveyed to him "for ever" by the Governor on the 28th of January, 1947: See Exhibit 7. The area comprised three plots numbered, 1, 2, and 3 in Block No. 12.

By a deed of mortgage made on the 6th of March, 1947, the entire premises were assigned to the second defendants as security for a loan of £2,000 repayable on or before the 30th of September, 1947, with interest at the rate of 12½ per cent per annum. The right of the first defendant to redeem the mortgage was expressly reserved; *See* Exhibit 8.

In 1948 the first defendant a medical practitioner, went to Great Britain to do post graduate work. It would appear from his evidence that the arrangements he had made to ensure sufficient funds for himself in Great Britain did not work out as planned and so he had to return to Nigeria. There is no evidence that the mortgage to the second defendants was redeemed on the stipulated date; indeed, there is evidence that it was not. When the first defendant returned to Nigeria the plaintiff, his brother, and some other close friends prevailed on him to return to Great Britain and carry on with his post graduate studies. It was then arranged that the plaintiff and the friends who advised the first defendant to return to Great Britain were to keep him in funds while he was there. The plaintiff was to give him £300 at once and £1,200 over one year. The sum of £1,200 was not all to be paid to the first defendant but was to be used in part in paying off part of the mortgage debt, interest thereon, insurance premiums due on the mortgaged premises, and rates and taxes due to the Lagos Town Council. What was left was to be sent to the defendant.

To secure these advances to the first defendant the Plaintiff took what his solicitors described as a "deed of transfer of Equity of Redemption." This deed is of the greatest importance in this case as it forms the bedrock of the Plaintiff's claim.

After reciting the first defendant's title and the mortgage to the second defendants and the consideration for the deed, it went on:

NOW THIS DEED WITHNESSETH that in consideration of the Assignee paying to the Assignor a sum of Three Hundred Pounds (£300) sterling before the execution of these presents (the receipt whereof the Assignor hereby acknowledges) and the Assignee paying to the Assignor a further sum of One thousand two hundred pounds (£1,200) sterling within one year of the date of this Deed the Assignor hereby transfers and assigns to the Assignee his Equity of Redemption in respect of the

said Mortgage subsisting on the property known as Plots One, Two and Three (1-3) in Blocks 12 (Twelve) of Yaba Estate the plan of which is drawn and attached to the said Deed of Conveyance dated 28th day of January, 1947, and registered as No. 69 at page 69 in Volume 673 of the Lands Registry in the Office at Lagos, subject to the following provisions for re-transfer and re-assignment of the said Equity of Redemption.

PROVISO

It is hereby provided and agreed that the said Equity of Redemption shall be re-assigned to the Assignor by the Assignee if and when the Assignee (*a*) re-pays back to the Assignor a sum of FIVE HUNDRED POUNDS (£500) Sterling and (*b*) conveys in fee simple to the Assignee and area of land measuring 60 feet front by 100 feet side lying at the back of the building of the said property and forms portion of the parcel of land already described. See Exhibit 9.

I would first of all call attention to a confusion of terminology in the proviso to this deed in which it appears to be provided and agreed that the Assignee would have to re-pay £500 to the Assignor and convey in fee simple to the Assignee the area of land described. This is a patent absurdity and an obvious mistake. It was not noticed in the heat of the arguments, and I am satisfied that what the parties intended was that the assignor, not assignee, was to repay £500 and convey the plot measuring 60 feet by 100 feet to the assignee. The effect of the deed will be examined on this footing.

It is admitted by the first defendant that the plaintiff fulfilled his own part of the bargain, £300 was handed to the first defendant and £1,200 was expended on his account and according to his directions.

When the first defendant finally returned to Nigeria he found he could not pay off the mortgage debt owed to the second defendant as it had accumulated to large dimensions. The first defendant thereupon took a loan from the third defendants to pay off the second. The plaintiff in the meantime, gave notice of the transfer of the Equity of Redemption to himself by the first defendant to the second defendants. Beyond paying £1,500 to the account of the first defendant the plaintiff, to whom the equity of redemption had been assigned, paid nothing more towards satisfaction of the mortgage debt. When the second defendant threatened to realise the mortgage by sale the first defendant wrote to the plaintiff notifying him of it but received no reply. The plaintiff however made it clear by a letter of the 3rd October, 1950 (Exhibit 31) that he would not buy in the mortgaged property if it was put up for sale, nor would he expend any more money on

the mortgage unless the first defendant was prepared to accept the terms of a "FAIR AGREEMENT" then proposed by the plaintiff. There is no evidence of what this Fair Agreement was. Whatever the terms were, the first defendant did not appear to have accepted them, for he raised funds from the third defendants, paid off the second defendants, took a re-conveyance of the property from the second defendants, and executed a fresh deed of mortgage to the third defendants to secure a loan of £3,500. *See* Exhibit 14.

In order to get the plaintiff's complaints in chronological sequence I pause to note that he quarrels with the second defendants for reconveying the legal estate in the mortgaged property to the first defendant thus enabling him to execute further mortgages when they had notice that the first defendant's equity of redemption had been assigned to the plaintiff. This complaint will be examined later. The deed of conveyance is Exhibit 15.

The first defendant later executed a second mortgage in favour of the fourth defendants to secure certain overdrafts and other banking facilities.

The first defendant defaulted in his payments to the third and fourth defendants, and, in exercise of their statutory and contractual powers the third and fourth defendants, caused the mortgaged property to be sold by public auction.

The plaintiff's agent and attorney attended at the sale and notified both the auctioneer and a representative of the ultimate purchaser of the plaintiff's claim to the property. Notwithstanding these protests the property was sold to the fifth defendant. When the fifth defendant sought to register his title under the Registration of Title Ordinance the plaintiff's agent filed an objection. The plaintiff then commenced the present suit.

Having set out the facts of the case which I find proved I now turn to the plaintiff's complaint that the second defendant had acted in breach of his duty as trustee of the mortgaged property for the assignee of the equity of redemption of whom he had notice, by reconveying the mortgaged property to the mortgagor. It is clear that the assignee of the equity of redemption can redeem the mortgage by paying off the mortgage debt and interest. *See Kinnaird v. Trollope*, 39, *Ch.D.* 636. The plaintiff did not redeem. The mortgagor was notwithstanding the assignment of the equity of redemption still liable on the express covenant in the mortgage deed to pay the mortgage debt and interest. If on being sued by

the mortgagee on his personal covenant to pay the mortgage debt and interest the mortgagor paid the full amount due to the mortgagee, the mortgagor would be entitled to a reconveyance from the mortgagee of the property, "subject to the subsisting equity of redemption, thus in effect, rendering the original mortgagor a mortgagee of the property". *See Kinnaird v. Trollope* already cited and *Coote's Treatise on the Law of Mortgages, 9th ed. Vol. II page* 995.

A mortgagor who had absolutely assigned his equity of redemption would not be in a position to redeem the property unless he was sued on the personal covenant to pay the debt contained in the mortgage deed.

It appears to me that in the present case the assignment of the equity of redemption to the plaintiff was not absolute in view of the proviso in Exhibit 9. The first defendant did not therefore, lose his right to redeem the property, but there appears to me to be no doubt that on his repayment of the mortgage debt and interest, the mortgagee thereafter held the legal estate as trustee of a subsequent incumbrancer of whose interest he had notice : *See Corbett v. National Provincial Institute* 17 *T.L.R.* 5 and *Banks v. Whittall, l De G. & S.* 542.

I am of the opinion that in reconveying the property in question to the first defendant without the consent of the plaintiff, the second defendants acted in breach of their duties as trustees of the legal estate for the plaintiff.

Mr Davies submitted that the Mortgagee of the equity of redemption was under a duty to redeem the mortgage. I do not think this proposition can be right, as it necessarily involves the further proposition that the mortgagee of the equity of redemption is bound further to make further capital advances to the mortgagor beyond his covenant in the deed of mortgage.

The claim before the court and the nature of the proviso in Exhibit 9, however, make it unnecessary and unprofitable to examine further the right of the first defendant to redeem. The plaintiff seeks an order compelling the first defendant to convey a portion of the mortgaged property to him. This claim is based on the provision in the proviso requiring repayment of the £1,500 by cash payment of £500 and absolute assignment of part of the mortgaged premises. As this is clearly a clog on the equity of redemption and void no order compelling the first defendant to transfer his property to the plaintiff can in the circumstances be made.

When the deeds of mortgage with the third and fourth defendants were executed the property had been reconveyed to the first defendant. The only notice of the plaintiff's equitable right which the third and fourth defendants could be deemed to have was the registration of this right in the Land Registry. Such registration has been held by the Supreme Court not to be notice to the world: *Anifowose v. Onasanya Federal Supreme Court Suit No.* 216 *of* 1958. As there is no evidence of any express notice to these mortgagees prior to their mortgages they cannot be affected by the plaintiff's equitable rights and the sale of the property to the fifth defendants appears to me to extinguish the equity of redemption and to leave the plaintiff to his personal rights on the covenant to repay the debt secured by mortage of the equity of redemption.

The claim against the third, fourth and fifth defendants must therefore be dismissed.

The plaintiff has not established any contractual relationship of landlord and tenant with any of the defendants or any one else and as he was an equitable mortgagee, he was not entitled to rents. It appears to me he cannot maintain an action for loss of rents. The claim for mesne profits appears to be based on the proviso in Exhibit 9 whereby the plaintiff was to get part of the mortgaged property. That appears to me to be the effect of Mr Dundas's evidence. The case is that if the plaintiff had had this property assigned to him as covenanted he would have got about £25 or £30 a month from it. As, in my view, the covenant in the proviso relied on is a clog on the equity of redemption and void. I fail to see how the plaintiff can build any claims on a void covenant. The claim for mesne profits must also fail.

With the failure of the claim for mesne profits nothing remains of the plaintiff's claim and it is accordingly dismissed.

No application is made for cost.

No order as to costs.

HIGH COURT, LAGOS

CHIEF T. A. ODUTOLA — PLAINTIFF

v

WEST AFRICAN PILOT LIMITED :
P. C. AGBU. — DEFENDANTS

[HIGH COURT, DICKSON, J. ; 16th April, 1960]
(Suit No. LD/36/58)

Libel—Rolled-Up Plea—Fair Comment—Justification—Practice—Particulars—Order 29 Rule 22A English Rules—Section 12 High Court of Lagos Ordinance, Cap. 80.

In an action for libel one of the defences set up by the defendants was by a common form of pleading known as the "rolled-up plea". Counsel for the plaintiff dealt with it as one of justification. The defendants failed to give particulars in support of that plea.

HELD : (1) There had been a considerable divergence of opinion as to what was the precise nature of the "rolled-up plea". Some judges have treated it as containing two defences—justification and fair comment—rolled into one. Others have expressed the opinion that it raises one defence only, that being the defence of fair comment. The opinion that the "rolled-up plea" is a defence of fair comment has been confirmed by the House of Lords in Sutherland *v.* Stopes (1925) A.C. 47, which followed the dictum of Collins, M.R., in the case of Digby *v.* Financial News Ltd. (1907) 1 K.B. 502.

(2) In a "rolled-up plea" by Order 19, rule 22A of the Rules of the Supreme Court, the defendant must now give particulars stating which of the words complained of he alleges are statements of fact, and of the facts and matters he relies on in support of the allegation that the words are true. In view of section 11 of the High Court of Lagos Ordinance, 1955 (now section 12, Chapter 80 of the Revised Laws of Nigeria) it would appear that the defence should have complied with the English practice.

(3) Although a plea of fair comment is different from that of a plea of justification, the defendant is entitled to prove, and indeed must prove, that the facts on which his comments are based are true, notwithstanding such facts are defamatory to the plaintiff, and there is no plea of justification. The two defences are similar to this extent, that in the plea of fair comment the defendant must show that there is a foundation of facts well and truly laid on which the comment is based ; but the conclusions inferred as matters of opinion have not to be proved as facts.

Cases referred to :

Digby v. Financial News, Ltd. (1907) 1 *K.B.* 502

Sutherland v. Stopes (1925) *A.C.* 47.

Walker v. Hodgson (1909) 1 *K.B.* 239.

Kemsley v. Foot (1952) 1 *ALL E.R.* 510.

Joynt v. Cycle Trade Publishing Co (1914) 2 *KB.* 292.

(*NOTE.— The case is reported only in so far as it deals with the matters referred to in the head-note.*)

A. O. Lawson for the Plaintiff.

A. A. Ogunsanya for the Defendants.

DICKSON, J. The plaintiff by his writ of summons, claims against the defendants the sum of £30,000 as damages for libel. Paragraph 4 of the particulars attached to the writ of summons reads :

> The defendants on the 7th day of January, 1958, falsely and maliciously caused to be printed and published of the plaintiff in the *West African Pilot* of the said date in their editorial column under the heading 'Odutola and his loans' the following words :—
>
> The quarrel between Chief T. A. Odutola and his people can be traced to the loan policy of the Western Government. Here is a man who because of his connection with the Action Group receives almost ninety-five per cent of the total loans so far given to Ijebu-Ode people. He applied for a loan to run his tyre-sole business : he received thousands of pounds. He applied for more loans to subsidise his school : he again got thousands.
>
> Chief Odutola's case is just one out of so many where loans were given for no other consideration than party connections.

The plaintiff was at the date of the filing of the statement of claim, Chief Ogbeni-Oja of Ijebu land, Chairman Board of Directors Odutola Tyresoles Company Limited, Chairman Board of Directors New Africa Insurance Company Limited, Chairman Board of Directors Ijebu Pioneer Timber Company Limited, Chairman Board of Directors Ijebu Traders Association Limited, Director of Omo Sawmills of Nigeria Limited, Sole Proprietor of Olu-Iwa College Ijebu-Ode, Sole Proprietor of Ijebu-Ode Secondary Commercial College, The Chairman Ijebu Divisional Council and Chairman of the Western Region Association of Divisional and District Councils, and also a Member of the Western House of Assembly. He was undoubtedly and, up to the date of hearing, an influential man in his community. The first defendant company owns, prints and publishes the newspaper called the *West African Pilot* ; the second defendant was at the material time editor of the said newspaper.

The newspaper containing the publication is in evidence and is marked Exhibit A. The words complained of form part of the leading editorial on the day in question. I shall quote the editorial in full :—

> ODUTOLA AND HIS LOANS
>
> When the Loan Policy of the Western Government is critically examined it would be seen that not half of the story has been told by the NCNC Opposition in the Western House of Assembly who have perennially but unavailingly been

questioning the scandalous deal. The NCNC Opposition have merely been scratching the surface because they are as yet unable to tear down the massive steel curtain that guards the secrets of the Loans Board.

The Government is quite aware of the scandal but it fears the resultant effect of its exposition, hence its stubborn refusal to accept an impartial commission of inquiry. But like the Peeping Tom, the vigilant Opposition will continue to peer through the key-hole and expose as much as they are able.

The quarrel between Chief T. A. Odutola and his people can be traced to the loan policy of the Western Government. Here is a man who because of his connection with the Action Group receives almost ninety-five per cent of the total loans so far given to Ijebu-Ode people. He applied for a loan to run his tyre-sole business : he received thousands of pounds. He applied for more loans to subsidise his school : he again got thousands.

Chief Odutola's case is just one out of so many where loans were given for no other consideration than party connections. The Ijebus are misdirecting their attack by pelting the Ogbeni Oja : the attack should be directed to the Western Government. Mr S. O. Shonibare, AG Federal Publicity Secretary who leads the brigade, knows where to attack but like a coward and hypocrite he chooses to fumble.

Pleadings were ordered and filed. In paragraph 2 of the statement of claim, the plaintiff avers that the defendant company owns, prints and publishes a newspaper called the *West African Pilot*. In paragraph 3 he alleges that the second defendant was at the material time the editor of the said newspaper. By paragraph 3 of the statement of defence, the defendants admit paragraphs 2 and 3 of the statement of claim. In view of these admissions, the issues to a certain extent have been narrowed. Paragraph 4 of the statement of claim repeats the contents of paragraph 4 of the particulars attached to the writ. The defence, by paragraph 4 of their statement of defence admit that the statements referred to in paragraph 4 of the statement claim were published in the *West African Pilot* of the 7th January, 1958, but aver that it was only part of the editorial alleged in paragraph 4. The defence have also pleaded that the statement referred to was not false and/or malicious.

The plaintiff has by paragraph 5 of the statement of claim pleaded certain innuendoes. It is pleaded that the words were understood to mean :

(*a*) that the plaintiff had improperly used his connections with the Action Group to take loans from the Government of the Western Region ;

(*b*) that such loans were given for no other consideration but party connections and not in accordance with established business practices and customs ;

(*c*) that the plaintiff's seeming state of affluence may be deceptive ;

(*d*) that the plaintiff had selfishly taken 95 per cent of the total loans given to the people of Ijebu-Ode ;

(*e*) that the plaintiff got loans to subsidise his schools and has either failed to show these loans in the books of the schools or has misappropriated the loans for other purposes.

(*f*) that the plaintiff's interests in the party may be due to his obtaining loans from the Action Group Government of the Western Region.

The statement of claim therefore contains two counts, as it is considered that where an innuendo is pleaded, the claim is one with an innuendo and one without. If the plaintiff fails to prove his innuendo, he may fall back on the other count, and succeed on that, if the words in their natural signification are actionable. If the words in their natural meaning are not actionable the plaintiff is bound by his innuendo : Odgers on Libel and Slander (6th edition) page 557.

The defendants after denying by their pleadings, that the words complained of or when read together with the rest of the editorial, bore or were understood to bear or are capable of bearing any of the meanings alleged in paragraph 5 of the statement claim, or that they were defamatory of the plaintiff, proceed to set up by paragraph 7 of their pleading, a defence by a common form of pleading, known as the "rolled-up plea".

Paragraph 7 reads :

> In so far as the said words consist of statements of fact they are true in substance and in fact and in so far as they consist of expression of opinion they are fair and *bona fide* comment made without malice upon the said facts which are a matter of public interest.

Mr Lawson in his address deals with the defence as one of justification, but as will be shown presently, he is in error. The "roll-up plea" is considered at page 95, paragraph 169 of the 3rd edition of Halsbury's Laws, a portion of which reads :—

> The plea, which has been described as 'very indefinite and embarrassing', but as one which 'must now be accepted as a proper pleading', is a plea of fair comment and not one of justification.

There had been a considerable divergence of opinion as to what was the precise nature of the "rolled-up plea". Some judges have treated it as containing two defences—justification and fair comment—rolled into one. Others have expressed the opinion that

it raises one defence only, that being the defence of fair comment. In Digby *v.* Financial News, Ltd. (1907) 1 K.B. 502, a portion of the head-note reads :

The defence to an action for libel in a newspaper article that 'in so far as the words consist of statements of fact, the same are in their natural and ordinary signification true in substance and in fact, in so far as they consist of comment, the same were fair and *bona fide* comment upon a matter of public interest' is a defence of fair comment and not a justification.

Collins, M.R., in his judgment, said at page 507 (ibid) :

When a plea of justification is pleaded, it involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel. This plea ("rolled-up plea") does not purport to be a plea of justification of imputations, if any, contained in the libel, it is nothing of the sort, but is a plea intended to raise a totally different defence, that of fair comment.

The opinion that the "rolled-up plea" is a defence of fair comment has been confirmed by the House of Lords in Sutherland *v.* Stopes (1925) A.C. 47, which followed the dictum of Collins, M.R., in Digby's case. In the former case the head-note reads :

The plea in an action for libel that in so far as the words complained of consist of allegations of fact they are true in substance and in fact and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice on a matter of public interest is not a plea partly of justification and partly of fair comment, but is a plea of fair comment only.

At page 62 in Sutherland *v.* Stopes Viscount Finlay in delivering his opinion said :

There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one, but it in fact raises only one defence, that being the defence of fair comment on matters of public interest. The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on a ground of truth, under which the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct.

The defence of fair comment differs from that of justification. The difference is more apparent perhaps in those cases where, as in the case of literary criticism, the plaintiff supplies the materials on which the comment is and purports to be based. But in all cases the distinction is essential : Halsbury (2nd Edition) 497.

In no uncertain terms plaintiff's counsel in his address submitted that the plea of the defendants is that of justification. He even referred to Odgers (*ibid*) at page 518, and made the comment that the plea of justification is a dangerous one. In view of the authorities to which I have referred the plea set up by the defence is

clearly one of fair comment. There are, of course, cases where both pleas are set up, but that is not so in this case. The court must now therefore proceed to consider the case on the basis that the defence pleaded to the action is that of fair comment. But before doing this, I might at this stage say that the court did not get sufficient assistance from counsel appearing for the plaintiff, due to his failure (in not treating) the defence as one of fair comment. Defendants' counsel's treatment of the defence of fair comment in his address was rather sketchy, and was little more than repetition of some of the things said in paragraph 7 of the statement of defence. The natural result of this state of affairs is that the burden of the court has been increased.

In a "rolled-up plea" by Order 19, rule 22A, of the Rules of the Supreme Court, the defendant must now give particulars stating which of the words complained of he alleges are statements of fact, and of the facts and matters he relies on in support of the allegation that the words are true. In view of section 11 of the High Court of Lagos, Ordinance 1955, it would appear that the defence should have complied with the English practice.

It is quite true that although, as we have seen a plea of fair comment is different from that of a plea of justification, the defendant is entitled to prove and indeed must prove that the facts on which his comments are based are true, notwithstanding such facts are defamatory of the plaintiff and there is no plea of justification. The two defences are similar to this extent, that in the plea of fair comment the defendant must show that there is a foundation of facts well and truly laid on which the comment is based; but conclusions inferred as matters of opinion have not to be proved as facts. On the other hand, the mental attitude of the commentator is material to the issue of fair comment, but immaterial to the issue of justification.

In *Digby v. Financial News Ltd.* (ibid) Collins, M. R., said at page 508 :

> It is therefore a necessary part of a plea of fair comment to show that there has been no mis-statement of facts in the statement of the materials upon which the comment was based.

In *Peter Walker v. Hodgson* (1909) 1 *K.B.* 239, Buckley, L. J., said at page 255 :

> To prove his defence of fair comment it is essential as I understand the authorities, that the defendant should first show that the statements of fact which he made were.....true.

In *Kemsley v. Foot* (1952) 1 *All E. R.* 501, Lord Porter said at page 507 :

> In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails.

The noble Lord continued by saying that what he had just said had been so frequently laid down authoritatively that it was not necessary for him to dwell further upon it ; and gave as an instance the direction given by Kennedy, J., to the jury in *Joynt v. Cycle Trade Publishing Company* (1914) 2 *K. B.* 292. In that case Kennedy, J., said :

> .....the comment must.....not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further, it must not contain imputations of an evil sort, except so far as the facts, truly stated, warrant the imputation.

To succeed in a defence of fair comment the words complained of must be shown to be (*a*) comment (*b*) fair comment (*c*) fair comment on some matter of public interest. A comment is a statement of opinion on facts. At the trial it is incumbent on a defendant to prove (*i*) that each and every statement of fact in the words complained of is true and (*ii*) that the comment on the facts so proved was *bona fide* fair comment on a matter of public interest. If a defendant fails to prove the truth of any of the statements of facts he fails in his defence.

We must now consider the words complained of in Exhibit A ; but in doing so, I think it apposite to refer to *Kemsley v. Foot* (ibid) and the words of Lord Porter at page 505 :

> The question, therefore in all cases is to whether there is a sufficient substratum of fact stated or indicated in the words which are the subject matter of the action.

He goes on to say that he finds his view well expressed in the remarks contained in Odgers on Libel and Slander (5th Edition, 1911) at page 203. He sets out the passage, and I propose to do the same. It is stated :

> Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded ; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation

of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact.

I may say now that the matter is the subject of public interest. It is relevant to note that at the material time the political party called the Action Group formed the Government of the day in the Western Region, the N.C.N.C. (National Council of Nigeria and the Cameroons) another political party, was in Opposition. The plaintiff was an active member of the Action Group. There is evidence by P.W. 6, which I accept, that the West African Pilot supports the policy of the N.C.N.C. The plaintiff admits that the newspaper named the Daily Service is the official organ of the Action Group. Mr S. O. Shonibare, of whom we will hear more later, is the Managing Director of the Amalgamated Press, the Publishers of the Daily Service; he is a staunch member of the Action Group, and is its Federal Publicity Secretary.

In my view, it is necessary to consider the whole of the editorial and not only paragraph 3 and the greater part of paragraph 4, which contain the words complained of. I might as well here and now dispose of a matter. It has been submitted by defendants' counsel, that the article as a whole is an attack on the Government of the Western Region, rather than on the plaintiff, and therefore cannot be defamatory of the plaintiff. Counsel referred to the evidence of P.W. 6., Ernest Ikoli, who when asked if he agreed that the editorial when read as a whole, in spite of the heading, is an attack on the Government of the Western Region, answered: "It is quite clear that the editorial is an attack on the Government". If A. in making a defamatory statement against B., at the same time defames C., it cannot be said that C. has not been attacked. It is plain from the heading of the article that the plaintiff is a target—what strikes the eye of the reader at first is not the "Government of the Western Region", but the words "Odutola and his loans". The text, however, makes reference to the loan policy of the Government of the Western Region, and also attacks the Loans Board. As I understand the editorial, the defendants link the plaintiff with the "loan policy of the Government of the Western Region". It is to be observed that paragraph 2 speaks of the Government being aware of the scandal.

We now come to paragraph 3. The first statement therein is :

> The quarrel between Chief T. A. Odutola and his people can be traced to the loan policy of the Western Government.

In my opinion, the statement is an allegation of fact. Has it been truly stated ? The defendants, as we have seen, must show that the statement is true. The defendants themselves have not given evidence, but called two witnesses : Sholanke Onasanya (D.W. 1), an Action Group Member of the Western House of Assembly, and Laban Namme, D.W. 2, the acting editor of the Daily Times, who was called only to tender Exhibit F. The former was not asked much in examination-in-chief, and was called no doubt to say, which he did, that he was a member of the Action Group and had received a loan from the Colony Development Board, a Government Board, for the development of his bakery at Surulere, and that there was nothing dishonourable in getting a loan from anyone to run a business.

The plaintiff in cross-examination, said there was a misunderstanding between himself and Shonibare, covering the period between late 1957 and the first quarter of 1958. He said that it was political, and he held meetings to refute what Shonibare had said about him. He sajd that the theme of Shonibare's campaign was that the latter thought that he was not running the affairs of Ijebu Ode in the way he Shonibare thought they should be run. He also said that Chief Okunowo supported Shonibare, and the latter was able to enlist the support of some of the members of the District Council. He attributed Shonibare's attitude to political jealousy. He stated the basis of the contention was that instead of one District Council for Ijebu-Ode, there should be separate councils for the suburbs. He said that they also complained that he was not paying sufficient rates to the Rating Authority. He admitted that Shonibare and his followers were demanding his removal from the chieftaincy. He said that he held meetings to counter Shonibare, and they both issued and distributed leaflets.

Exhibit F, which is dated the 6th January, 1958, purports to be a newspaper report of one of the plaintiff's meetings. It bears the caption "Odutola Defends Role in Ijebu Affairs". Among other things, mention is made of a loan which had been given to the plaintiff to finance his school, and that the plaintiff challenged the Western Government to deny if he ever received more than £13,000 for maintenance of the school. The report also stated that the plaintiff denied that all the loans which the Government

should have given to Ijebu-Ode citizens had been given to him alone. He was shown the report and admitted that it was a report of one of his meetings. Plaintiff's counsel in his address submits that there is no proof of the truth of its contents. It is quite true that D.W. 2 said he knew nothing about the publication of the news other than it was printed and published.

Mr Lawson submits that the Exhibit is valueless, and commented that the reporter has not been called. There would have been substance in Mr Lawson's submission if the plaintiff had not admitted the report. The document was shown to the plaintiff in cross-examination, who made the admission, and it was then and there marked Identification F, and as we have seen subsequently tendered as Exhibit F. The plaintiff was not re-examined on it.

A pamphlet purported to have been issued by Mr Shonibare, was put to the plaintiff by defendants' counsel and marked Indentification E. It is written in Yoruba and has not been tendered—perhaps for reasons best known to themselves. I would have expected after several witnesses had been questioned about it, it would have been tendered by the defence. Mr Lawson has rightly submitted that the document cannot be relied upon by the defence as it is not in evidence.

P.W. 3, Adeboyejo Oduwole, the bursar of Olu-Iwa College, in cross-examination said that he did not go to the meeting referred to in Exhibit F, but it had occurred to him when he had read it that there was trouble between the plaintiff and the people of Ijebu-Ode, and that was not the first time he had read that there was trouble between the plaintiff and the people of Ijebu-Ode. He first read of it in an article published in the Daily Service. P.W. 7, Benjamin Awonusi said in cross-examination that the difference between the plaintiff and Shonibare was settled in 1958 at Ibadan in the house of the Leader of the Party, Chief Awolowo, and that he was present. Another of the plaintiff's witnesses also deposed to this under cross-examination.

It is my judgment that on the evidence elicited under cross-examination, that at the material time there had been differences between Shonibare, the Publicity Secretary of the Action Group, and the plaintiff, and that later the former was joined by Chief Oknnowo and some members of the District Council. To that extent it can be said that there had been a quarrel between the plaintiff and his people, and therefore that part of the statement can be held to be truly stated. But can it be said on the evidence that the quarrel is traced to the loan policy of the Western Government ?

On interpreting Exhibit F. there is an indication that the plaintiff at a meeting of Ijebu citizens is refuting certain allegations made against him. A portion reads.

> On the allegation that he was given a loan to finance his school Chief Odutola challenged the Western Nigeria Government to deny if he ever received more than £13,000 for the maintenance of the school which had cost him a little more than £50,000. He also denied that all the loans which the Government should have given to Ijebu-Ode citizens had been given to him alone.

Digressing here, it would not be correct to say that he was given any loan to finance any of his schools. There is clear and incontrovertible evidence that the Olu-Iwa College of which the plaintiff is sole proprietor and which is managed by a Board of Governors receives a grant, in common with other schools of that type in the Western Region. On Exhibit F., it is clear that it had been said at sometime or another that all loans which the government should have given to Ijebu Ode citizens had been received by the plaintiff only. It is also to be observed that the report is not confined to the matter of loans, for there is a reference to the finances of the Ijebu-Ode District Council. On the evidence it is clear that certain things had been alleged concerning loans, but could it be said that the quarrel could be pin-pointed to loans alone ? I would say not. Perhaps a more accurate way to have put it would be to say "partly" or "in part be traced to the loan policy....". But the matter would not have ended there. What is the Government's policy ? It has not been shown. In my view reference to the quarrel being due to the loan policy of the Government of the Western Region has not been accurately stated.

The next statement is :

> Here is a man because of his connection with the Action Group receives nearly ninety-five per cent of the loans so far given to Ijebu-Ode people.

This is in my view a statement of fact. It has not been shown that because the plaintiff is a member of the Action Group he has received almost ninety-five per cent of the total loans given so far to the people of Ijebu-Ode.—Indeed it has not been shown that the aggregate of the loans received by him is ninety-five per cent. This statement is therefore not truly stated. On the contrary, it is shown by the evidence of the Secretary of the Western Region Finance Corporation (P.W.2) that the plaintiff received *three loans only* from the Western Region Development (Loans) Board, the predecessor of the Corporation, and that the loans were not regarded as for Ijebu-Ode, but Ibadan. It has also been shown that the plaintiff received the following sums which have been secured in

each case :—£100,000 in 1950 ; £5,000 in the same year and £7,500 in 1951. All these were in connection with the establishment, running and buying of equipment for his tyre-sole business at Ibadan. These loans were granted under provisions of Ordinance 4 of 1949. This witness said under cross-examination that it was on the 9th August, 1952, for the first time, that it could be said that Action Group members were appointed to the Board as such. He said there was a majority of Action Group members on the Executive Council and they advised the Lieutenant Governor to nominate them. Prior to that date, the appointments to the Board were made by the Lieutenant Governor, after reference or advice from the Civil Secretary, Residents and District Officers. I gather that prior to that date there were officers on the Board and an expatriate—one Mr Barr—and African gentlemen. It is plain on the evidence that the first two loans were approved before the Action Group became the majority party under the McPherson Constitution in 1951. As we have seen these loans were approved in 1950. The third loan was applied for on the 29th November, 1951, and approved on the 31st December, 1951. If the Action Group Government had anything to do with the loans made to the plaintiff, it could have only been in respect of the last. It would be therefore a gross misstatement, even if it were true, that the Government gave loans on party connections only, to say as has been stated in the editorial, that he received *loans* in contradistinction to loan. It stands out boldly that the plaintiff received one loan only since the Action Group became anything like a government.

The statement :—"He applied for a loan to run his tyre-sole business : he received thousands" is an allegation of fact and is truly stated. There is evidence as we have seen that he got several thousand pounds for his business which is being carried on at Ibadan. The next statement : "He applied for more loans to subsidise his school : he again got thousands" is an allegation of fact. On the evidence the statement has not been truly stated. It is grossly false. Reference has already been made to this aspect; but I will dilate on it a bit. P.W.5., Ladipo Oshinnowo, Administrative Assistant, Ministry of Education, Ibadan, said that a building grant of £15,000 had been given to the Olu-Iwa College. He deposed that when a school is approved as a public school, and it becomes grant-aided it is eligible to receive a building grant not exceeding £15,000 ; and that there are about sixty such schools in the Western Region. He also deposed under cross-examination that he had a record to support his statement that the

Olu-Iwa School and Secondary Commercial College had not received any loans. The record was tendered and marked Exhibit Q. It was made quite clear by P.W.2 that loans are not given arbitrarily to people. He stated the four criteria. They are :

(I) the applicant must either have sufficient stake in the enterprise or that he has started in a small way.

(II) collateral security for the loan must be adequate.

(III) the business shows probability of being commercially viable.

(IV) management appears to be adequate.

He said the plaintiff satisfied all these. I have no hesitation whatever in accepting his evidence. How can it be stated then, that the plaintiff received loans because of his connection with a political party ? Exhibits O and O1 are two mortgage deeds executed in 1952 as securities for the loans given to the plaintiff. The witness said it was false to suggest that the loans were given to the plaintiff for no other consideration than his connection with the Action Group. In the light of the evidence, it is a gross inexactitude and a travesty to suggest that the plaintiff received loans because of his political affiliation. It is just as well to say that the evidence which I accept, show that the members who approved the loans were appointed in 1949 and the Chairman and Secretary were the Development and Assistant Development Secretaries respectively.

There is evidence, and I think it is to the credit of the plaintiff, that of the total sum of £22,500 with interest loaned to him, only £2,592-6*s*-0*d* was left unpaid on the 7th of January, 1958, the date of the publication, and even then that sum was not yet due for payment.

In my opinion the words : "Chief Odutola's case is just one out of so many where loans were given for no other consideration than party connections", are comment. Even if they are regarded as statements of fact and not comment, where are the facts to support the statement ? They do not exist.

The defendants have failed to prove the truth of all the allegations of fact. The defence therefore fails. In Kemsley *v.* Foot (ibid), Lord Porter said :

> In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails.

It seems to me that what was published was done with reckless indifference on the part of the defendants without caring whether the facts were true or not—this indicates the defendants' state of mind.

What has been published is libellous. There can be no doubt that the publication is capable of referring to the plaintiff, and did refer to him.

In my view the innuendoes alleged in paragraph 5 (*a*) and (*b*) arise from the publication. I thought P.W.6 a reliable witness. He has been a journalist for forty years, and although efforts were made to prove him prejudiced, he impressed me as a frank and truthful witness. He stated his reactions on reading the publication. He said among other things that he formed the impression that the plaintiff, like many other members of the Action Group, had obtained loans from the Government for no other reason than that they were members of the party. He also said that, when he read paragraph 3 of the editorial, he formed the impression that the plaintiff was using his position as a member of the Action Group to obtain loans from Government to finance his business and that 95 per cent of the loans given generally to Ijebu-Ode was taken by him alone. He said he was very shocked when he read that the plaintiff had got 95 per cent of the loan intended for his people.

In re-examination when asked :

> Upon reading paragraphs 3 and 4 of Exhibit A what opinion did you form of the plaintiff, when he got loans for no other consideration but party connections ?

He answered :

> I would think there was something shady about that.

He further said :

> I would think it was far from an honourable business loan.

In examination-in-chief P.W.9 said :

> The other parts of the editorial gave me the impression that the plaintiff was a selfish man, because it was stated that 95 per cent of the loans given to Ijebu-Ode was taken by the plaintiff.

I thought D.W.1, to whom I have referred earlier in this judgment, an equally truthful witness. I do not know why he was called by the defence, because he was not asked anything in examination in chief which could have *materially* advanced their case.

He was asked in cross examination, what impression he formed of the plaintiff after reading the first sentence in paragraph 4 of the editorial. He said that his impression was that the plaintiff used his position as a party man to get a loan for himself. He also said he formed the impression that the plaintiff was unbusinesslike, because there was no mention of any security given for the loans mentioned.

It is also my view that the innuendoes alleged in paragraphs 5 (*d*) and (*e*) arise. P.W.3 deposed that if any loans had been given to the plaintiff for the school it should have appeared in the books of the school. He said that the accounts do not show any loans received from the Government for the school. He added that the school received no loans at any time from any source. He formed the opinion that there was something fishy about the loans received by the plaintiff because they were not paid into the Funds of the school and they did not appear in the Accounts.

There is also the evidence of P.W.9 Olumuyiwa Odumo, a teacher at the Ijebu-Ode Secondary Commercial College. He formed the opinion that the plaintiff was a selfish man after having read the editorial.

I have not exhausted the evidence in support of these matters.

As regards the innuendoes alleged in paragraph 5 (*c*) and (*f*), I do not think they arise.

There is evidence that after the publication complained of, persons changed their opinion of the plaintiff. Much evidence was led on this aspect and the witnesses for the plaintiff were strenuously cross examined. Evidence was led to show that as a result of the publication he had not been re-elected Chairman of the Ijebu Divisional Council. The defence suggested that he was not re-elected because it was the policy of the Action Group party to, as it were, rotate holders of offices and those elected to local government bodies, and the Federal and Regional legislatures. This was denied. Was it a coincidence that the plaintiff was not re-elected, following the publication of the editorial, or was it the result? Exhibits B and C are letters which were written to the plaintiff after publication by the 7th and 8th P.W.s respectively. Exhibit B speaks of the witness being shocked, the writer in Exhibit B asked the plaintiff for a discussion and referred to two letters he had received—from Mr Sule and the other, Exhibit D, from D.W.1. Exhibit D speaks of a very strong reactionary group in the writer's District Council area who were against the re-election

of the plaintiff, because of the editorial. The writer expressed doubts of his support of the plaintiff's candidature. In cross examination D.W.1 said that the plaintiff was not re-elected Chairman because the reaction of the people in Ijebu-Ode was not favourable to him, as a result of the editorial. He said he formed the opinion that the plaintiff was a selfish man. I find that the plaintiff was not nominated for re-election on account of the article in Exhibit A. I must say, I have given some thought to this matter, as I was hesitant in acting on the evidence of the 7th and 8th P.W.s on this aspect, but I have been swayed by the evidence of D.W.1.

I have doubts about the evidence concerning the reaction of the students at the Olu-Iwa College.

I am satisfied that the plaintiff has been defamed.

Now comes the difficult question of damages. There is evidence which I accept that the newspaper in question has a wide circulation covering nearly all parts of the country and I must consider the rank and position of the plaintiff and that reflections were made on him in a newspaper with a wide circulation. There can be no doubt that he suffered embarrassment. I have not lost sight of the fact that slightly over a period of one year, since the publication that the plaintiff was made regent. The defendants are joint tortfeasors. I assess the plaintiff's damages against the two defendants at £1,000.

Judgment is therefore entered against both defendants for £1,000. They will also pay the plaintiff the costs of this action which are to be taxed.

HIGH COURT, LAGOS

EDEM ARCHIBONG .. .. APPELLANT

v.

INSPECTOR-GENERAL OF POLICE .. RESPONDENT

[High Court : DE LESTANG, C.J., 8th June, 1960]

(Appeal No. LD/50CA/60)

Practice—Case sent back to Trial Court to take Additional Evidence and Re-adjudicate—

S. 45 *High Court of Lagos Ordinance—Sentence.*

This case is reported solely on the question of practice when a case is referred to the trial court to take fresh evidence and re-adjudicate.

HELD : That when a case is sent back to a Magistrate to take additional evidence and adjudicate afresh the Magistrate must make a new finding and may pass a sentence differing from that he originally imposed.

C. K. Oyero for the Appellant.

Respondent not represented.

DE LESTANG, C.J.—The appellant was originally tried and convicted in the Magistrate's Court, Apapa, of demanding money with menaces with intent to steal and of theft of part of the money so demanded, namely £5, contrary to sections 406 and 309, Criminal Code, respectively. He was sentenced to concurrent terms of six months imprisonment. He appealed against his conviction and sentence and in the course of the hearing of the appeal obtained leave to adduce fresh evidence. The Appellate Court acting under section 45 of the High Court of Lagos Ordinance, referred the case back to the trial Magistrate to take such evidence and further directed the Magistrate to adjudicate afresh after taking the evidence.

After hearing fresh evidence the learned Magistrate again convicted the appellant of both offences maintaining the same sentence and again the appellant appeals against his conviction and sentence.

There is only one ground of appeal against conviction and it is that the decision is unreasonable or cannot be supported having regard to the evidence.

The case against the appellant which rests entirely on the evidence of the complainant P.W. 1 and his friend Miller Atunmojo, P.W. 2, is to the effect that on the 3rd December, 1958, the complainant was engaged by the Labour Department of Messrs U.A.C. and assigned to work under the appellant. The appellant told the complainant that if he wanted to retain his job he had to pay him £10 otherwise he would be sacked. Not having the necessary money the appellant called on his friend Miller with whose help £5 was borrowed from a female relative of Miller's. On the 5th

December at noon Miller met the complainant and appellant by arrangement at Iddo Motor Park and there in a shed the complainant paid over the £5 to the appellant promising to pay the balance at the end of the month. He was unable to keep his promise as (so he says) his entire pay packet for that month was stolen. On the 21st January, 1959, the complainant's employment was terminated partially at least on the unfavourable reports of the appellant. The defence was a complete denial of the prosecution's case coupled with an alibi which was disclosed at a somewhat late stage of the trial. The appellant alleged that on 5th December, 1958, he worked as foreman in charge of a gang which included the complainant on the ship *Eketian* which was on a floating dock approximately two miles away from the Iddo Motor Park, and that he was on that ship from 7.30 a.m. till midnight. He called fellow workmen to support his defence and also established by documentary evidence that he was paid for 15½ hours work on this ship for that day, *i.e.*, from 7.30 a.m. to 12 noon and from 1.00 p.m. to 12 midnight. It will be seen that the hours of work exclude the period between 12 noon and 1.00 p.m. and that it was during that period that the money was alleged to have been paid. It is plain, however, that if the appellant was on the ship until 12 noon he could not have been at Iddo Motor Park round about that time because it took between twenty-five to forty minutes, depending on the tide, to travel from the ship to the Motor Park.

The learned Magistrate however disbelieved the evidence of the appellant and of his witnesses that he never left the ship on that day at all. He also took the view that the fact that the appellant was paid for 15½ hours work on the ship on that day was not conclusive of his presence on the ship all the time because the method of ascertaining the hours of work was not fool-proof especially as the person who certified the time was not called as a witness. On the other hand he was impressed by the evidence of the complainant and his witnesses. Having carefully considered all the evidence it is impossible for this Court to say that the learned Magistrate erred in not finding the alibi proved. I am satisfied that the appellant and complainant could have met at Iddo Motor Park on that day between 12 noon and 1.00 p.m. They could have also absented themselves from work for a time without being noticed, especially as the appellant was the foreman in charge of the job.

The appeal against conviction accordingly fails.

The appellant also appeals against the sentence. The basis of this appeal is that in passing sentence at the second adjudication, the learned Magistrate was doubtful whether he had power to

impose a fresh sentence or whether he was bound to maintain the original sentence. He intimated that if the former were the case he would impose a fine of £15 or two months imprisonment in default on each count, but as he was not sure he maintained the original sentence of six months imprisonment. Learned Crown Counsel concedes, and I agree with him, that when a case is referred back to a Magistrate to take additional evidence and there is an added direction that he should adjudicate afresh thereafter the Magistrate must make a new finding and pass a fresh sentence which may or may not be identical with the previous finding or sentence. That being so learned Crown Counsel concedes that the sentence should be altered to that which the learned Magistrate would have passed had he correctly directed himself on the Law, namely, a fine of £15 on each ground and in default two months imprisonment, the terms of imprisonment to be concurrent. The sentence is altered accordingly and the appeal is otherwise dismissed.

HIGH COURT, LAGOS

J. A. SHOTE .. .. APPELLANT

v.

A. A. ADEYEMI .. .. RESPONDENT

[HIGH COURT ; DE LESTANG, C.J. ; 20th June, 1960]

(Appeal No. LD/24A/60)

Jurisdiction—Counterclaim in excess of Jurisdiction—Section 14 Magistrates' Court Ordinance—Power of Magistrate.

The facts appear sufficiently from the judgment.

HELD : That a counterclaim is in the nature of a cross action and the limitation on the jurisdiction of the Magistrates' Courts applies to a counterclaim as to an ordinary claim.

O. Harrison-Obafemi for the Appellant.

B. Alli-Balogun for the Respondent.

DE LESTANG, C.J.—This is an appeal by a defendant from the decision of the Chief Magistrate's Court striking out his counterclaim on the ground that it was in excess of the jurisdiction of the Court. The counterclaim was for £1,000 and section 14 of the Magistrates' Court (Lagos) Ordinance restricts the pecuniary jurisdiction of the Chief Magistrate's Court to £500.

The appellant contends firstly that a counterclaim is not an action but a special defence and that there is no pecuniary limitation on a Magistrate's Court jurisdiction to entertain any counterclaim. In my view this contention is wrong. A counterclaim is in the nature of a cross action and the limitation on the jurisdiction of the Magistrate's Court applies to it as to an ordinary claim.

The appellant also contends that the learned Chief Magistrate should not have struck out the counterclaim but should have acted under section 30 of the Ordinance and sought to transfer the case to the High Court.

It is sufficient to say that there was no application to transfer the case. Moreover in my view section 30 is not designed to apply to a case where the claim exceeds the jurisdiction of the Court.

This appeal is dismissed, with £10-10s-0d costs.

HIGH COURT, LAGOS

A. A. OJO SHAMONDA .. .. .. APPELLANT

v.

A. O. JAMES .. .. RESPONDENT

[HIGH COURT : DE LESTANG, C.J., 25th July, 1960]
(Appeal No. LD/30A/60)

Negligence—Action for Damages for Negligent Driving—Motor Car not driven by Owner—Presumption of Liability.

A Car belonging to J. and driven by X collided with a car belonging to S. which was properly parked on the highway. S. brought an action for damages against J. The Court dismissed the action on the ground that there was no evidence that X. was J's servant and that he was driving the car in the course of his employment.

HELD : That when a plaintiff in an action for negligence proves that damage has been caused by the defendant's motor car, that fact of ownership of the motor car is *prima facie* evidence that the motor car, at the material time was being driven by the owner, or by his servant or agent.

Cases referred to :

Barnard v. Sully 47 T.L.R. 557

Onuchuku v. Williams 12 N.L.R. 19

S. O. Okunribido for the Appellant.

A. A. Isikalu for the Respondent.

DE LESTANG, C.J. :—The plaintiff claimed damages for alleged negligence of the defendant's servant in the driving and management of the defendant's car whereby his own car was damaged. At the trial it was proved that the motor car admittedly owned by the defendant collided with the plaintiff's car which was properly parked on the roadway. The learned Magistrate, however, dismissed the plaintiff's suit on the ground that there was no evidence that the driver of the defendant's car was his servant and that he was driving the vehicle in the course of his employment.

The plaintiff appeals on the ground that the learned Magistrate erred in so holding and in dismissing the suit.

In my view there was abundant evidence that it was the defendant's car driven by the defendant's servant in the course of his employment which damaged the plaintiff's car. That evidence is to be found primarily in a document signed by the defendant himself after the incident, the first paragraph of which reads :—

> I, Chief A. O. James of P.O. Box 628, Ibadan declared that on the 25th day of December, 1958 went to a friend's house at Inabere Street, Lagos and on leaving there at about 8.30 p.m. with my car, my driver unknowingly drove the car and it gave some scratches to another car which was parking. The owner of the said car and I got into an agreement, and I promised to do the repairs at my own expense.

There is moreover the evidence of the plaintiff that on hearing the noise of the crash he went to investigate and found that the defendant's car with the defendant in it had collided with his car. The defendant begged him not to call the police and he eventually agreed.

The learned Magistrate appeared to think that a witness to prove that the driver of the car was a servant of the defendant and acting in the course of his employment should have been called. He seems to have lost sight of the principle that facts which are admitted do not require to be proved. But even if there had been no admission there was clear evidence from which the liability of the defendant could be properly inferred. It was held in *Barnard v. Sully* 47 *T.L.R.* 557 that where a plaintiff in an action for negligence proves that damage has been caused by the defendant's motor-car, the fact of ownership of the motor-car is *prima facie* evidence that the motor-car, at the material time, was being driven by the owner, or by his servant or agent.

Similarly following that case it was held in *Onuchuku v. Williams* 12 *N.L.R.* 19 that a Court was entitled to presume as a fact that the defendant's car was being driven by someone for whose negligence the defendant was responsible—there being no evidence called by the defendant to rebut that resumption.

As it was clearly proved in the present case that the car which caused the damage to the plaintiff's car belonged to the defendant and furthermore that he was in it at the time, the principles of those two cases apply to this case. This appeal accordingly succeeds. The proper order to make should be to send it back to the Court below to assess the damages. Unfortunately the

Magistrate who tried the case is no longer on the Bench and in the circumstances it would be in the interests of both parties since all the evidence is before me for this Court to assess the damages.

The plaintiff claimed damages as follows :—

	£	s	d
Special damages (repairs) ..	40	8	0
Special damage, loss of use, 4 weeks at £1 per day	28	0	0
General damage	16	12	0
Total	£75	0	0

I find the first item clearly proved. As regards the other two items, there was only the bare evidence of the plaintiff that he hired a taxi at £1 per day. One is accustomed to such claims in these cases and to discount such evidence. I would allow the plaintiff only £10 for the loss of use of his car and inconvenience caused whilst it was being repaired.

The appeal is accordingly allowed and the decision of the lower Court set aside together with the order for costs. Judgment will be entered for the plaintiff for £50-8*s*-0*d* damages with costs in the Court below assessed at 11 guineas and in this Court assessed at 16 guineas.

Appeal allowed.

FUJI TRADING CO. LTD. .. .. .. APPELLANT

v.

REGISTRAR OF TRADE MARKS .. .. RESPONDENT

[HIGH COURT : DE LESTANG, C.J. ; 1st August, 1960]
(Suit No. M/115/60)

Trade Mark—Application for Registration—Discretion of Registrar—S. 15 (1) *Trade Marks Ordinance—How Exercised—Principles Applicable—Sections* 13 *and* 25 *ID—*

The Registrar of Trade Marks refused to register a mark submitted by the appellant Company on the ground that it so nearly resembled another trade mark relating to goods of the same description, *viz.* bicycles as to be likely to deceive or cause confusion. The appellant appealed.

HELD : (1) The Registrar has a discretion to accept or refuse an application for the registration of a trade mark but such discretion must be exercised in accordance with the provisions of the Trade Marks Ordinance.

(2) The Registrar may refuse the registration of a trade mark in respect of any goods which so nearly resembles a registered mark belonging to a different proprietor as to be calculated to deceive.

(3) The onus of proving absence of reasonable probability of deception is on the appellant and he has failed to discharge that onus.

Cases referred to :

The Taendstikkek Case (1886) 3 *R.P.C.* 54).

Baschiera's T.... M.... (1889) 5 *T.L.R.* 480.

O. Aiyeola and *O. I. Alokolaro* for the Appellant.

Miss Kuye for the Respondent.

DE LESTANG, C.J. :—This is an appeal against the refusal of the Registrar of Trade Marks to accept an application by the appellant for the registration of a Trade Mark. The grounds of the refusal are the following :—

(*i*) The proposed mark so nearly resembles Trade Mark No. 3399 belonging to the Raleigh Cycle Company Limited which is already on the register that it is likely to deceive or cause confusion. Looking at the lay-out of the two marks as the public would regard them, the similarity in general is so apparent that the likelihood of confusion is not far removed.

(*ii*) The words "RALEIGH" and "RELIGION" which appear on the marks are incidental and in my view, by the resemblance in style in which the latter is portrayed, it is not sufficiently distinguishable from the former.

(*iii*) In arriving at my decision I have taken into consideration local conditions, the monogram in the centre, the main feature of which is the letter "R" common to both marks, is likely to mislead the public, particularly the illiterate section of the community. I am therefore of the opinion that the two marks are similar and likely to deceive or cause confusion.

The appellant appeals on the ground that "the Registrar's decision is wrong and unreasonable having regard to the distinguishing features apparent in the trade mark which is sought to be registered as compared with the trade mark described in paragraph 5 of the Registrar's ground of refusal (Exhibit A)," that is to say the registered trade mark belonging to Raleigh Cycle Company Ltd.

At the hearing of this appeal no evidence was called by either side except that the two trade marks in question were exhibited. On behalf of the appellant it was submitted that having regard to the many differences between both marks no person using ordinary care could be deceived by the proposed mark. The Registrar rested on his grounds for refusal.

As I understand the Law, section 15 (1) of the Trade Marks Ordinance (Cap. 217) gives a discretion to the Registrar to accept or refuse an application for the registration of a trade mark. Such discretion however must be exercised in accordance with the Ordinance so that no application may be refused unless it can properly be objected to under any of the provisions of the Ordinance such as under section 13 or 25. These sections read as follows :—

13. It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being calculated to deceive or otherwise, be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design.

25. Except by order of the court or in the case of trade marks in use before 30th March, 1901, no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive.

It would appear that here the Registrar exercised his discretion under section 25 although his reference to "confusion" is outside the ambit of that section and indeed of the Ordinance.

Two questions arise for consideration under section 25. The first is whether the goods in respect of which the appellant is seeking registration are the same or of the same description as those of the registered trade mark. There is no difficulty about this

since both marks relate to bicycles. The second question is whether, presuming use of the marks in a normal and fair manner, there will be a reasonable likelihood of deception among a substantial number of persons if the mark is allowed to be registered. The Registrar found that there was and in deciding whether he was right on this question it must be borne in mind that the onus of proving absence of reasonable probability of deception is on the appellant and that such onus is heavier when a mark is new as in the present case. It is also necessary to bear in mind that even though two marks, when placed side by side, may exhibit many and various differences, yet the net impression produced by both may be the same (*The Taendstikkek case* (1886) 3 *R.P.C.* 54) and the question whether a mark bears such resemblance to another as to be likely to deceive should be determined by considering what is the dominating characteristic of each (*Baschiera's T.....M.....* (1889) 5 *T.L.R.* 480).

With these principles in mind, I have examined both marks. There can be no doubt that they differ in many respcts and that no intelligent and educated person who has the opportunity of comparing them would be deceived but their general lay-out is the same. The dominating feature of each mark, *i.e.* the letter "R" surmounted by the head of a bird or an animal is very similar with the result that the general impression that would remain with any person seeing them apart at different time is likely to be the same. This, in my view, is particularly so in this country where a large number of likely purchasers of bicycles are illiterate and badly educated. They would be more impressed by the general lay-out and the leading feature than by the differences of detail. That being so I am not satisfied that there would be no reasonable danger of the public being so deceived and consider that the Registrar exercised his discretion properly. The appeal is accordingly dismissed.

HIGH COURT, LAGOS

DOMINION FLOUR MILLS LIMITED .. PLAINTIFFS

v.

ABIMBOLA GEORGE .. .. DEFENDANT

(Trading as Abimbola George & Sons)

[HIGH COURT : ONYEAMA J. : 12th August, 1960]

(Suit No. LD/338/1958)

Pleadings—Amendment—New Issue of Agency sought to be raised at the Hearing—Allegations of Illegality in Proposed Amendment.

The parties in this suit delivered their pleadings and the case proceeded to hearing. In the course of the hearing and after the plaintiffs' case was closed the defendant sought to amend his statement of defence by alleging illegality in the dealings in question in the suit, and alleging that he was the agent of the plaintiffs.

HELD : At the stage the hearing had reached such an amendment would be prejudicial to the plaintiffs. The court would limit its consideration to such evidence as was relevant to the pleadings as delivered.

Archibald MacFarlan for the Plaintiffs.

A. O. Bickersteth for the Defendant.

ONYEAMA, J.—The plaintiffs claim £8,528-14*s*-10*d* from the defendants as balance of purchase price due on a quantity of flour sold and delivered to the defendants. The same sum is claimed in the alternative as due on three promissory notes given by the defendants to the plaintiffs. Application was made for the claim to be placed in the Undefended List and the application was granted on the 10th December, 1958. On the 19th December, 1958, the defendants gave "notice to (*sic*) intention to defend" and filed an affidavit the material part of which is in the following terms :—

4 (*a*) When the market for flour was unfavourable to the defendants, the defendants held large stock of flour supplied by the plaintiff in anticipation of more favourable market. The plaintiff in a letter dated 6th March, 1958, which will be relied upon by the defendants states as follows :—

> In the circumstances then Mr George, my Co-Directors and I must ask you to go ahead and sell the flour for the very best price possible. With the quantity you appear still to have a price of between 20*s* to 25*s* per bale, according to condition and quantities being purchased, ought to meet your obligations.

The defendants acting in good faith upon this request by the plaintiff sold about 9,000 bags of flour at 20*s* per bag thereby incurring a loss of about 31*s*-9*d* per bag.

An order for pleadings was made and the parties filed and delivered their respective pleadings. The defendants delivered a counter-claim to which the plaintiff replied. The defendants

specifically admitted the following allegations in the Statement of Claim :—

1. The Plaintiff Company is a manufacturer and exporter of flour, having its principal office at Montreal in Canada, its agents in Nigeria and the United Kingdom being the firm of Eastwood and Sharples Limited.

2. The Defendants are the partners in the firm of Abimbola George and Sons, registered in Nigeria and carrying on business principally in Lagos as importers and merchants of flour and other commodities.

3. There has been a continuing series of business transactions between the parties hereto between 1956 and 1958 involving principally shipments of flour by the Plaintiff to the Defendants in Lagos to the Defendants' order, through the medium of the Plaintiff's agents Eastwood and Sharples Limited, the existence of the Plaintiff as the principal of Eastwood and Sharples Limited in these transactions being known to the Defendants throughout.

4. The payment system in use between the parties in respect of the transactions in flour above referred to were by way of the issue by the Defendants of promissory notes in favour of the Plaintiff, payable on demand, against shipments discharged at Lagos.

8. During 1957, the Nigerian flour market deteriorated, increasing stocks of unsold flour accumulated in the Defendants' possession, and payments against the promissory notes given by the Defendants in favour of the Plaintiff in respect of consignments of flour shipped became progressively more delayed. Nevertheless by November 1957 all promissory notes issued by the Defendants up to May 1957 had been paid. Thereafter, the promissory notes shown in Annexure "A" hereto as Nos. L.13, L.14, L.15, L16 and L.18 remained unpaid until the transfer to the Plaintiff, referred to in paragraph 7 hereof, of £10,508-5*s*-0*d*, together with the transfer of the balance shown in Annexure "B" hereto amounting to £124-9*s*-5*d*, and also the insurance claims totalling £104-3*s*-7*d* brought into account in Annexure "A" hereto, discharged promissory notes Nos. L.13 and L.14, and partly discharged that numbered L.15, as shown in Annexure "A".

At the hearing the defendants sought to raise a series of new issues particularly agency and illegality. In neither the affidavit filed with the notice of intention to defend nor the statement of defence did the defendants set out any acts tending to suggest illegality in the transaction between the parties.

After the only witness called for the plaintiffs had concluded his evidence-in-chief he was cross-examined by defence counsel who elicited what he considered evidence of some illegality in the transaction. I noted the evidence.

After the case for the plaintiff had closed and during the evidence of one of the defendants, facts were alleged which suggested that the defendants and the plaintiffs' attorney had improperly obtained import permits or had imported the flour in question in this case on permits belonging to other people.

I intimated that I would not consider the evidence as illegality had not been specifically pleaded. An application was then made to amend the statement of defence so that illegality might be made an issue in the case. I refused the application because I considered it would unduly delay the trial, and that to allow it at this stage would unfairly prejudice the plaintiffs who had concluded their case. I considered also that if there had been any *bona fides* in the defence of illegality, the facts on which it was founded would certainly have been pleaded in the statement of defence at the outset.

I similarly refused an application to add a new issue of agency to the defence especially when it had been admitted that :—

3. There has been a continuing series of business transactions between the parties hereto between 1956 and 1958 involving principally shipments of flour by the Plaintiff to the Defendants in Lagos to the Defendants' order, through the medium of the Plaintiff's agents Eastwood and Sharples Limited, the existence of the Plaintiff as the principal of Eastwood and Sharples Limited in these transactions being known to the Defendants throughout.

4. The payment system in use between the parties in respect of the transactions in flour above referred to were by way of the issue by the Defendants of promissory notes in favour of Plaintiff, payable on demand, against shipments discharged at Lagos.

This admission in the statement of defence filed impliedly negatives any suggestion of agency. I formed the opinion that the defendants sought to take advantage of every turn in the wind. Pleadings would lose their meaning if parties could trim their statements of claim or defence in the course of the trial so as to take advantage of the evidence as the case progressed.

I propose to decide the case before me in the light of such evidence as is relevant to the pleadings.

It is not denied by the defendants that the flour concerned in this case was supplied at the price set out in the claim and that it was accepted by the defendants. The defence is two-fold ; firstly, that the plaintiffs shipped flour after they had been told to stop further shipments ; secondly, that the defendants sold at a loss because the plaintiffs' attorney had told them to do so. Regarding the first point, the documentary evidence shows that the defendants requested one particular shipment to be cancelled ; they were told that the request was too late as the shipment had then been made : *see* Exhibit 9 and Exhibit 12. It is to be noted that no issue was made in the statement of defence, nor in the

counter-claim, of the fact that some of the goods supplied had not been ordered. In any case the goods were accepted by the defendants who took them into their store and gave promissory notes for their value. The defendants cannot now be heard to say that they had not ordered the goods. This disposes of the first line of defence. The second appears to me to have even less merit than the first. This defence is based upon a paragraph in a letter Exhibit 6A from the plaintiffs' attorney to the defendants, which reads :—

> In the circumstances then Mr George, my co-Directors' and I must ask you to go ahead and sell the flour for the very best price possible. With the quantity you appear still to have, a price of between 20*s* and to 25*s* per bale, according to condition and quantities being purchased, ought to meet obligations.

The defendants claim that this paragraph amounted to instructions and that they acted upon these instructions and incurred loss. I cannot myself see how this paragraph can be considered to be anything more than good advice to the defendants to cut their losses by selling "for the very best price possible". The paragraph immediately before the one in question clearly pointed out to the defendants :

> Our Principal's have also pointed out that if, because you are not able to realise full market price for the flour, there should be any difference in the amounts set out above, *e.g.*, any deficiency when all the flour is sold, then this must be for your account.

This made the position perfectly plain and it is idle for the defendants to urge that they were instructed to sell at a loss which was to be borne by the plaintiffs. Exhibit 6A was written on the 6th March, 1958; on the 14th August, 1958, the defendants wrote Exhibit 7, which in my view unreservedly admits liability and contains this pertinent paragraph regarding the matter of selling at a loss :

> You would remember that most of this Flours were sold at a very considerable reduced price, after consulting your accredited Representatives here, and after they have had several inspections on them, we were told to go on selling them at a considerable price ranging at a reduced price of 20*s* to 15*s* each sack, so as to avoid the whole goods to go bad, resting on this, that is why we decide and continued to sell at such a very low price, though we are not the only firm who sells at such a reduced price, but we are cognisance of the fact that the very contract has been contracted by us alone, but, yet still we do not think it would be out of the way on our part not to listen to such a talk which will assist us in getting something on the flour than loosing the whole. And even greater part of this flour were condemned by our Government Authority as unfit for human consumption, and as this lot in our stores are not covered by any Insurance on the storage, we are not in a position to obtain any Insurance on them. The loss which we have got to bear.

Nowhere in this plaintive appeal is it suggested that the loss was to fall on the plaintiffs either in whole or in part. The defendants clearly recognised that they had to bear any losses which might be incurred by a fall in the price of flour in respect of the quantity in their store. Indeed, once it was admitted or found that the flour was the property of the defendants the onus would be on them to prove circumstances giving rise to any liability in the plaintiffs for the loss of such goods. The general principle is that the owner of goods takes the benefit of the goods and bears the loss of the goods. Having listened to all the evidence and examined the mass of documents put in evidence, I find nothing in support of the contentions of the defendants. I find on the evidence, and all the documents satisfy me, that the flour was the property of the defendants, and therefore that the loss caused by a fall in the price of the flour must be borne by them.

The plaintiffs are entitled to the contract price of the goods sold and delivered and, accordingly, I enter judgment for them for the sum of £8,528-14*s*-10*d*, being the balance of the purchase price due on the flour supplied and covered by the promissory notes given by the defendants—Exhibits 3, 4 and 5.

The counter-claim is dismissed.

The defendants will pay the costs of the action assessed at 100 guineas on the claim and 20 guineas on the counter-claim.

OLUFELA C. SOWANDE .. .. PETITIONER

v

MILDRED B. SOWANDE .. .. .. RESPONDENT

[HIGH COURT : DICKSON, J., 26th August, 1960]
(Suit No. HD/37/1958)

Divorce—Desertion—Degree and Burden of Proof.

The facts are fully set out in the judgment.

HELD : (1) Desertion must be strictly proved, as is shown by the cases. There can be no doubt that the burden is high.

(2) The legal burden throughout is on the husband as petitioner to prove that his wife has deserted him without cause. The marriage has no doubt broken down, but that fact does not detract from the obligation of the petitioner proving his case ; nor from the duty of the Court satisfying itself that desertion has been proved.

Cases referred to :---

Pratt v. Pratt (1939) 3 *All E.R.* 437.
Kafton v. Kafton (1948) 1 *All E.R.* 435.
Fromhold v. Fromhold (1952) 1 *T.L.R.* 1522.
Smith v. Smith 1 *SW. and TR.* 360
Williams v. Williams (1943) 2 *All E.R.* 746.
Galler v. Galler (1954) 1 *All E.R.* 539.
Preston Jones v. Preston Jones (1951) 1 *All E.R.* 124.
Dunn v. Dunn (1948) 2 *All E.R.* 822
Hosegood v. Hosegood 66 *T.L.R.* 739.
Williams v. Williams 3 *SW and TR.* 547.
Bulcher v. Bulcher (1947) 1 *All E.R.* 319.
Wilkinson v. Wilkinson (1921) 26 *L.T.* 29.
Abercombie v. Abercombie (1943) 2 *All E.R.* 465.

Ayo Williams for the Petitioner.

B. Walker for the Queen's Proctor.

DICKSON, J.—In this suit the petitioner seeks the dissolution of his marriage to the respondent an American Negress and a citizen of the United States of America, on the ground of desertion.

The facts as deposed by the petitioner are briefly these :—

The petitioner is a Nigerian and married the respondent in London on the 20th September, 1936. Their respective ages then being 31 and 26 years. They co-habited in various places in London after their marriage. The marriage was consumated and there are two female issues of the union namely : BEVERLEY, born on the 11th September, 1937, and LEANNE, born on the 22nd March, 1939. Shortly after the outbreak of World War II in 1939 the United States of America Government offered passages to its citizens who wished to return to the United States. The respondent expressed a desire to take advantage of the offer. According to the petitioner, he persuaded her not to go as the younger daughter was only six months old. He further stated that he did not see the necessity for her to go away as they had only got married in 1936, and were just getting settled in married life. She left between October-November, 1939. He further stated that he gave her no cause to leave and does not know why she did. In answer to me he said that there was no reason why the respondent should return to the United States of America during World War II, that he had even arranged for her to have a home in Kent as he was liable to be called-up. In fact, he was called-up on active service and served in the Royal Air Force.

They corresponded after her departure for about three to four years, the respondent ceasing to do so at the expiration of that time.

He next saw the respondent and his children on a Sunday evening in March 1951, rather suddenly, after evening service at Kingsway Hall where he had been organist and choirmaster. According to a copy of a letter written by the petitioner to the respondent and marked Exhibit B. (of which more will be said), it could not have been in March that he saw them but in April of that year. They did not resume co-habitation. He said she told him that she was staying at Waterloo. He stated that he did not have a house then. He had only a room. He said that they spoke and he felt that she came to him for some reason of which he was not aware. After the War he tried to get her back but she did not come. They talked about the possibility of resuming co-habitation—he could not understand her attitude—she gave him the impression that she was hiding something. He could not hazard a guess why she came back. With her knowledge and approval he got the children to stay with him—"that through them we might be able to bridge the twelve years".

The respondent turned up one afternoon in the same year and took away the children.

The respondent returned to Nigeria in 1953 and took up an appointment on contract with the Nigerian Broadcasting Corporation as Head of Music and Musical Research. He visited the United States of America under the auspices of the United States of America State Department in 1957. The respondent reading of his visit wrote him and asked for a meeting. According to the petitioner they met; the respondent's letter is Exhibit C. The petitioner also put in a letter which he wrote to the respondent whilst in New York which is marked Exhibit E.

During the hearing I invited the assistance of the Queen's Proctor; he was asked to send counsel to argue certain points, namely: whether there has been unreasonable delay in presenting the petition: and whether the refusal of an offer made by a respondent spouse in a desertion matter before the commencement of the three years' period immediately preceding the presenting of the petition, would operate against a petitioner in obtaining relief.

I have approached the consideration of this case with much concern and anxiety. The petition poses a difficult problem. My task is made the more difficult because the suit is undefended. There are certain observations which I desire to make now, as they are matters which necessarily are to be borne in mind when considering the case. First, there seems to be an erroneous impression because a suit is undefended the duty of a petitioner and counsel is mitigated. The fact that the petition is unopposed in no way absolves the petitioner from the obligations of discharging the burden of proof imposed on him. *See Pratt v. Pratt* (1939) 3 *All E.R.* 437 at page 438. Cohen, L.J. (as he then was) said in *Kafton v. Kafton* (1948) 1 *All R.E.* 435, at page 437, that the need of corroboration is necessarily greater in an undefended case than in a defended case, where the evidence of the petitioner, though uncorroborated, is decided by cross-examination and can be measured against the evidence on the other side.

On the point of corroboration, in *Fromhold v. Fromhold* (1952) 1 *T.L.R.* 1522, Dening, L.J. (as he then was) said at pages 1526-1527:

> It is true the Divorce Court as a rule requires corroboration whenever it can be obtained..... The Divorce Court, of course, hesitates long before granting a divorce on the sole and unsupported testimony of a petitioner. It likes it to be supported by other evidence, and the supporting evidence which it requires depends on the circumstances of the case.

Of course, it is quite plain that a court will not necessarily refrain from pronouncing a decree simply because the evidence is uncorroborated.

Secondly, desertion must be strictly proved, as is shown by the cases, some of which will be referred to. There can be no doubt that the burden is high. In one of the early cases—*Smith v. Smith* 1 *Sw. & Tr.* 360 (164 *English Reports* 766) the Lord Chancellor said :

> The petitioner in this case is the wife and she prays for a dissolution of her marriage by reason of the adultery of her husband, coupled with desertion without reasonable excuse for two years and upwards. It is necessary that the court should be very strict in regard to the proof of the circumstances which enable the wife to obtain a decree of dissolution of marriage. It is essential in this case, as a foundation of the decree prayed, that the petitioner should show clearly and satisfactorily that there has been desertion.

In *Williams v. Williams* (1943) 2 *All E.R.* 746 at page 752, Du Parcq, L. J. said :

> Desertion without cause is no technical offence. It is nothing less than a total repudiation of the obligations of marriage. The law can never regard it lightly. The court should always insist that it must be strictly proved.

In *Galler v. Galler* (1954) 1 *All E.R.* 539 at page 540, Hodson L.J. (as he then was) referred to the case of *Preston Jones v. Preston Jones* (1951) 1 *All E.R.*, page 124, and in particular to the words of Lord MacDermott :

> I am unable to subscribe to the view which though not propounded here has had its adherents namely, that on its true construction the word 'satisfied' is capable of connoting something less than proof beyond reasonable doubt.

Hodson, L.J. went on to say that the subject was the word "satisfied" in section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by section 4 of the Matrimonial Causes Act (now section 4 (1) of the Matrimonial Causes Act 1950). He said that he thought the courts of this country (England) may be taken to have come down on the side of the view that there was no distinction to be drawn between the word "satisfied" standing alone and the word "satisfied" accompanied by the words "reasonable doubt". He referred to the speech of Lord Simonds in which he expressly assented to and adopted the language of Lord MacDermott. Lord MacDermott said :

> The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict enquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be 'satisfied', in respect of a ground for dissolution, with something less than proof beyond reasonable doubt.

Now, a word about the burden of proof. I am content, and I think it necessary to refer to one case only—*Dunn v. Dunn* (1948) 2 *All E.R.* page 822. At page 823 Denning, L.J. said :

> The legal burden throughout this case is on the husband as petitioner to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause but it is not bound to do so. Once he proves the fact of refusal she may seek to rebut the inference of desertion by proving that she had just cause for her refusal, and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court still has, at the end of the case, to ask itself : Is the legal burden discharged ? Has the husband proved she deserted him without just cause ?

The marriage has no doubt broken down, but that fact does not detract from the obligation of the petitioner proving his case, nor from the duty of the court satisfying itself that desertion has been proved. I mention this specifically because it has been urged in another case before me with temerity, because both parties had prayed for a dissolution of the marriage, the court without any further ado should proceed to dissolve the union. On this point, Denning, L.J., said in *Hosegood v. Hosegood* 66 *T.L.R.* at page 739 :

> We are not at liberty to grant a divorce simply because a marriage has utterly broken down. It may be a good thing if we could grant a divorce after long years of separation even if separation was originally by agreement or some cause short of cruelty : but the statute does not permit it.

Now, in view of the large variety of circumstances and modes of life involved, the courts have discouraged attempts at defining desertion, there being no general principle applicable to all cases : 12 Halsbury (3rd Edition) page 241, paragraph 453. This attitude is illustrated both by two earlier and recent cases. In *Thompson v. Thompson*, 1 *Sw. & Tr.* 233, the Judge Ordinary said :

> There is a difficulty in the defining "desertion" ; and cases may arise in which it would be very difficult to say whether the facts proved would fall within the meaning of this statute.

In *Williams v. Williams* 3 *Sw. & Tr.* 547 the Judge Ordinary said :

> It is not easy to define 'desertion'. To desert is to forsake or abandon. But what degree or extent of withdrawal from his wife's society constitutes a forsaking or abandonment of her ? This is easily answered in some cases not necessarily in others, for the degree of intercourse which married persons are capable to maintain with each other is various. It depends upon their walk in life, and is not a little at the mercy of external circumstances.

In actual desertion the spouse charged must be shown to have abandoned the matrimonial consortium in fact and to have done so with the intention of deserting. In constructive desertion the

spouse charged must be shown to have been guilty of conduct equivalent to driving the other spouse away: *Buchler v. Buchler* (1947) 1 *All E.R.* 319 at page 320.

Lord Greene M.R. (ibid) said that it is as necessary in cases ot constructive desertion as in cases of actual desertion to prove both the *factum* and the *animus* on the part of the spouse charged with the offence of desertion. He goes on to say that in each case the intention may of course be inferred if the circumstances are such as to justify the inference. He stated that in the cases of actual desertion the mere act of one spouse in leaving the matrimonial home will in general make the inference an easy one.

Mr Walker, Senior Crown Counsel, who appeared for the Queen's Proctor, intimated that he would at the outset deal with the latter question put by the court. He argued the point obliquely by submitting that on the evidence, there was no desertion on the part of the respondent, and such evidence as there is, shows in Exhibit B., if anything, the petitioner deserted the respondent. In the circumstances he submitted the question of a *bona fide* offer to return did not arise. He argued, if there was desertion, Exhibit B. shows there was a *bona fide* offer, and it was refused. He submitted by that refusal the petitioner himself has committed desertion.

Mr Williams, for the petitioner, contended that the act of the respondent in leaving the United Kingdom for the United States of America in 1939 showed an intention to put an end to co-habitation. He however stated that something might be said for the period 1939/1951, but desertion during the later period could not be doubted. He further submits that there was no evidence of a distinct offer to return, and no evidence of *bona fides*.

It is my view that the petitioner has not placed the facts of this case as fully as a spouse seeking a dissolution of his marriage should do. There are gaps in the history of the lives of this couple. It is my opinion that many things which should have been said by the petitioner are left untold. The petitioner is not as frank as he should be. It is not out of place to mention the words of Lord Birkenhead in *Wilkinson v. Wilkinson* (1921) 26 L.T. at page 29:

> It is the duty of every petitioner in this court to place the facts of his or her case most fully before the court.....

He goes on to speak about the consequences of a failure in dealing with the court with the utmost good faith. Granted, he was dealing with a matter upon the exercise of the court's discretion

where the petitioner had committed adultery—notwithstanding, that duty is not mitigated in other aspects of divorce proceedings by a petitioner.

I propose to deal now with the period 1939/1951. Now, the act of desertion requires two elements on the side of the deserting spouse, namely : the *factum* of separation and the *animus deserendi*. The petitioner, as we have seen, said he did not consent to the respondent going to the United States of America at the outbreak of war, he did not know why she left and he gave her no cause. If his story, which is uncorroborated, is true, it follows that on his side (that is to say the side of the deserted spouse) there was the element of the absence of consent. I would have no difficulty in finding that the respondent took advantage of the offer made by the Government of the United States of America and returned to her native country soon after the conflict had begun in Europe. The petitioner has not stated in evidence exactly when in 1939, after the outbreak of war, the respondent left ; but in his petition he says that it was about the month of November. He deposed that it was between October and November of that year that he joined the Royal Air Force. The question to be asked is : Whether or not that separation is attributable to an *animus deserendi* on the part of the respondent ? There is nothing in the record indicating that from the date of their marriage to her departure there had been any matrimonial differences. Here is a coloured woman about twenty-six years of age at the time, with two young children, a foreigner as it were, a husband already called-up or at least soon to be conscripted, faced with the hostilities of nations in Europe ; and at the same time an opportunity arises whereby she might return to her native land with her children—to a country which is far removed from the hostilities. I would find it difficult in these circumstances to hold that up to the time she left England in 1939 that she did so with the intention of permanently putting an end to the marriage. Everyone knows with what savagery the war was fought and in England civilians were very much in the front line. Those events were foreseen, and no doubt that is why the Government of the United States of America offered the passages to its citizens. It is my judgment that when the respondent left England in 1939, there was no *animus deserendi* on her part. I take the view that she left in the interests of herself and family and her action was not unreasonable.

The petitioner says that he sent her money through the Royal Air Force until regulations made it impossible ; and they had corresponded for a period of 3-4 years. During his evidence the

petitioner at first (in my view) gave the impression that the respondent did not correspond with him, later he said : "I heard from her for a while after she left and then stopped. She ceased writing about 3 to 4 years after.". It might well be that at first he was inclined to be disingenous, but on second thoughts changed his attitude. His only reason for his first action, could only be an attempt to portray her adversely. In passing, it may be said that some light might have been thrown on their attitude if the petitioner had produced some of the letters he had received from her during that period. Insofar as the record is concerned, there is almost a vacuum in the story, except that the petitioner says after the war he tried to get her back but she would not come. If he made an attempt to get her to return at the end of hostilities which would have been in either 1945 or 1946, as the war ended respectively in Europe and Asia in those years, there would have been some correspondence between them, none of these has been produced. It is observed that the petitioner is a person who has been keeping copies of correspondence between himself and his wife, for example Exhibits B. and E. He is the only party before the court and he has told nothing about this particular period, except that he tried to get her back. He has not mentioned whether he arranged for the payment of passages.

Mr Walker submits that three facts emerge : (I) at the cessation of hostilities it would have been impossible for the respondent to have returned before 1947, in view of transport difficulties ; (II) children at school (they would have been respectively, at the cessation of war, about 9 and 7 years of age) ; (III) cost of transportation. He submits that these are important questions, and if there was a discussion of the respondent returning each one of the above problems would have had to be overcome in some way. They would have dominated the lives of these people at about that time. A not unimportant matter is that of housing.

It is not unreasonable to presume, having regard to the common course of events, the children were at school and would be there for several years. Their up-rooting would not have been very easy. In all probability, immediately after the war, they and the respondent would have had to experience a more austere way of life as England was nearer the scene of hostilities and had suffered more than the United States of America. The girls would have had to commence at a new school. The upheaval would not have been easy.

We now come to the year 1951. According to the evidence, the respondent suddenly turned up on a Sunday evening in April at the Kingsway Hall with the two children. It is quite clear to anyone that the mere fact that the respondent was able to find the petitioner there, would strongly suggest that there had been correspondence between them about that time. This is made abundantly clear in Exhibit B. The petitioner, to use his own words, said he never fathomed why she came back and he could hazard no guess. Here again, I must say that he is not being frank. Mr Williams suggests both *sotto voce* and in his address that she returned for the purpose of getting money from the petitioner. Exhibit B. is an important document and when read its implication is clear. It is far fetched to suggest that the respondent came to England with her children to extract money from the petitioner. In the first place the petitioner did not say so ; surely, if that had been the case, he would have said so, but as I said before he has been lacking in candour on this aspect and refuses to admit the purpose of her advent. Secondly, I hardly think that the respondent would have expended monies on passages for herself and daughters, who were then 14 and 12 years respectively, for the purpose of extracting money from the petitioner.

The first paragraph of Exhibit B. implies that either the respondent herself or someone, but certainly not the petitioner, had paid for the passages. It might be well to quote the letter :

Mrs Mildred Sowande,
288 Camden Road, N.7.

25c Lexham Gardens,
Kensington, W.8.
April 25th, 1951.

My dear Mildred,

I was very surprised to see you, Beverly and Leanne so unexpectedly last Sunday evening, as I was not aware you had left America somewhere around the 14th April. However, I was glad to see you, and to go back with you to the Hotel where you were then registered, for a short while.

My letter to you of March 27th, which you confirmed on Sunday that you had received in New York, was not a definite refusal on my part to consider the possibility of our coming together; I was not altogether sure whether—if and when we did meet—there might not be a slim chance of giving the idea a trial ; but the two meetings we have had since your arrival, *i.e.* on Sunday at York Hotel, and yesterday at the above address, have left me with the one clear and distinct impression that you and I are, really, strangers one to the other. I find no points of contact ; I can quite believe you when you say that I have altered ; I am quite sure you have. Perhaps it is not to be expected that it should prove otherwise. However, I feel quite convinced now that I must honestly regard any attempt on our part to set up home together as foredoomed to eventual failure. I do not intend to consider it any longer as a possibility.

I wish however to remain good friends, and would like to see Beverly and Leanne as time permits in an effort to get really to know them. I would like to know that you have no objection, and would be glad to have a reply to this letter.

As ever,
(Signed) FELA SOWANDE.

It is clear that the petitioner had been in communication with the respondent before she left the United States of America. He refers to a letter of the 27th March which he had written to the respondent. It is plain from the exhibit that someone had put forward an idea, that is to say, the resumption of co-habitation ; and that person is the respondent. Exhibit B. indicates a qualified answer. It seems to me that before the 27th March, 1951, there had been correspondence between the parties concerned and an offer to return and I do so find. I also find that the offer was made by the respondent, and as she left America on the 14th April, she must have in March taken active steps herself for transporting herself and her children to England. I take the view that on the evidence that at that stage of April, 1951, there was no *animus deserendi* on the part of the respondent. It has already been pointed out what is the nature of the onus of proof, and on whom it lies. It is my judgment, that on the state of the evidence, it has not been proved with that high degree necessary, that at any time between 1939 and April 1951, there had been *animus deserendi* on the part of the respondent.

The next phase to consider is whether the respondent has deserted the petitioner since 1951. I am satisfied on the evidence that the respondent desired to resume marital relationship with the petitioner. In Exhibit B. he made a definite refusal towards a resumption of married life ; and in his evidence he says that during the period the respondent was in England in 1951 he had no marital relationship with her. In respect of Exhibit B., according to his evidence with the knowledge and approval of the respondent he got the two girls to stay with him. He got a room for them where he stayed. He said he did this that through them, they might be able to bridge the twelve years. This is somewhat in conflict with Exhibit B. He states in reply to me, that he does not remember if there was a reply to Exhibit B., and adds that it was after Exhibit B. that the children came to him. He stated that he also procured a room for the respondent, when he discovered that the one at Waterloo was not good. It is plain that the parties were not living in a state of affairs which amounted to having a matrimonial home. Having regard to my finding that the petitioner has not satisfied me that the respondent was in desertion from 1939-1951,

it is unreasonable that the petitioner should have refrained from establishing matrimonial relationship with the respondent. As was pointed out in *Abercombie v. Abercombie* (1943) 2 *All E.R.* 465 at page 469, there can be resumption of co-habitation without necessarily going under the same roof. In this case, the parties did not live under the same roof, and on the petitioner's own showing he did not consider marital relationship had been resumed. In passing, the question might be asked, why did not the petitioner also receive the respondent under his roof as he had done to his daughters? If through the unreasonable attitude of the petitioner, by denying the respondent of the matrimonial state of affairs to which she is entitled, it is my judgment that in the circumstances the respondent cannot be said to be in desertion. It is not clear exactly after Exhibit B., when the daughters went to live with their father. We know Exhibit B. is dated 25th April, 1951, and although it is not in evidence when the respondent left with them it appears from the petition that it was in July 1951. The petitioner has not told the court for how long a period the respondent was left in uncertainty. The position would either be, that for a long or short period, after the 25th April, the respondent was labouring under the categorical refusal in Exhibit B., or on the other hand, it might have been a long or short period of waiting for the years to be bridged by the girls. If the respondent did allow the daughters to stay with their father it is evident that she was really anxious to have resumed a matrimonial state. It was a bold move on her part, for no doubt the petitioner had been living a self-centered existence and there is no evidence that he knew how to look after girls of the ages of 14 and 12 years. It would be unreasonable to have expected the girls of that age to be living for any length of time with the father under those circumstances. The petitioner has not said under what circumstances they left.

Another aspect is, if the evidence that the children stayed with the petitioner with the knowledge and approval of the respondent that through them the twelve years might be bridged, can be interpreted to mean that they were living separate by mutual consent, then it would seem that there could not be desertion until there had been a resumption of co-habitation. In any event, the respondent on leaving in 1951 did not appear to have withdrawn from an existing matrimonial state of affairs, because, on the evidence, the petitioner refrained from establishing such, and in my view, it can hardly be said that she departed against his will. It is my judgment that the petitioner has not satisfied me that the respondent is guilty of desertion and therefore the petition is dismissed.

If I am held to have erred in finding that between 1939 and 1951 there was no desertion it is my judgment that from the context of Exhibit B, there was an offer which was *bona fide* and which was refused. Exhibit B, indicates there was an *animus revertendi*; accompanied by notification to the petitioner. There is also evidence of the factum of return, not only to the United Kingdom, but to the very city in which the petitioner lived. There is also evidence that the respondent sought out the petitioner. I can hardly conceive that in the circumstances of this case the respondent would have crossed the Atlantic with her children, no doubt incurring expenses, with no other but a genuine desire to resume the matrimonial state of affairs. The petitioner's conduct, as Mr Walker has rightly said, was anything but a complete and unconditional acceptance of the respondent's offer to return. The divorce jurisdiction admits of a *locus poenitentiae*, and a deserted spouse is not justified in rejecting a *bona fide* offer which is reasonable. If he does he becomes the deserter. I see nothing unreasonable in the offer of the respondent as implied in Exhibit B.

In *Pratt v. Pratt* (ibid), a wife had admittedly deserted her husband in 1934. In 1936, she wrote asking him to meet her and discuss the future. In 1938, the husband petitioned for divorce on the ground of desertion, it was held that by refusing to meet his wife when she requested him to do so the husband caused the desertion to continue or prevented the possibility of its termination. In the circumstances, therefore, he had failed to discharge the burden imposed upon him by proving desertion without cause for the statutory period.

Mr Walker has said that in Exhibit C, a letter written to the petitioner whilst in New York in 1957, by the respondent, there was this statement :

> I say this to assure you that my wanting to contact you has absolutely nothing to do with any designs, any requests or any such annoying things.

may very well be indicative of some reason other than a *bona fide* reason for wishing to join the petitioner in 1951. He also refers to the statement in the same letter :

> I am only trying to say that I hope you do not hold any mistakes I have made against the children.

I am unable to see in what way the first statement might be referable to the respondent's *bona fide* in 1951. Mr Walker has said that it would have been helpful if the petitioner had stated

what the respondent meant by those statements. One thing which is clear throughout these proceedings is that there is no allegation of misconduct on the part of the respondent apart from the alleged matrimonial offence of desertion. Spouses do make mistakes, but not every error is a grave one. There must be wear and tear in the matrimonial status. Reference to divorce is also made in that letter, but in its context it does not necessarily mean that the writer has been guilty of a matrimonial offence. In passing, it may be said that lay people have queer ideas on matters appertaining to divorce, and persons on the other side of the Atlantic, are likely to refer to matters which may give cause to divorce proceedings in their country, but not in England or in Nigeria.

Exhibits G and H, letters from the respondent to the petitioner's mother, do show that she is wishing to maintain a close link with the petitioner's family.

Delay does not arise in view of my findings.

It is my judgment that for the reasons stated that the petition be dismissed.

DR G. B. A. COKER .. .. PLAINTIFF

v.

O. ANIMASHAWUN .. .. DEFENDANT

[HIGH COURT, DE LESTANG C.J.; 29th August 1960]
(Suit No. LD/101/58)

Family Property—sale of—Conveyance by one Branch only—Voidable—whether Native Land Convertible into Fee Simple Estate.

A piece of land belonged to family E which was divided into two branches. One branch purporting to act for the whole family conveyed the land to C for an estate "in fee simple absolute and in possession". A few years' previously a member of the other branch had purported to sell the land as being his own to A. The questions for discussion were whether tenure under Native Customary Law can be converted into a fee simple estate and who had the better title, C or A.

HELD : (1) A conveyance in English form of land held under native customary tenure purporting to convey an estate in fee simple and using words of limitation appropriate thereto may properly convey a fee simple estate.

(2) Although C's title was voidable and defensible at the instance of the now existing branches it was better than A's which was completely void.

Cases referred to :—

Boulos v. Odunsi (1958) *W.R.N.L.R.* 169.

Thomas v. Holder 12 *W.A.C.A.* 78.

Johnson v. Ojobaro (unreported *W.A.C.A.* 3238 of 7.12. 1950).

Oshodi v. Balogun 4 *W.A.C.A.* 1 at pages 2 and 6.

Williams and others v. Onayade, Suit No. 410/54 unreported.

H. A. Lardner for the Plaintiff.

M. A. Odesanya for the Defendant.

DE LESTANG, C.J.—In this action the plaintiff claims three things, namely :—

(*a*) a declaration that he is the owner for an estate in fee simple absolute of the piece or parcel of land being and situate at Shiro Street, Ikorodu Road, in the mainland of Lagos, which is more particularly described on an Indenture of Conveyance dated the 21st March, 1958.

(*b*) £50 damages for trespass by the defendant on to the said land.

(*c*) an injunction restraining the defendant his servants and/or agents from further trespassing on the said land.

The defendant resists the claims on the ground that the land belongs to him and that at all material times he was in occupation of it.

I find the facts to be as follows : The property in suit forms part of a large area of land belonging originally to the Eyisha family under Native Law and Custom. In or about 1911 disputes arose within the family which, as a result split into two branches—the Fafumi branch and the Osu Apena branch. One Aboki Bada was at one time the head of the Fafumi branch. After his death a woman was appointed head of the branch but she was subsequently replaced by Aboki Bada's son, O. S. Bada. In 1945 O. S. Bada purported to sell and by an indenture of conveyance duly registered to convey a portion of land which consists, if not the whole, part at least of the property in suit to the defendant. The defendant took possession of the land but did not occupy it or do anything with it until 1948 when he allowed one John Baro to plant corn and cassava on it. It is alleged that the defendant placed one or two sign-boards on the land indicating that it belonged to him and that he had the land fenced, but I am unable on the evidence as a whole to find these allegations proved. John Baro cultivated part of the land for a few years but it is clear from the evidence of the surveyor, which I accept, that there were no signs of cultivations on it in 1955 or 1957. On the 19th December, 1957, the head of the Osu Apena branch and three other members of that branch purported to sell the property in suit to the plaintiff. The plaintiff went into possession, appointed a neighbour, who was also a member of the Osu Apena branch as caretaker, caused the land to be cleared and a sign-board bearing his name to be erected on it. He also caused a shed to be erected on the land. By an indenture of conveyance dated 21st March, 1958, the same four vendors purporting to act as representatives of the Eyisha family conveyed the land to the plaintiff for an estate "in fee simple absolute and in possession". On the 24th March, 1958, the defedant went on to the land with a large number of workmen and began to dig and prepare foundations for a building. In the process the sign-board which the plaintiff had erected at a cost of £3-10*s*-0*d* disappeared.

These briefly are the material facts giving rise to this action.

It is contended for the defendant that as the plaintiff derives his title from the Eyisha family, in whom title is vested by Native Law and Custom, he cannot be entitled to a declaration of title to an estate in fee simple absolute. In support of this contention the defendant relies on *Boulos v. Odunsi* (1958) *W.R.N.L.R.* 169, which purports to follow *Thomas v. Holder* 12 *W.A.C.A.* 78 and *Johnson v. Ojoharo* (unreported W.A.C.A. 3238 of 7th December, 1950). *Boulos v. Odunsi*, being a decision of the High Court of the Western Region of Nigeria, is not binding on this Court,

although it is of course entitled to the highest respect. Moreover it purports to follow decisions of the West African Court of Appeal, which in my view are not directly in point. While there are, true enough, passages in both *Thomas v. Holder* and *Johnson v. Ojobaro* which tend to suggest that tenure under native customary law cannot be converted into a fee simple estate merely by a conveyance in English form, these were however unnecessary for the decisions in both cases which indeed proceeded on other considerations. English Common Law and Statutes of general application in force in England on the first day of January, 1900 apply in Lagos alongside native customary Law and it cannot be doubted that fee simple estates exist in Lagos. The Courts have so held in a large number of cases and our law provides for such estates. For example the Registration of Titles Ordinance contains provision for the compulsory registration of fee simple estates.

How then are such estates created ? I venture to suggest that just as in England a fee simple estate is created by the use of certain words of limitation in the document of title, so in Lagos land held under Native tenure may become fee simple when it is alienated by means of a conveyance in English form expressed to convey a fee simple estate. Ownership of land by native law and custom is, as is well-known, absolute ownership and in theory at least more extensive than a freehold estate in fee simple. Our Law recognises the right of Natives to have their transactions regulated by English Law. Section 26 (3) of the High Court of Lagos Ordinance provides that "no party shall be entitled to claim the benefit of any native law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be exclusively regulated otherwise than by native law and custom or that such transactions are transactions unknown to native law and custom."

It is well settled that a purchaser of land held under native law and custom can acquire an absolute title equivalent in all respects to a fee simple estate. As the Privy Council said in *Oshodi v. Balogun* 4 *W.A.C.A.* 1 at page 2 :—

> In olden days it is probable that family lands were never alienated ; but since the arrival of Europeans in Lagos many years ago a custom has grown up of permitting the alienation of family lands with the general consent of the family ; and a large number of the premises at Lagos on which substantial buildings have been erected for the purposes of trade or permanent occupation have been so acquired. These alienations in the great majority of cases have been to persons not members of the family to whom the lands have been allotted, and their Lordships see no reason for doubting that the title so acquired by these purchasers was an absolute one

and that no reversion in favour of the chief was retained. In recent times the title deeds have been made out in English form and duly registered according to law, and their Lordships do not intend to express any doubt as to the validity of these titles.

Again at page 6 the following passage occurs :—

To prevent misconception it seems desirable to state that the present decision is not based on any doubt as to the possibility of a title equivalent to a fee simple being obtained as the result of a sale of family lands with the general consent of the family.

For these reasons I consider that a conveyance in English form of land held under customary native tenure purporting to convey an estate in fee simple and using words of limitation appropriate thereto may properly convey a fee simple estate. As the plaintiff's conveyance was in such a form the defendant's contention fails.

The second question is, who has the better title ; the plaintiff or the defendant ? It is contended by the plaintiff that the conveyance to the defendant is void because it purports to convey land expressed to belong to Aboki Bada when in fact it belongs to the Eyisha family. In my view this contention is well founded. There can be no doubt and it is indeed admitted on both sides that the land belongs to the Eyisha family. Therefore, except as a member of the family, Aboki Bada had no title or interest in the land. The purported sale of the land as being his by his son on behalf of the members of Aboki Bada's family is consequently void and of no effect (*Williams and others v. Onayade*, Suit No. 410/54, unreported). But what about the title of the plaintiff ? The evidence shows that the sale to the plaintiff was effected and the conveyance executed by four members of the Osu Apena branch and, although they described themselves as the principal members and the representatives of the Eyisha family, they are in reality members and representatives of the Osu Apena branch of the family. It is also evident that the head of the Fafumi branch not only did not but indeed refused to take part in the sale. It is therefore plain that the sale to the plaintiff was not by the whole family but by one branch thereof. In such a case it is well settled that the title acquired by the purchaser is not perfect but voidable and defeasible at the instance of the non-consenting branch. It is clear, nevertheless, that the plaintiff has a better title than the defendant and the question for decision is whether in these circumstances the Court may properly grant the plaintiff a declaration of title. I am not aware of any case in which the Court has declared a voidable title valid and in my view it would not be right to do so. Having found however that the plaintiff has a better title than the defendant, who has none at all, I consider that the entry of the defendant on the land which was then in the possession of the

plaintiff was wrongful and without justification. The defendant is accordingly responsible for the destruction of the plaintiff's sign-board valued at £3-10*s* and also liable for general damages for trespass. The amount claimed by the plaintiff is most reasonable and I allow it. As the plaintiff has failed to establish his title this is not a proper case in which to grant an injunction. In the result the plaintiff's claim for a declaration of title is non-suited and the claim for an injunction is dismissed but judgment will be entered against the defendant for £50 damage for trespass. As both parties have been partly successful I will make no order as to costs.

HIGH COURT, LAGOS

SULE SALAMI IDOWU, ASANI SALAMI IDOWU .. .. PLAINTIFFS

v.

SAMSON TALABI ONASHILE .. DEFENDANT

[HIGH COURT : ONYEAMA J. ; 7th September, 1960]
(Suit No. LD/55/1960)

Mortgage—Mortgagor in Possession—Liability for Mesne Profits—What are Mesne Profits—Quantum of.

Defendant was the mortgagor of premises which were sold to the plaintiffs under the mortgagee's powers of sale. The defendant who was in possession paying no rents failed to give up possession when he was notified of the sale and requested to give up possession by the purchaser.

HELD : The plaintiffs were entitled to mesne profits which is another term for damages for trespass. These would be calculated on what rents or profits the defendant might have received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort of trespass which he had committed.

Cases referred to :—

Bramwell v. Bramwell (1942) 1 *All E.R.* 137.

G. L. Impey for the Plaintiffs.

O. Moore for the Defendant.

ONYEAMA, J.:—The issue of possession in this suit has already been decided in favour of the plaintiffs and it now remains to deal with the claim for means profits.

The plaintiffs claim mesne profits from the 14th January, 1960, although their writ was issued on the 25th of February, 1960. I think that the plaintiffs are entitled to mesne profits from the 8th February, 1960, for the principle in *Elliott v. Boynton* (1924) 1 Ch. 236 appears to me to apply to tenants holding a lease only. The date 8th February, 1960, was the date on which the plaintiffs requested the defendant to give up possession. When the defendant refused or neglected to give up possession he became a trespasser from that date.

On the evidence, the ground floor of the house in question fetches £500 a year as rent. This is £41-13*s*-4*d* a month. The first floor is occupied by tenants who pay a total of £17-10*s* a month. The second floor, comprising four rooms and a parlour, is occupied by the defendant who pays no rent. On the basis of the payments made by the tenants of the first floor, a room and parlour on the second floor would fetch £9 and each of the three rooms left would fetch £3-5*s* as rent in a month.

It is true the defendant pays no rent, but as Goddard L.J. (as he then was) said in *Bramwell v. Bramwell* (1942) 1 *All E.R.* 137 (at page 138) ".... mesne profits is only another term for damages for trespass." Mesne profits have been defined as the "rents and profits which a trespasser has, or might have, received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort, which he has committed." *See* Wharton's Law Lexicon 14th ed.

I am of the opinion that in calculating the sum payable as mesne profits the yearly value of the premises is the proper basis of calculation and not the actual sum received by the trespasser.

The rents which the defendant would have received if he had let the entire house in question, based on his own figures, is about £935 a year, or £77-18*s*-4*d* a month.

I therefore enter judgment for the plaintiffs for £77-18*s*-4*d* a month as means profits from the 8th February, 1960, until possession is delivered up to them by the defendant.

The defendant will pay the costs of the suit which I assess at 150 guineas (including £75-7*s*-10*d* out-of-pocket expenses).

HIGH COURT, LAGOS

B. T. BANWO .. .. PLAINTIFF

v.

A. G. LEVENTIS & COMPANY LIMITED .. DEFENDANTS

[HIGH COURT : DICKSON, J, 19th September, 1960]

(Suit No. LD/281/1958)

Action for declaration—Deed of Mortgage void for Illegality—Alternatively Guarantee unenforceable on ground of concealment or Deceit—Indebtedness of Principal Debtor. Practice—Facts shewing illegality either by Statute or Common Law, or Statute of Frauds to be specifically pleaded—O. 19R. 15 (English Rules)—Court will take notice of Illegality though not pleaded.

The facts are fully set out in the judgment.

HELD : (1) Applying the principle laid down in the case of *London General Omnibus Company v. Holloway* (1912) 2 K.B. 72, there was no duty cast on the defendants to disclose to the surety that the principal debtor had overdrawn his account, since there was nothing in the contract between them and the principal debtor which was unusual or may not have been reasonably anticipated by the surety. Further, the mere non-disclosure of the sum of £66-0*s*-0*d* in excess of the limit of the debt guaranteed, would, in the circumstances of the case, be insufficient to enable the plaintiff to succeed in avoiding the contract. Therefore, the guarantee contained in the Mortgage deed could be enforced against the plaintiff as surety.

(2) On the evidence before the Court the transaction between the defendants and principal debtor was not a money lending transaction within the meaning of the Moneylenders Ordinance, and therefore the Mortgage deeds were not void for illegality.

Per Curiam : Facts relied on for the purpose of bringing the transaction within the Moneylenders Ordinance should be stated, for example, (*i*) Moneylending transaction ; (*ii*) void on the ground of moneylending.

Matters of this nature should be specifically pleaded : *see* O.19 R.15 (English Rules). The subject has, however, been raised in a nebulous manner in the writ of summons under the umbrella of the word "illegality". Though the plaintiff has not complied with the rules of pleading, the Court cannot close its eyes to a transaction if it is illegal. The old and well-known legal maxim applies : "*Ex turpi causa non oritur actio*". *See* per *Cozens-Hardy M.R.*, IN *re Robinson's settlement*, (1912) 1Ch. 724 ; and *Sajan Singh v. Sardara Ali* (1960) 1 *All E.R.* 172.

Cases referred to :

Hamilton v. Watson 8 *E.R.* 1339.

London General Omnibus Co. v. Holloway (1912) 2 *K.B.* 72.

Lee v. Jones (1864) 17 *C.B.* (*N.S.*) 482.

United Africa Co. v. Jazzar 6 *W.A.C.A.* 208.

In re Robinson's Settlement (1912) 1 *Ch.* 724.

Sajan Singh v. Sardara Ali (1960) 1 *All E.R.* 269.

O. Somolu for the Plaintiff.

J. G. Bentley for the Defendants.

DICKSON, J. :—The plaintiff's writ of summons reads :—

The plaintiff seeks against the defendants a declaration that the Deed of Mortgage dated 9th day of April, 1950 and registered in the Deeds Registry, Lagos, as No. 45 at Page 45 Volume 856 and a Deed of Further Charge dated 8th day of April, 1954 and registered as No. 34 at Page 34 Volume 997 in the Deeds Registry, Lagos, made between the plaintiff and the defendants are void for illegality and therefore cannot be enforced, *alternatively*.

The plaintiff seeks a declaration against the defendants that his guarantee as contained in the latter of the two deeds mentioned above cannot be enforced against him on the ground of material of concealment or deceit by the said defendants at the time of its execution by him.

Pleadings were ordered and filed. In paragraph 2 of his Statement of Claim, the plaintiff avers that he entered into a deed of mortgage with the defendants as guarantor to one S. A. Olayode, who was then to be engaged as a produce buyer of the defendants. Paragraph 3 avers that the defendants in entering into the agreement with the plaintiff Olayode made it a consideration of the agreement that if Olayode should default in his account by way of shortages both the plaintiff and Olayode would be required to pay the shortages with interest calculated thereon. Paragraph 4 avers that in the month of April 1954, the defendants induced the plaintiff to enter into another deed of mortgage, by which the limit of the plaintiff's guarantee was raised to £1,500, without disclosing to the plaintiff the previous shortages. The defendants in their statement of defence admit paragraph 4 of the statement of claim, save that the allegation concerning failure to disclose previous shortages to S. A. Olayode is denied. They state further that the plaintiff was aware of the shortage. At the hearing they gave no evidence supporting the allegation that the plaintiff was aware of the shortage, but Mr Bentley relied upon the law as set out in the authorities of which more will be said. In short, among other things, he submitted in effect that there was no duty having regard to the circumstances of the case cast on the defendants to disclose.

The facts are that in April 1950, as evidenced by Exhibit A (Mortgage Deed) the defendants agreed to employ S. A. Olayode as a produce buyer in their business upon the plaintiff giving security by way of mortgage to the extent of £500 ; and in consideration of the plaintiff and Olayode promising jointly and severally to pay within one month after demand in writing, all shortages in cash,

losses, charges, etc., which the defendants may sustain by reason of dishonesty, misconduct, neglect or default of the said Olayode together with interest thereon fixed at 10 per cent. Cash advances were made from time to time, and in turn Olayode brought in produce. In April 1954, it was decided to increase the limit of the advances to £1,500; and on the 8th April of that year, a supplemental mortgage deed (Exhibit B) was executed, giving effect to this. On the same day, a sum of £1,300 was advanced Olayode. The statement of account has been put in as Exhibit K. It is shown on Exhibit K that as at the 1st of April, 1955, Olayode was owing the defendants £1,328-18*s*-2*d*. The defendants, according to D.W.3 closed down their produce business in Lagos in 1954, and Olayode's account was closed on the 31st March, 1955. His last delivery of produce was on the 26th March. On the 3rd May and 1st August, 1958, notices were despatched to the Plaintiff and Olayode, informing them that £1,540-2*s*-7*d* was owed by the latter on his trading accounts and intimating that if the default was made in paying this sum in one calendar month, the power of sale would be exercised. A notice was also affixed to the mortgaged premises on the 2nd April, 1958. There is no evidence before me whether there has been an actual sale.

It is contended by plaintiff's counsel that on the 1st April, 1954, the date nearest to the execution of Exhibit B when an account was struck, the defendants had already paid £556-4*s*-1*d* to Olayode, which was a sum in excess of the amount guaranteed. He asks the question whether that had been done with the consent of the plaintiff, and submits if not with the consent of the plaintiff at the time of execution of Exhibit B, it must be disclosed.

Digressing here a while, it is observed throughout Exhibit K that there have been cash advances by the defendants on the one hand, and the delivery of produce by Olayode on the other hand. The accounts also show that subsequent to the 1st April, that is to say, on the 6th and 8th April, there had been deliveries of 65 and 124 bags of produce respectively. Between the 3rd and 6th April, there had been three advances of relatively small sums. No one would contend that the delivery of 65 and 124 bags of produce before the 8th April were of no value. The value of deliveries during any one month is shown only in total at the end of the month, and not the value of each delivery.

Reverting to Mr Somolu's submission, he contends that there was a non-disclosure on the part of the defendants. If I understand him correctly he is saying that since the plaintiff's liability was

limited to £500, and in fact the account shows £66-4*s*-1*d* in excess as at the 1st of April, it was the duty of the defendants to have disclosed that fact. I shall quote him :

> If the liability was less than the guarantee given by the plaintiff, *i.e.*, under £500 there is no duty to disclose or even if it were unlimited.

Mr Bentley for the defendants submits that the only guarantee requiring complete disclosure is a contract of insurance ; and states guarantees fall into two categories (*i*) Fidelity and (*ii*) Cash facilities, for example, bank advances. He submits that the advances in the present case are analogous to bank overdrafts.

The authorities show that there is a distinction between suretyship for the fidelity of a servant and a guarantee in respect of a cash account. The two cases most often cited on this point are : *Hamilton v. Watson* 8 E.R. 1339 ; and *London General Omnibus Company v. Holloway* (1912) 2 K.B. 72. In the former case, Lord Campbell said at page 343 :

> Your Lordships must particularly notice what the nature of the contract is. It is suretyship upon a cash account. Now the question is, what, upon entering into such a contract, ought to be disclosed ? and I will venture to say, if your Lordships were to adopt the principles laid down, and contended for by the appellant's counsel here, that you would entirely knock up those transactions in Scotland of giving security upon a cash account, because no bankers would rest satisfied that they had a security for the advance they made, if, as it is contended, it is essentially necessary that every thing should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given, to state how the account has been kept : whether the debtor was in the habit of overdrawing ; whether he was punctual in his dealings ; whether he performed his promises in an honourable manner—for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure ; and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect ; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires.

In the latter case Farewell, L.J. ; at page 82 expressly pointed out that there is a wide distinction between a case where there is suretyship and cases which have been cited of guarantees for overdrafts given to bankers. He referred to *Hamilton v. Watson* and so did Kennedy, L.J. He continued :

Dishonesty may occur, and the guarantee is given to ensure against the chance, but guarantee for overdrafts are required for the purpose, and not on the chance, of being used. A man may have the misfortune to be robbed by his servant in the course of his business ; if he is, it is a mischance ; but it is perfectly legitimate and usual for a man to carry on his business on borrowed money, including money borrowed from his bankers by way of overdraft, and the surety knows this, and becomes surety for the very purpose of enabling him to do so. There is nothing in such a case which the surety does not know as well as any other member of the community, and nothing therefore which needs to be disclosed to him. The surety may well complain "I did not know that your servant was a thief" ; but he cannot be heard to complain "I did not know your customer had been overdrawing his account or what the nature of his business was".

Kennedy, L.J., said at page 85 :

The surety who was sued had given to a banker an obligation to be responsible for a cash credit granted by the banker to one of his customers. At the time when the surety was asked to sign, and did sign, the bond, the customer was already indebted to the banker for the full amount of the credit and interest thereon, and payment had been requested by the banker. The surety, when he signed the bond, was not informed of the dealings between the banker and his customer. The House of Lords (the Lord Chancellor Lord Brougham and Lord Campbell) held that, neither fraud nor misrepresentation being even alleged, the mere non-disclosure to the surety of these dealings constituted no ground of defence to the action brought by the banker against the surety.

Then at page 87, quoting Story :

If a party knowing himself to be cheated by his clerk, and, concealing the fact, applies for security in such a manner, and under such circumstances, as holds the clerk out to others as one whom he considers as a trustworthy person ; and another person becomes his security, acting under the impression that the clerk is so considered by his employer ; the contract of suretyship will be void ; for the very silence, under such circumstances, becomes expressive of a trust and confidence held out to the public, equivalent to an affirmation.

He goes on :

On the other hand, in the case of the suretyship or guarantee of a financial account, the previous pecuniary dealings between the creditor and the person whose future liability the surety is invited to secure constitute only extrinsic circumstances. They may be material circumstances, such as might affect the judgment of the person who is asked to be surety. But, in the language of Sir Frederick Pollock (Principles of Contract, 8th ed., p. 568), 'the creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the suretyship relates ; and on this point there is no difference between law and equity.' The bank or other creditor cannot reasonably be taken as affirming, by mere silence respecting earlier dealings, the financial ability of the person whom the proposed surety is asked to guarantee.

Finally, he says at page 88 :

Blackburn J. in stating his reasons for his judgment in the Exchequer Chamber in *Lee v. Jones* clearly held that there was no obligation on the creditor to disclose to the surety every circumstance within his knowledge material for the surety to

know, and pointed out that in his opinion great mischief would ensue if the law imposed upon the creditor any such obligation.

The honesty of the servant, which is the subject matter of a surety bond is an intrinsic circumstance.

Kennedy, L.J. in *London General Omnibus Company v. Holloway* referred to Story's Equity Jurisprudence and said that according to the author there is apparent, at the outset of the comparison the difference between intrinsic and extrinsic circumstances, the first forming the very ingredients of the contract, and the latter forming no part of it, but only accidentally connected with it, or rather bearing upon it, so as to enhance or diminish the price of the subject-matter, or to operate as a motive to make or decline the contract. He continues: "In regard to such extrinsic circumstances, no class of case occurs to my mind in which our law regards mere non-disclosure as a ground for invalidating the contract, except in the case on insurance.

Now, in the local case of *United Africa Company v. Jazzar* 6 *W.A.C.A.* 208; a case which Mr Bentley submits is on all fours with this suit, the plaintiff had agreed to employ one Naoum in the trade or business as a produce buyer, in consideration of the defendant promising to indemnify the plaintiffs against all losses, charges, etc., which might be suffered by the company owing to the dishonesty, misconduct, etc., of Naoum. It was alleged by the defendants in that case who sought to avoid the contract that, at the date of the agreement it was not disclosed to the defendant that the person guaranteed was already indebted to the plaintiff. In the judgment of the W.A.C.A. it was said that the case appears to come within the reasoning of Farewell L.J. in his opinion expressed in the Court of Appeal in *London General Omnibus Company v. Holloway*. The Court then quoted the passage at page 82, to which I have already referred. Mr Somolu submits that the case can be distinguished in that, the liability was less than guarantee given. In my view, the argument is not sound.

The plaintiff was not inclined to be frank. I formed the impression he was reluctant to admit anything which might be favourable to the defendants. On one occasion there was hesitation to an obvious answer which could have been given without any difficulty, and was only elicited after pressure. The question was, "What was the purpose of your standing surety?". I do not for one moment believe the plaintiff when he says he did not know that balances were struck from time to time. He denies knowledge of the system of buying produce, but admits that it is the system for cash to be advanced to produce buyers, and knows that the

buying agents make regular advances to the produce buyers and monies returned when produce is brought in. He also knew that monies were advanced to Olayode for the purchase of produce. He made no enquiries from the defendants although he had the opportunity of doing so. In my view it cannot be said that the plaintiff did not know that the relationship between the plaintiff and Olayode was that of creditor and debtor, and that a debit balance was an ordinary incident of the relations between the defendants and Olayode. He ultimately admitted that the purpose of the guarantee was to guarantee the refund of monies given to Olayode. It is quite clear, that the additional security was required for further advances to be made : and as Mr Bentley had said that, the very fact that on the 8th April, 1954, when the further charge was executed, the largest advance was made, namely £1,300 is corroboration of the statement that the additional security was for the purpose of securing further advances. It cannot be suggested on the evidence that its purpose was to provide security for past advances. Indeed, the plaintiff admitted that the additional security was given not because Olayode's account was not good, but that he might acquire more funds for the purchase of produce. The plaintiff went on to say in cross examination, if Olayode's account was bad the defendants would not have asked him to give additional security.

Another aspect of the case is, that it appears from the evidence that there would have been no "default" at the time the further charge was given, for according to the evidence a floating outstanding debit against a produce buyer, would not be a "default". The 4th D.W. whose evidence I accept said : "We usually advance to produce buyers an amount as large as the security or a little more". He went on to say, looking at Exhibit K, the balance outstanding at the beginning of April was £566-4*s*-1*d* and at that date the guarantee was exceeded only by £66 odd, which is not bad.

The plaintiff said that Mr Leventis told him, Olayode, was a very good boy and that he should increase the amount. I do not believe this evidence. Against this, Mr Leventis (D.W.4) said so far as he could recollect he saw the plaintiff once, and cannot recollect whether he said Olayode was a good boy. I regard this statement as an afterthought. From the plaintiff's point of view it would not be an unimportant matter, and if the statement had been made, one would have expected to find it in the pleadings. It would have been a matter of direct misrepresentation and maybe fraud. Even if those words were said, they would not have been enough to support the verdict, on the plea, of fraud, unless it was

further established that the defendants made the inaccurate representation intending to deceive the plaintiff, and induce him to enter into the contract, in the belief that what was represented did exist whilst the plaintiff knew it did not exist : *Lee v. Jones* 144 E.R. 204 per Blackburn, J.

There has been a suggestion of misrepresentation in this case, but it has not been pleaded. We have already seen above, what Kennedy, L.J. had to say in *London General Omnibus Company v. Holloway* at page 85 on this aspect, when he referred to what the House of Lords (The Lord Chancellor, Lord Brougham and Lord Campbell) held. There was no duty on the defendants to disclose any of those facts, since there was nothing in the contract between them and Olayode which was unusual or may not have been reasonably anticipated by the plaintiff and surety.

It is my judgment that the mere non-disclosure of £66 in excess of the limit, or a debit balance of £566 odd, would, in the circumstances of this case, be insufficient to enable the plaintiff in succeeding in avoiding the contract. Much has been said about Statutory Notices. This matter is irrelevant to the present claim. Had it been a claim for an injunction it would have been different. Mr Somolu seemed to have recognised this, because he says this issue is immaterial to his case, resting his case on non-disclosure of a material fact. Much evidence has been laid on the subject and I will therefore make a few comments. In so far as Exhibits G and G2 are concerned I am satisfied that they reached the plaintiff's address, and it is not unreasonable to infer that he refused to accept them, knowing no doubt that they emanated from Messrs Irving and Bonnar, the defendants' solicitor. The fact that these notices despatched by registered post were returned undelivered through the post office, the service would be ineffective : *see* Conveyancing and Law of Property Act, 1881, s. 67 (4). However, the defendants gave evidence that a notice was affixed on the property in question. As I have said before there is no evidence whether the property has been sold, and if so, when. The exercise of the power under Lord Cranworth's Act, has been abridged to three months by Exhibit A. If the sale took place on the 30th September, 1958, as shown in advertisement Exhibit D, the three months' period would not have expired as the notice was affixed on the 2nd August, 1958.

Mr Somolu submits that the defendants having admitted Para. 1 of the Statement of Claim they have therefore admitted that they are not licensed money lenders. He submits further that since

they are not licensed money lenders, Exhibits A and B are tainted with illegality and they are therefore void. The averment in his pleading is very sparse. The facts relied on to bring the transaction within the Ordinance should be stated, for example, I. Money lending transaction, II. Void on the ground of money lending.

Matters of this nature should be specifically pleaded ; *see* 0.19 R.15 (English Rules). The subject has however, been raised in a nebulous manner in the writ of summons under the umbrella of the word illegality. Though the plaintiff has not complied with the rules of pleading the court cannot close its eyes to a transaction if it is illegal. The old and well-known legal maxim applies : "*Ex turpi causa non oritur actio*" : see per Cozens-Hardy M.R., *in re Robinson's settlement* (1912) 1 Ch. 724 and *Sajan Singh v. Sardara Ali* (1960) 1 *All E.R.* 269.

I have considered the law, the relevant documents and the circumstances of this case and hold this is not a money lending transaction within the meaning of the Ordinance. Indeed, in *Moriarmo Odfu v. Sick* 15 *N.L.R.* 4, where a guarantee was given by way of mortgage, there was a stipulation similar to the instant case charging £10 per annum interest, should the company sustain any loss, etc., by reason of the misconduct, neglect or default of the employee. Neither did counsel nor the court in that case raise it as an issue.

In view of what I have said before it is my judgment that the claims be dismissed with costs assessed at 35 guineas.

HIGH COURT, LAGOS

LEMOMU AMBALI AND ANOTHER .. APPELLANTS

v.

B. O. AJETUNMOBI .. .. RESPONDENT

[HIGH COURT, DE LESTANG C.J. ; 26th September, 1960]
(Appeal No. LD/29A/60)

Appeal—Question of Fact—Principles on which Court Acts—

This is an appeal on facts.

The facts are irrelevant and are set out fully in the judgment.

HELD : That the principles upon which the Court acts in an appeal on facts are the following :—

(1) The burden of showing that the trial judge was wrong lies on the appellant.

(2) Since an appeal is a rehearing of the case the Court must consider the materials before the trial judge and make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong.

(3) The Court should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect and be slow to reject a finding of primary facts (as opposed to inference of fact) especially when the finding is based on the creditability or demeanour of a witness.

B. Alli-Balogun for the Appellants.

J. O. Ojosipe for the Respondent.

DE LESTANG, C.J.—This is an appeal from a decision of the Magistrate's Court, Lagos, awarding £105 damages to the respondent against the appellants jointly and severally.

The respondent's case was that he was the tenant of a room at No. 27 Isalegagan Street, Lagos, at which he used to store boxes of electric bulbs ; that on the 27th April, 1957 the appellants broke into the room and removed his goods as a result of which some were damaged and some were lost. He claimed from them £200 damages for trespass to his goods.

The appellants' case was a complete denial that the respondent rented a room or stored goods at No. 27 Isalegangan Street. They alleged that the room in question was occupied by one of the appellants under a tenancy agreement with the landlady of the premises. They also denied interfering with respondent's goods at any time.

The learned Magistrate after reviewing some of the evidence said this :—

I have carefully examined the evidence adduced on both sides. I have also observed the demeanours of each witness including the parties.

I believe the evidence of the 1st and 2nd witnesses for the plaintiff and the plaintiff himself. Their story is very simple and the evidence adduced by him in support of the story is harmonious.

Mr Martin's evidence is his true observations when he was acting for the Ogunro family but these observations fell short of the actual incident of this case, *i.e.*, trespass on the material date by the Defendants.

After carefully considering all the circumstance in this case I am unable to accept the total denial of the two defendants *vis a vis*, the evidence adduced in this case.

I find the two Defendants jointly liable in this case.

I award the sum of £105 as General Damages against both Defendants jointly and severally to be paid to the plaintiff.

The appellants appeal on the ground that the decision is against the weight of evidence. This is, therefore, an appeal on facts and the principles upon which an appeal Court acts in such an appeal are well settled and have often been stated by this Court. Firstly the burden of showing that the trial judge was wrong lies on the appellant. Secondly, since an appeal is a rehearing of the case the Court must reconsider the materials before the trial judge and make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong.

Thirdly, the Court should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect and be slow to reject a finding of primary facts (as opposed to inference of fact) especially when the finding is based on the creditability or demeanour of a witness.

It is contended for the appellants that the learned Magistrate should not have believed the evidence in support of the respondent's case because he could not prove that the landlady had accepted rent from him and because there was conflict on one point between the respondent's evidence and that of one of his witnesses.

It is true that the receipt for rent which the respondent produced was in respect of rent paid to the rent Board and there was no evidence that the landlady had received the rent. This receipt was however produced without objection and the learned Magistrate

does not specifically rely on it in his judgment. Apart from it there was the oral testimony of the respondent and of that of his witness to the effect that his goods were stored in a room in the premises in question. That being so it is impossible to say that but for the receipt the learned Magistrate would not have accepted the evidence of the respondent and his witnesses.

The alleged discrepancy relates to the evidence of respondent and one only of his witnesses. The respondent in cross-examination said that he had previously made a friendly loan to this witness but had been repaid. The witness said that he had never had any loan from the respondent but had purchased goods from him on credit. He added that the respondent could have described it as a loan. It will be observed that the discrepancy is not a very serious one and is foreign to the matter at issue between the parties. There is further nothing to show that the learned Magistrate did not bear it in mind in coming to his decision.

The learned Magistrate had before him two contradictory versions both supported by evidence. He chose to believe the respondent's and it is impossible for this Court to say that he was wrong. That being the position, applying the above principles, the appeal fails and is dismissed with costs assessed at £7-7*s*-0*d*.

HIGH COURT, LAGOS

JOHAN ARNOLD JOSEPH NUNNINK .. PLAINTIFF

v.

COSTAIN-BLANEEVOORT DREDGING LIMITED .. .. DEFENDANT

[HIGH COURT: DICKSON J.: 12th October, 1960]

(Suit No. LD/321/1959)

Master and Servant—Wrongful Dismissal—Onus of Proof where Incompetency Alleged.

The defendants under a written contract had engaged the plaintiff as Head of their Administrative Department in Nigeria. His duties were virtually those of Chief Accountant. Within one year of the plaintiff's engagement, the defendants terminated the contract of employment by dismissing him on the ground of incompetence or incapability. In an action against the defendants for wrongful dismissal, it was argued that if the employers are genuinely dissatisfied with the plaintiff's work, the dismissal is justified and whether or not they had good reason is immaterial. It was further submitted that the onus was on the plaintiff to show that the defendants were in fact satisfied or that they could not as reasonable men have been dissatisfied.

HELD: That in a case of wrongful dismissal where incompetency is alleged, the onus is on the master to prove incompetence. The whole question is whether there is justification for the dismissal. There is no rule putting the burden on the plaintiff to show that the defendants were in fact satisfied.

Cases referred to :—

Diggle v. Ogston Motor Company (1915) 112 *L.T.* 1029.

Clouston v. Corry (1906) *A.C.* 122 *and* 129.

G. E. Shyngle for the Plaintiff.

J. G. Bentley for the Defendants.

DICKSON, J. :—The plaintiff's writ of summons reads :

1. The plaintiff was employed by the defendant company as Chief Accountant under an agreement in writing dated 5th January, 1959 for a period of eighteen (18) months from the 7th February, 1959 at a salary of £1,680 per annum.

2. The defendant, by letter dated 25th September, 1959, wrongfully terminated the said employment by dismissing the plaintiff therefrom and refusing to employ him any longer.

Wherefore the plaintiff claims from the defendant £3,078-0*s*-0*d* damages, whereof £2,298-0*s*-0*d* is special damages and £750-0*s*-0*d* general damages.

It is averred in paragraph 3 of the statement of claim that by an agreement in writing, dated the 5th January, 1959, between the plaintiff and the defendants, that the plaintiff should serve the defendants in the capacity of Head of the Administrative Department in the defendants' business in Nigeria for a fixed term of

18 months from the date of his arrival in Nigeria, or until his service is determined in accordance with paragraph 16 and 17 of the agreement. The salary per annum stated in this averment is the same as that mentioned in the writ of summons. Exhibit 1 is the agreement. Paragraph 2 avers that the plaintiff arrived in Nigeria on the 7th February, 1959, and served the defendants in the said capacity until the 31st October, 1959, when the defendants wrongfully terminated the plaintiff's employment by a letter dated the 25th September, 1959. The letter is Exhibit 4. Paragraph 5 avers that the termination of the plaintiff's service was not in accordance with Articles 16 and 17 of Exhibit 1, and was not justified by any other article in the said agreement. In effect a portion of Article 17 states that the employment can be legally terminated at all times either by mutual agreement, or if the termination takes place either on account of a pressing reason within the meaning of the provisions of the Netherlands Civil Code, it must be notified to the employee immediately.

The defendants by paragraph 3 of their Statement of Defence admit paragraph 3 of the Statement of Claim. Paragraph 4 of the Statement of Claim is admitted save and except that the defendants wrongfully terminated the plaintiff's employment. Paragraph 5 of the Statement of Defence denies paragraph 5 of the Statement of Claim, and avers that the plaintiff was dismissed for inability which is a pressing reason within the meaning of the Netherlands Civil Code which is in accordance with the provisions of Clause 17 of the agreement. It is convenient at this stage to refer to the evidence of Mr Norbart (D.W.4) Vice-Consul of the Netherlands in Lagos, who gave evidence as an expert in Dutch Law. He deposed that in Dutch Law the term "pressing reasons" is defined as the existence of such behaviour, conduct, and features of the employee that it could not in all fairness be expected of the employee to continue the contract of employment. He went on to say that there are ten such reasons stipulated in the Dutch Civil Code and proceeded to state one of them. I will quote his evidence on this last aspect, as given by him literally :

> An employer may terminate the services of an employee, if it seems in a serious way that the employee does not have the proper qualifications to do the work for which he is employed.

He continues :

> It says 'proper qualifications or capability to do the work for which he is employed'.

He also said that it would be within the judgment of the employer whether he continued with the services of the employee, and if the latter did not agree with the reason given, he may take legal proceedings with a view of obtaining a ruling. The effect of his evidence is that an employer would be justified in dismissing an employee without compensation if it appears to an appreciable degree that the latter did not possess the proper qualifications or capability to perform the work for which he had been employed.

Mr Shyngle, for the plaintiff, in his address makes the statement that the evidence of Mr Norbart is clear and lucid and could not be quarelled with. He went on to say that this witness made it clear that the employee must have immediate communication of the pressing reason from the employer. Indeed, D.W. 4 deposed that if the contract is terminated because of a pressing reason, by one of the parties, the other party should be notified immediately of the reason. He submits that in view of Exhibit 11, a confidential letter addressed to Mr Van Wylk in Holland, and dated the 25th June, 1959, in which Mr Verburg, D.W. 1, was enquiring about a replacement of the plaintiff, it was in June the reason for dismissal, if any, had arisen; and therefore the notification of the reason as contained in Exhibit 4, which is dated the 25th September, 1959, could not be deemed immediately. With respect I do not think Mr Shyngle appreciated the evidence on this point. Mr Norbart made it clear in re-examination that signification of the reason was not necessarily required before the act of dismissal. What is necessary is that it should be done at the time of dismissal. He said: "The pressing reason must be assigned at the time of dismissal". In answer to Court he said:

> According to the law the employer must have certain reasons for dismissal—these reasons are enumerated in the law—which were previously enumerated. The employer must give a reason to the employee for his dismissal—this must be done immediately.

It is my opinion that the evidence of the witness does not imply that the pressing reason *must* be notified immediately it has arisen, what is essential is that it should be done no later than at the time of dismissal.

Paragraph 6 of the Statement of Claim states, if, which is denied, the termination of the employment was not justified pursuant to the provisions of Article 17 of Exhibit 1, the defendants will aver that the plaintiff was in breach of an implied condition as to his ability to perform his agreed duties and that in pursuant to Article 2 of Exhibit 1 the defendants were justified in terminating the employment. Then, paragraph 7 raises another defence in

the alternative, to the effect that if the termination was not justified under Article 17, the plaintiff could be dismissed by reasonable notice which had been given. During the opening of the plaintiff's case, Mr Bentley, for the defendant company, stated that there would be no question as to reasonable notice and therefore abandoned the averment in paragraph 7.

Mr Shyngle has abandoned items 2 and 3 in the particulars of damage, namely: claims for leave pay, and bonus respectively. He has also abandoned the claim for general damages. Mr Bentley concedes that the amount stated in item 1 would be the the correct and principal sum in damages, subject to the matter of deductions in respect of income tax, of which more will be said. The claims of the plaintiff are now confined to nine months' salary from the 1st November, 1959, to 31st July, 1960, and living accommodation for nine monts at the rate of £50-0*s*-0*d* per month.

Both counsel agreed upon certain principles of law (*i*) the contract is to be interpreted according to English Law, (*ii*) the measure of damage would be the actual damage over the nine month period, that is to say, salary for 9 months less any amount the plaintiff has actually received from any employment during that period. It has also been conceded that there should be an appropriate reduction in respect of liability to income tax.

In interpreting the contract of service according to English law, the agreement must naturally be looked at and the implied conditions must also be ascertained. The written contract brings in the Dutch law. Now, in English law, where a skilled servant is engaged, there is on his part an implied warranty that he is reasonably competent for the work which he is employed to undertake, and if he proves to be incompetent the employer is not bound to continue him in his service for the term for which he is engaged: 25 Halsbury 3rd ed., paragraph 936. In *Harmer v. Cornelious* 141 *E.R.* 94, Willes, J., said at page 98:

> When a skilled labourer, artisan, or artist is employed there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—spondes peritiam artis.

He continues:

> The public profession of an art is a representation and an undertaking to all the world that the professor possesses the requisite ability and skill. An express promise or express representation in the particular case is not necessary.

It seems to me from the evidence of D.W. 4 that the example of "pressing reason" in Dutch law, given by him, and which is relevant to this case, does not differ from that English law.

I might as well say here and now, that on the evidence, in spite of what D.W. 2 said, I find that the plaintiff was employed as a Chief Accountant, which duties entailed a certain amount of administration. Shortly, more will be said about this witness. In short the complaint of the defendants is that the plaintiff was incompetent.

The law, as I understand it, is that the onus lies on the master to prove incompetence: BATT MASTER AND SERVANT 4th ed., page 67. It would therefore appear that the defendants must prove incompetency. It is recognised that in many cases proof of incompetency to the satisfaction of a judge and jury may present difficulties. It would seem that my function is to ascertain whether upon the facts proved, the dismissal of the plaintiff is justified or not: 25 Halsbury (ibid) paragraph 488. A guide to the approach of this question is to be found in the passage of the opinion of Lord James of Hereford in the case of *Clouston and Company Limited v. Corry* (1906) *A.C.* 122 at page 129:

> Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.

Although that was a case in which misconduct was alleged, the principles are the same. The sole question is whether there is justification for dismissal. The learned author of BATT (ibid) states that the difficulty lies in establishing the standard and in proving that the servant has failed to attain that standard.

Mr Bentley has directed the court's attention to the case of *Diggle v. Ogston Motor Company* (1915) 112 *L.T.* 1029, and submits that on the authority of that case, if the employers are genuinely dissatisfied with the plaintiff's work, the dismissal is justified; and whether or not they had good reason is immaterial. He further submits that the case puts the burden of proof on the plaintiff—the onus being on him to show that the defendants were in fact satisfied, or they could not as reasonable men have been dissatisfied. In that case it was held that the dismissal was justified, the dissatisfaction of the master being real and genuine, although unreasonable. If that decision is held to cover every case, it means that the well established principle that the onus lies on the master to prove incompetency (or to use another word incapability), has been abrogated. I am not aware that that general principle has been overruled. The case, does not in my

view, abrogate the general rule that the onus lies on the master. The judgment was confined to the particular facts of that case and was not intended to lay down a rule of general application. When the case is read, it will be seen that much turned on the word "satisfaction", which was an express condition of the contract. That is not the case here. In that case, "A" had been engaged as a shop superintendent at the company's works, and one of the letters constituting the contract contained the following passage—"The engagement will be for one year, subject of course, to your carrying out your duties to the satisfaction of the directors.....". It was purely a *conditional* engagement for one year.

It is my opinion that the onus is on the defendants in the instant case to prove incompetency or incapability; and it is my function to decide whether the nature of the acts, if proved, would justify dismissal. I also propose to deal with the matter in the light of the submissions made by Mr Bentley on his view of Diggle's case, in the event I am held to have erred in my interpretation of that case.

I propose at this stage to make some observations about the chief witnesses, namely, the plaintiff, Mr Langewisch (D.W.1) and Mr Verburg (D.W.2.). The plaintiff impressed me as a truthful, frank, honest and reliable witness. He made no attempts at prevarication. He readily admitted things which would tend to be against him. His story was simple and straightforward. On the other hand, Langewisch's demeanour was that of arrogance—If I may say so he was cocky. He was in my view prejudiced and biased against the plaintiff. He did not impress me as an honest and truthful witness. From my observations of him in the witness box he would appear to be a difficult man for anyone to get on with, and probably exhibits his arrogance in his day-to-day activities. Many of his accusations against the plaintiff are vague. It is my opinion that he influenced Verburg against the plaintiff. The evidence would support the inference. Verburg is in my opinion equally prejudiced against the plaintiff. He did not impress me as being truthful and frank. He was guilty of evasion. Both were reluctant in making admissions in favour of the plaintiff. It must be noted that both these gentlemen are engineers by profession and not accountants.

The plaintiff arrived in Nigeria on the 7th February, 1959, and commenced work on the 9th. Verburg the General Manager went on leave 11 days after the plaintiff had embarked upon his duties and returned to Nigeria on the 20th June of that year.

During his absence, the Assistant General Manager, Langewisch relieved him. It is not in dispute that from October 1958 until the plaintiff arrived there had been no Chief Accountant, Mr Bosma, the previous holder of that office having left at that time. It was very clear from the evidence that when the plaintiff assumed duties he inherited arrears of work. Verburg in the letter Exhibit 4 addressed to the plaintiff said :

> I admit that when you took over, the administration for the previous period was not up to date and these matters had to be sorted out by you.

It is also clear that the Quarterly Report for December had not been compiled and this work was done by the plaintiff. It is to be observed that the Quarterly Reports are considered vital documents and the Head Offices of the defendant company in Holland and England attach much importance to them. They cannot be described as simple documents. It is also to be noted that Exhibit 4 is the letter notifying the plaintiff of the Company's intention to terminate his services as from 31st October. There can be no doubt that when the plaintiff assumed his duties in Lagos, he was not only a new man in a new office, but also a visitor to the country for the first time. Coupled with these circumstances there was the additional hardship of coping with the arrears which according to Exhibit 4 he brought up to date. This achievement must rebound to his credit, and must be taken into account in considering the merits of this case.

Now, the reasons for dismissing the plaintiff are contained in Exhibit 4. It is an important document and it will be quoted :

25th September, 1959.

Our Ref : C/5609.

Dear Mr Nunnink,

I herewith wish to confirm our recent discussion during which I informed you that it was advisable to terminate your services with this Company as from the end of October, the Auditors having then finalised the work for the current financial year. I regret that we had to take this step, but found it necessary, as, with the present course of events in this country, the administration controlled by you did not supply the required data within the requisite time limit. This lack of data hampered to a certain extent the efficient operation of the general management of this Company.

I admit that when you took over, the administration for the previous period was not up to date and these outstanding matters had to be sorted out by you. After this had been brought up to date, however, I observed that the administration was entirely passive and that no push or suggestion to improve the current unsatisfactory position came from your side, and that you had not the ability to take a more active part in assisting the general management.

Yours faithfully,
D. A. VERBURG

One may call this the letter of complaint. The defence have given oral evidence tending to show that the plaintiff had been guilty of acts amounting to dereliction of duty. These consist of matters appertaining to Cost Accounting, Barclays and Twentsche Banking Accounts Insurance reports and certain letters not written.

There is in my view a preponderance of evidence that the plaintiff's work as an accountant was satisfactory; and it cannot be said that in that aspect of his work he was incompetent or incapable. This is borne out by Mr Orton, P.W.2., an accountant under Cassleton and Elliott, auditors to the defendant company. After deposing that the plaintiff did work which he would describe as a chief accountant, he referred to the accounts as being satisfactory. He even went on to say he saw the quarterly reports, and even used the figures in the September 1959 Report for compiling his final account after checking them. Paawu, D.W. 3, who relieved the plaintiff stated that when he took over, the books were in a fair state. There is no evidence from Holland that Head Office was not satisfied with the figures submitted to them. Langewisch deposed that he received nasty letters from Holland, but when pressed for their production could not do so. If his assertion were true, one would have expected the correspondence to have been produced. Langewisch said the plaintiff was a failure as an accountant. This could not be sincere. What is the opinion of an engineer in accounting matters against that of Mr Orton? Langewisch went on to say that on the return of Verburg he communicated his opinion to him. When asked why he thought he was a failure as an accountant he gave as one of the reasons that on occasions he saw him playing with his pencil and looking through the window. Mr Van Wyek, who is a chartered accountant in Holland visited the office in June 1959. He inspected the office and on his return to Holland wrote a report which he forwarded to Lagos. Notice to produce the report was served on the defendants, and counsel emphatically stated in court that the document would not be produced. The attitude of the defendants on this matter leaves much to be desired. If one looks at the evidence of Verburg on this subject, a sorry picture is painted—his conduct is not in keeping with a person of his class and holding a responsible office. The record shows a series of evasions and vagueness. He is unwilling to make a clear-cut statement. The natural question to be asked is: Why must he be so vague and evasive on this issue? Another pertinent and important question is: Why are they relunctant to produce the report? The inference to be drawn is that if produced it would be unfavourable to defendants. I am entitled to make this presumption, and I do so.

On a wider plane, on the purely administrative side, as opposed to accountancy, Langewisch deposed in examination in chief that he regarded the plaintiff as a failure as an accountant, because he was expected to help the management and he did not do so. The plaintiff had only shortly arrived in country before Langewisch took over from Verburg. At that time he had more than enough to do, and would have been occupied for several weeks in bringing matters up to date. Therefore, it could not have been expected that he could have given any help to the management for sometime.

In Exhibit 4, one of the complaints is that the administration controlled by the plaintiff did not give the required data within the requisite time limit. This is one of the defendant's dissatisfaction. Mr Shyngle has correctly pointed out that the evidence does not bear out the reason given. He asks the question: What is the required data? The only evidence is in respect of the quarterly reports which are to be ready within six weeks of the expiry of the quarter. We have already seen that when the plaintiff assumed duties the quarterly report for December 1958 was still outstanding. Without going into much detail, suffice to say that the plaintiff did not get the promised assistance from Mr Marshland readily which Verburg himself thought necessary for a newcomer, and when the assistance did come it was once or twice a week for an hour or two. The December report was ready about the middle of April, and according to the evidence of Verburg under cross-examination, the plaintiff after taking over in February brought the outstanding matters including the December quarterly report up to date within ten weeks. In view of the circumstances could it be said that the plaintiff was incompetent in this particular matter or that the defendants were genuinely dissatisfied? In these circumstances the defendants could not as reasonable men have been dissatisfied. The March report was finally finished at the end of May, but about the 15th of that month details of the contracts for March had been forwarded pending the completion of the report. When one bears in mind that the plaintiff had to cope with arrears dating from about October 1958, including a quarterly report, and which was brought up to date in the month of April 1959, it cannot be said that having regard to the circumstances, that the March report was forwarded unduly late, when it is borne in mind that the December report was only ready in the middle of April. Here again, in my view it cannot be said that the plaintiff was incompetent nor could the defendants as reasonable men have been dissatisfied. The draft report for June was completed on the 15th July, and

finally ready at the end of that month. It is clear, it was ready in less than six weeks. It is patent here, that the plaintiff could not be considered incompetent, or that the defendants were genuinely dissatisfied for the report was ready well within the stipulated time.

Mr Shyngle has referred to Exhibit 11, in which Verbourg stated that the plaintiff considers it will be possible for the June Quarterly Report to be ready by the middle of July ; and went on to say that under the present circumstances the accuracy of the figures must be doubtful and asking for the plaintiff to be replaced. Mr Shyngle comments, that the plaintiff had only been with Verburg for a short while before the latter went on leave in February returning on the 17th June, and therefore for him to have written as he did on the 25th June is indicative of prejudice, for altogether they had not been together for any length of time. He says that there is not the slightest evidence to suggest that the figures were or would be inaccurate. On the face of it, the statements savour of prejudice. It has been submitted that Langewisch poisoned his mind. It would not be an unreasonable inference to draw in the circumstances, particularly as Langewisch admitted that he told Verburg that the plaintiff was a failure as an accountant.

Much has been said about cost accounting. There is the evidence of Mr Orton which I accept that costing are reflected in the Quarterly Reports. There is no evidence that the Quarterly Reports were not satisfactory. What is more important is that Paawu said when he took over the cost accounting was in order. He also said that most of the administration was up to date. Paawu is a more credible witness than either Verbourg or Langewisch. If most of the administration was up to date would it be reasonable to hold that the plaintiff was incompetent. What is required is reasonable competence. If the cost accounting was in order, the defendants' complaint lack bona fides.

The system of the General Manager dealing with correspondence relating to the transfer of funds to the Twentsche Bank in Holland for payment to Dutch creditors had its inherent difficulties. The system existed before the plaintiff assumed duties. It was suggested by Verburg that he wanted to transfer that duty to the plaintiff but he was not capable. I do not for one moment believe him. Both the plaintiff and Paawu deposed that normally such matters should have been dealt with by the Chief Accountant, in their section. The plaintiff says as a result of the system he was unable to give an accurate statement of the banking account when asked. It meant wading through files in the General Manager's office and at times letters were not readily filed. He states that as a result of

the copy letters not being readily filed he would not be able to give the correct information when asked. I can imagine that at times there would be delay in filing copy letters. I would not disbelieve the witness on this matter. The plaintiff in his evidence stated that on one occasion he first knew of a payment in to Barclays Bank when either Verburg or Langewisch told him that he was about £17,000 to £19,000 out in his bank balance. He discovered that this was due to a payment in by Mrs Foxwell, Secretary to the General Manager, without the knowledge of the plaintiff. A photostat of the credit slip for £17,596-15*s*-0*d* has been put in as Exhibit 3. This amount is not recorded in Exhibit 2, the lodgment book kept in the accounts section. How then could the plaintiff be blamed ? It was put to the plaintiff that on one occasion his bank balance was £22,000 out. He said as far as he knew he had never been out that amount, and referred to the £17,596-15*s*-0*d* as the only balance being out. Langewisch stated the amount as £23,000. Verburg referred to it as £20,000. Verburg said that he had the day before given the plaintiff the cheque for lodgment. The witness was shown Exhibit 2 and identified the lodgment slip as No. 12775 in the plaintiff's handwriting for two cheques—£57-1*s*-4*d* and £21,062-14*s*-0*d* :—It is the plaintiff's word against Verburg's and Langewisch's. As I have said before the plaintiff has impressed me as a truthful witness and it would be surprising if he lied in this matter. Could it be that he has forgotten the incident ? Having regard to my impression of Langewisch and Verburg, it may be best to disregard this incident.

Mr Shyngle has correctly asked the question, how could the plaintiff be expected to give accurate figures appertaining to bank balances, when by the very nature of the system he was not allowed to do his work ? He submits in these circumstances, the complaint could not be genuine.

There is a complaint that the plaintiff did not prepare certain insurance returns in time. Formerly, it was not done by the Chief Accountant, but by the private secretary to the General Manager. Langewisch in his usual vague manner is unable to say when the plaintiff had been charged with the duty. He was not able to say when the job was completed. He however said the papers were found stuffed away 2, 3, 4 or 5 weeks after they had been given to the plaintiff. Here again he is vague. If it was cast on him during the time that he was catching up with the arrears and the December report, though simple the task might have been, it was an increased burden at an unwelcomed time. Langewisch said the job was done and accurately done. The plaintiff has been very frank about these insurance papers,

and has been able to refer to the matter with accuracy and not with any vagueness, as was the case with Langewisch. He has been very honest over the whole affair and this evidence of his, is an illustration of his general credibility. He could have lied if he wished, and in all probability with success. But he chose not to. He said that it was about the end of February, the private secretary (a woman) who was leaving in March, handed him the matter. He said that it was suggested that he should make these returns. He admitted that he had not done the job then, as he had many things to take over at that time (this is known only too well) and had to absorb new impressions. He said Langewisch drew his attention to the matter in May and told him that he had forgotten it, as he had to use his own words "to absorb all these new impressions". He stated that he had finished the list for the first quarter of 1959, and the second quarter's had been nearly finished, when Verburg handed it over to Berrick. It is to be observed that Langewisch stated that the plaintiff had finished the job. I mention this to show that Langewisch is not really a reliable witness. Here is the plaintiff, a man whom it affects admitting that he had not completed the job, and Langewisch saying he had. This job was given to the plaintiff at a time when he was coping with the back log. His attitude cannot be attributed to incompetence.

It has been said that certain debts for the sale of sand had not been collected by the plaintiff. According to Paawu's evidence when he took over the sales invoices had been made out and were up to date, and there were about 4/5 bills which were outstanding. These went back to June 1958. He could not find any statements of accounts or correspondence about these. This allegation was first brought in by either Verburg or Langewisch. I accept the evidence of the plaintiff that he came across these matters when he was doing the December Report, and he queried Anderson the Chief Clerk who told him that they should be dealt with by Berrick. Berrick was contacted and he confirmed that they should be dealt with by him personally.

The defendants do not seem to have appreciated that the plaintiff did not take over duties which were in a normal state, and apparently allowed him no time to get settled in after bringing the work up to date; for in June, there had been correspondence about relieving him. They seemed to have allowed him no time to get acquainted with the work. According to Mr Norbart, in Dutch Law, it is customary for the employer to give the employee sufficient time to get acquainted with the work. As I see it, Exhibit 4 does not complain of his work as an accountant, and,

yet Exhibit 11 tends to say differently. The state of affairs is contradictory on the part of the defendants ; and one wonders at their attitude. It is puzzling. I sometimes gain the impression from the record that they wanted him to do everything, and imply that he should even do some of the work of the Chief Clerk Anderson. It is significant since Paawu took over the staff has been increased.

The plaintiff obtained employment with Leach Johnson Travis and Company from the 27th December, 1959.

It is my judgment that upon the proved facts the dismissal is not justified. Having regard to all the circumstances, it cannot be said that the plaintiff was incompetent. If I have erred in the first approach, and, it is held that the matter should be approached in the way contended for by Mr Bentley, that is to say, the criterion should be that of genuine dissatisfaction, it would in that event be my judgment that the defendants could not as reasonable men have been dissatisfied. The circumstances do not show that they were acting *bona fide*.

There will therefore be judgment for the plaintiff.

I will now proceed to assess damages. The plaintiff obtained employment on the 27th December, 1959, at the rate of £100 per month, and, therefore his damages have been mitigated. He is entitled to receive £256-13*s*-4*d* for the period 1st November to 26th December, 1959, and thereafter the difference between £140 and £100 per month for seven months. It has been well established that his income tax liability is to be deducted. This has been agreed at £55 : He will therefore receive £481-13*s*-4*d* under Item I.

Under the contract of service the plaintiff was entitled to free living accommodation. The plaintiff gave evidence that this was valued at £50 per month. This evidence was not challenged. The contract did not stipulate free accommodation or a specified monetary value in lieu. It stated simpliciter free accommodation.

It is my view that he is entitled to receive compensation, but not at the rate claimed. He can only be paid what he has actually spent. The compensation assessed under this head will be £75 in respect of the accommodation at Apapa and £82-10*s*-0*d* ; for the shared accommodation at Balogun Street, Lagos, to 31st July, 1960.

Judgment is therefore entered for the plaintiff against the defendants for £481-13*s*-4*d* : under Item I, and £157-10*s*-0*d* : under Item 4, being special damages ; and costs agreed at 200 guineas.

HIGH COURT, LAGOS

LYDIA E. MACHI .. .. PETITIONER

v.

RAYMONDE E. MACHI .. .. .. RESPONDENT

[HIGH COURT : DE LESTANG, C.J. ; 14th November, 1960]
(Suit No. WD/29/1959)

Matrimonial Cause—Divorce—Domicile—Jurisdiction

A wife petitioned for divorce in the High Court of Lagos. Both she and her husband originated from the Eastern Region of Nigeria and merely resident in Lagos.

HELD : (1) That since each Region has a separate jurisdiction from the point of view of international law a person can only be domiciled in a Region and not in Nigeria generally.

(2) That the High Court of Lagos has no jurisdiction in divorce unless the petitioner is domiciled within the jurisdiction of the Court.

Cases referred to :—

Le Mesurier v. Le Mesurier 1895, A.C. 517

Bater v. Bater 1906, *p.*209

Attorney-General for Alberta v. Cook, 1926, *A.C.* 444 at page 465.

Josephine Nwokedi v. Charles O. Nwokedi

Susanna Mgbeke Okonkwo v. Raymond Eze & OR. (1960 *W.R.N.L.R.* 80)

Bell v. Kennedy, 1868, *L.R. I.SC. APP.* 307, at page 320.

Iravers v. Holley, 1953, *A.C.* 246, at page 253.

Gatty v. Gatty, 1951 page 454

Trottier v. Rajotte, (1940), 1 *D.L.R.* 433

Exparte Cunningham, In Re Mitchell, 1884, *Q.B.D.* 418 at page 423.

C. Egerton Shyngle for the Petitioner.

O. A. Aiyeola for the Respondent.

S. O. Okunribido for Queen's Proctor.

DE LESTANG, C.J.:—This is a wife's petition for divorce on the ground of her husband's desertion. The petition is undefended since the husband merely entered appearance and did not file an answer. The parties are Ibos and orginate from Owerri in the Eastern Region of Nigeria. The husband came to Lagos to find work and obtained employment with the Public Works Department.

He then sent for the petitioner and they were married in Lagos on the 8th April, 1944. They lived together in Lagos until 1956, the petitioner paying occasional visits to her home in Owerri.

There are four children of the marriage. Some time in 1956 the respondent ceased to support the petitioner and their children and in August of that year he left the matrimonial home taking away all his belongings and telling the respondent to go her own way. Since then he has neither made any allowance to the petitioner nor returned to her. Being abandoned in this way without means it is not surprising that the petitioner, having met a man who was prepared to support her and her children, went to live with him. She has had two children by that man, and wishes the Court to exercise its discretion in her favour so that she may marry him. I would be prepared on the evidence to find desertion proved and to exercise the Court's discretion in favour of the petitioner had this Court jurisdiction to entertain this petition.

Jurisdiction in divorce is conferred by section 15 of the High Court of Lagos Ordinance, 1955, which provides that the jurisdiction of the High Court in divorce may be exercised by the Court in conformity with the law and practice for the time being in force in England. Now apart from certain statutory exceptions which do not apply here, the English Courts will decline to exercise jurisdiction in divorce proceedings unless at the time of the presentation of the petition the husband was domiciled in England. I say the husband because it is trite law that the domicile of the wife follows that of the husband and that the wife cannot have a domicile different from that of the husband while the marriage lasts. This attitude of the Courts is in accordance with the general principle established by *Le Mesurier v. Le Mesurier* 1895, *A.C.* 517, and subsequently confirmed and adopted in such cases as *Bater v. Bater* 1906, *p.*209, that the Court of the petitioner's domicile has the exclusive jurisdiction to dissolve the marriage.

In *Le Mesurier v. Le Mesurier*, Lord Watson observed

> The domicile for the time being of the married pair affords the true test of jurisdiction to dissolve their marriage.

Also in *Attorney-General for Alberta v. Cook*, 1926, *A.C.* 444, *at page* 465, the Privy Council said

> In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant (*i.e.* the husband) in the suit shall be domiciled within the jurisdiction.

It is thus well settled that the English Courts take the view that the only Court which can validly dissolve the marriage is the Court of the domicile of the parties and this is the principle which this Court must apply.

The petitioner avers in paragraph 6 that the parties are "domiciled in Nigeria" and the evidence shows, as I have already stated, that they originated from the Eastern Region of Nigeria. In these circumstances a question of jurisdiction arises for decision, and it is whether this Court has jurisdiction to try a suit for dissolution of marriage where the parties are domiciled in Nigeria generally or whether it is necessary to prove that they are domiciled within the area of the Court's jurisdiction, which in the present case, is the Federal Territory of Lagos. There is, unfortunately, a conflict of judicial opinion on this point. In *Josephine Nwokedi v. Charles O. Nwokedi*, Suit No. WD/17/1958 (as yet unreported), the High Court of Lagos (Onyeama, J.) held that a domicile in Nigeria was sufficient to give the Court jurisdiction. But in *Susanna Mgbeke Okonkwo v. Raymond Eze & Or.*, (1960 *W.R. N.L.R.* 80), the High Court of the Northern Region of Nigeria (Hurley, Ag. C.J.) held that the Court had no jurisdiction unless the petitioner was domiciled in the Northern Region. In view of this conflict the Honourable the Attorney-General, as Queen's Proctor, was invited to argue the question of jurisdiction before the Court. On the 27th October the Court heard arguments from Mr Shyngle, the Solicitor for the petitioner, Mr Okunribido, representing the Queen's Proctor, and Mr Aiyeola for the respondent.

I pose the question again. It is whether there is only one Nigerian domicile or whether a subject may be domiciled in any Region. In *Bell v. Kennedy*, 1868, *L.R. I.SC. APP.* 307. *at page* 320, Lord Westbury said

> "Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country". In Dicey's Conflict of Law (Sixth Edition, page 83) it is stated that "The area contemplated is a 'country' or 'territory' subject to one system of law".

The position is clearly stated in Halsbury's Laws of England, Third Edn., Vol. 7, at pages 14-15 :—

> English law determines all questions in which it admits the operation of a personal law by the test of domicile. For this purpose it regards the organisation of the civilised world in civil societies, each of which consists of all those persons who live in any territorial area which is subject to one system of law, and not its organisation in political societies or states, each of which may either by co-extensive with a single legal system or may unite several systems under its own sovereignty.

All those persons who have or whom the law deems to have, their permanent home within the territorial limits of a single system of law are domiciled in the country over which the system extends; and they are domiciled in the whole of that country, although their home may be fixed at a particular spot within it.

The application of this principle of one system of law has led to decisions elsewhere that there can be no domicile in the United States, or Canada, or Australia generally, but that domicile in these countries must be in one of the constituent States or Provinces as the case may be. Thus, in *Attorney-General for Alberta v. Cook* (ibid) it was held that for purposes of divorce the domicile of a person settled in one of the Provinces of Canada is that particular Province, although the Dominion Parliament has legislative power to dissolve the marriage.

In *Travers v. Holley*, 1953, *A. C.* 246, *at page* 253. Jenkins, L.J., expressed agreement with the Commissioner who in the course of his judgment had discussed the question whether what had to be proved in order to give the Courts in New Wales jurisdiction based on domicile was a domicile of choice in Australia generally or a domicile of choice in the particular State of New South Wales and held it to be the latter.

In *Gatty v. Gatty*, 1951, *page* 454. Karminski, J. cited with approval the decision in *Trottier v. Rajotte*, (1940), 1 *D.L.R.* 433, and held that a domicile of choice can only be acquired in a particular state and not in the United States of America generally because the United States of America consists of a number of states each with its own Courts and to some extent and for some purposes with a distinct system of law. The substance of the decision in *Trottier v. Rajotte* was that since each State of the United States of America has a separate jurisdiction from the view-point of private international law a person alleging the acquisition of a domicile of choice in a particular State must prove an actual residence in such State with a fixed settled determination of making his permanent residence therein. Proof of residence or of an *animus manendi* in the United States generally without reference to any particular State was insufficient.

It was contended by Mr Shyngle that since the law relating to divorce is the same throughout Nigeria the test of one system of law succeeds. In my views the fallacy of this argument lies in the fact that the identity of law on one particular subject is not conclusive of the existence of one system of law. As Lord Merrivale

delivering the opinion of the Privy Council in *Attorney-General for Alberta v. Cook said at page* 450 :—

> Uniformity of law, civil institutions existing within ascertained territorial limits, and juristic authority in being there for the administration of the law under which rights attributable to domicile are claimed, are indicia of domicile, all of which are found in the Provinces. Unity of law in respect of the matters which depend on domicile does not at present extend to the Dominion. The rights of the respective spouses in this litigation, therefore, cannot be dealt with on the footing that they have a common domicile in Canada, but must be determined upon the footing of the rights of the parties and the remedies available to them under the municipal laws of one or other of the Provinces.

Cotton, L.J. laid stress on the necessity for identical Courts as a foundation for a single domicile when he said in *Exparte Cunningham, In Re Mitchell,* 1884, *Q.B. D.* 418, *at page* 423 :—

> I am of opinion that 'domicile in England' means in England as distinguished from Scotland and Ireland as well as from foreign countries because Scotland and Ireland have their own separate local tribunals.

It is well known that Nigeria is a Federation composed of several independent and sovereign Regions, each with its own legislature and Courts of Justice. So the power of making and administering law in Nigeria is shared between the Central Government and the Regional Governments. It is true that on a number of subjects the Federal Parliament has exclusive jurisdiction, and on those subjects the law may be the same throughout Nigeria, but this need not necessarily be so. Moreover it is equally true, that the Legislatures of the Regions have concurrent Legislative powers with the Federal Parliament in a large number of subjects and also possess exclusive powers in matters not contained in the exclusive and concurrent Legislative lists. On these matters differences either exist or are liable to exist. The Regions have also their own separate Courts, created by the Constitution itself which are outside the control of the Federal Parliament. That being the position it seems to me that Nigeria cannot properly be described as a territory with one system of law. That description however fits each Region better, and for the reasons which I have given I hold that a subject may acquire a domicile in a Region but not in Nigeria generally.

I find indirect support for my decision in the Legitimacy Ordinance. It is well known that generally speaking jurisdiction in legitimacy proceedings rests on domicile. (*See* sec. 3 of the Ordinance and the Rules of Court which require the domicile of a father to be disclosed). If there was only one domicile in Nigeria all High Courts throughout Nigeria would have jurisdiction and

yet the Ordinance shows that this is not so. Section 3 provides for legitimisation by the subsequent marriage of the parents where the father of the illegitimate person was at the date of the marriage domiciled in Nigeria. Section 4 (1) then provides for application to the Courts for a declaration of legitimacy and states that the person "may apply by petition to a High Court having jurisdiction". I stress the words quoted which would clearly be unnecessary if there was only one Nigerian domicile but very necessary if there are Regional domiciles.

Mr Shyngle contended further that *Okonkwo v. Raymond Eze and Other* was wrongly decided because the learned Judge erred when he said "in regard to them (legitimacy and succession) the Regions may legislate independently of the Federation and of one another and they may legislate variously". He argued that having regard to item 44 of the exclusive legislative list in the Constitution the Federal Parliament had exclusive legislative power in regard to legitimacy and succession as being matters incidental or supplementary to marriages, which is item 23 of the said list. That may or may not be so and I am not prepared to express an opinion without hearing full argument on the point. Assuming however that Mr Shyngle is right this merely shows that the law on the three subjects, namely marriage, legitimacy and succession may (not must) be the same throughout Nigeria. This, as I have tried to point out is not sufficient to constitute one system of law for the whole of Nigeria. In the result I hold that this Court has no jurisdiction to try this suit, which is accordingly struck out. No order as to costs.

HIGH COURT, LAGOS

YESUFU M. A. AGBALAYA .. .. .. APPELLANT

v.

YEKINI BELLO .. .. RESPONDENT

[HIGH COURT : DE LESTANG C.J. ; 19th October, 1960]

(Appeal No. LD/40A/60)

Landlord and Tenant—Statutory Rent—Power of the Court—Rent Restrictions Ordinance sections 6, 9, 19—*Method to be used.*

In fixing the rent for premises on the application of a landlord the Court fixed a rent it considered fair. The tenant appealed.

HELD : That in fixing the rent of premises the Court must give effect to the provisions of the Ordinance and cannot, disregarding those provisions, fix a rent it considers fair.

Cases referred to :

Ana v. Owodunni Trading Company 1956 L.L.R. 20.

A. O. Bickersteth for the Appellant.

M. O. Oseni for the Respondent.

DE LESTANG, C.J. :—This is an appeal from a decision of a Magistrate's Court, Lagos, fixing the rent of certain premises to which the Rent Restrictions Ordinance (Cap. 183 New Edition of Laws) applies.

The premises were in existence long before the 1st July, 1941, since the tenant has been in occupation of them since 1912 paying £2 rent per month in addition to the rates. The landlord who purchased the premises in August, 1958, applied to the Court to fix the rent. The learned Magistrate after hearing evidence but without giving any reasons fixed the rent at £8 per month exclusive of rates. The tenant appeals on the ground that "the decision cannot be suported having regard to the evidence."

It was contended for the landlord *in limine* that no appeal lay on the ground that the amount in issue was less than £10. A similar point was unsucessfully argued in *Anah v. Owodunni Trading Company* 1956 L.L.R. 20. Mr Oseni contended that that decision was given *per incuriam* and should not be followed. In my view the decision in the case quoted was given after full arguments and being a decision of this Court in its appellate jurisdiction it is binding on the Court. Moreover I can see no good reason for not following it.

Reverting to the appeal proper, the evidence shows that the premises are very old indeed and lacking in such necessary amenities as water supply, electric light and a kitchen. There is only one bathroom (without water) and lavatory combined for the whole

premises which consists altogether of six small rooms. The tenant personally occupies only one room. It is alleged however that he lets out other rooms at £2 per month each. The witness who so testified said that he himself moved into a room which was previously occupied by his brother and that although he had been in occupation for six months he had paid no rent and no payments had been claimed from him. The tenant alleges that the occupants of the various rooms reside on the premises rent free. As the learned Magistrate did not give any reasons for his decision, it is impossible to say what facts he found proved. He must have been satisfied however that the rent was not reasonable in all the circumstances. It is plain that the landlord was not seeking an increase in the rent on any of the grounds set out in section 6 (2) of the Ordinance. As I understand the Ordinance the Court is empowered on the application of any interested person to fix the rent of any premises but in doing so the Court is not in my view free to do as it pleases. Section 19 which is in mandatory terms enjoins the Court to conform to the Ordinance and consequently in fixing the rent the Court must have regard to the provisions of the Ordinance and not act arbitrarily. The Ordinance prescribes how the rent of premises is to be determined and what increases to the statutory rent are permissible. In the case of premises let on the 1st July, 1941, at a rent, it is that rent. Section 6 (1). In the case of premises standing vacant on the 1st July, 1941, it is the rent at which such premises were last let. Section 9 (*a*). In the case of premises completed after the 1st July, 1941, it is the rent at which such premises are first let. Section 9 (*b*). In the case of premises which were not let at a rent on the first day of July, 1941 and which are first let after that date it is such rent as, in the absence of agreement, may be fixed by the Court as a fair and reasonable rent. Section 9 (*c*). In all those cases the rent may be increased for one or more of the reasons contained in section 6 (2). Therefore when the Court is required to fix the rent it must first ascertain what the statutory rent is and then add thereto any permitted increases under the Ordinance. It cannot, in my judgment go outside the provisions of the Ordinance or, disregarding those provisions, fix a rent it considers fair. In the present case the statutory rent is £2 per month, the tenant paying all the rates. As it is not sought to increase the rent by any permitted increase the Court cannot fix the rent at anything but the statutory rent, namely £2 per month. In fixing the rent at £8 per month the Court below therefore erred. The appeal is accordingly allowed and the decision of the Court below is set aside with costs in the Court below assessed at £5-5*s*-0*d* nd in this Court assessed at £11-0*s*-0*d*.

HIGH COURT, LAGOS

M. N. NWEGBU AND OTHERS .. .. APPELLANTS

v.

ABRAHAM FOLAJI .. .. RESPONDENT

[HIGH COURT OF LAGOS: DE LESTANG, C.J.; 19th October, 1960]

(Appeal No. LD/39A/60)

Landlord and Tenant—Rent Restrictions Ordinance Cap. 183*—Increase of rent—When and to what extent permitted—Sections* 6, 9, 11 *and* 19 *of Ordinance.*

A landlord applied to increase the rent of premises to which the Increase of Rent Restriction Ordinance applies on several grounds and the Court allowed an increase of 50 per cent and over on the ground that the landlord had spent a sum of money on repairs. The tenants appealed.

HELD : (1) A landlord may increase the rent of premises let and recover such increased rent in the circumstances provided by S. 6 (2) of the Ordinance without having recourse to the Court provided he complies with the provisions of the Ordinance.

(2) There can be no increases save those expressly permitted by the Ordinance and the Court itself is not free to increase the rent as it pleases but is bound by the provisions of the Ordinance and may only increase in the circumstances and to the extent permitted by S. 6 (2).

(3) Under S. 6 (2) the maximum increase permissible, where the landlord is responsible for repairs, is 5 per cent of the net rent irrespective of the cost of the repairs.

G. N. Okafor for the Appellants.

I. I. Oluwa for the Respondent.

DE LESTANG, C.J. :—This is an appeal from a decision of the Magistrate's Court, Yaba, increasing the rent of premises to which the Rent Restrictions Ordinance applies.

The appellants are three tenants of separate portions of the premises. Appellant Nwegbu rents two rooms since 1946 for which he pays 40*s* per month. Appellant Achinwabu rents one room, also since 1946, for which he pays 25*s* per month. Appellant Atukpawu rents a room since 1949 for which he pays 25*s* per month. Originally the conservancy rates and lighting charges were borne by the landlord but he ceased paying in 1953-54 and since then the tenants have been paying for these services.

This year the landlord applied to increase the rent on the ground (1) that he had spent £60 in repainting the premises (2) that there had been increases in the rates and (3) that he had

spent £390 in repairs. The learned Magistrate dismissed the landlord's claims under 1 and 2 but increased the rent of each room to £3 per month under 3.

The question for decision is whether this increase is authorised by law. I have no hesitation in saying that it is not, but since the provisions of the Rent Restrictions Ordinance relating to the powers of the Court to increase rent do not appear to be properly understood in the Magistrates' Courts, I take this opportunity of stating what I consider the law to be.

The relevant provisions of the Ordinance are to be found in sections 6, 9, 11 and 19, the relevant portions of which read as follows :—

> 6. (1) Subject to the provisions of this Ordinance as and from the 1st day of July, 1941, it shall be unlawful for any landlord to—
>
> (*a*) receive or recover the increased rent of any premises to which this Ordinance applies where the rent has been increased on or after the 1st day of July, 1941 ; or
>
> (*b*) increase the rent of any premises to which this Ordinance applies without the order of a court.
>
> (2) The amount by which a landlord may increase the rent of premises to which this Ordinance applies, shall subject to the other provisions of this ordinance, be as follows :—

The section then sets out the cases in which rent may be increased such as where improvements have been made, where rates payable by the landlord are increased, where the landlord has responsibility for the repairs, etc., etc. Section 9 fixes the rent of premises standing vacant or unlet on the 1st July, 1941 or erected after that date.

> 11. (1) Any landlord or tenant or other person interested may apply to a court for an order fixing the rent of any premises.
>
> (2) Where an application is made to a court under this Ordinance the court may refuse to make an order or may make an order authorising the receipt or recovery of the whole or any part of any increased rent or an order fixing the amount by which the rent may be increased or may by order fix the rent.
>
> (3) A court may also make any such order of its own motion on the hearing of any suit, or matter or application before it.
>
> (4) Where an order has been made by a court fixing the rent of any premises, the order shall be binding on all present and subsequent landlords, tenants or sub-tenants or mortgagees.
>
> (5) A court shall have full powers of rehearing, reconsideration and revision in any case in which it thinks fit to exercise such powers and at any time on application made by any party.

19. (1) Every court whether of civil or criminal jurisdiction shall, so far as is necessary, conform to this Ordinance in all proceedings, actions, suits or cases between landlords and tenants or such landlords and tenants or sub-tenants and in all applications, suits, actions, cases and matters arising therefrom in which the rights, remedies, duties or title of the same are in question.

(2) In this section the term "court" includes all courts by law established in Nigeria.

It will be noticed that section 6 (1) which prohibits the receipt of increased rent and the increase of rent without an order of Court, is expressed to be "subject to the provisions of this Ordinance." It is accordingly subject *inter alia* to section 6 (2). It follows therefore that a landlord may increase rent and recover the rent so increased in the cases prescribed in section 6 (2) without the necessity of having recourse to the Court provided he complies with the other provisions of the Ordinance such as, for example, section 10 which requires the service of notices before any increased rent may be recovered. That being so it would appear at first sight that there must be occasions outside section 6 (2) where rent may be increased with an order of the Court. But the significant silence of the Ordinance concerning those occasions and the absence of any guidance as to how the Court is to determine the proper increase in such cases lead one to a different conclusion. Moreover on a closer examination of the provisions of the Ordinance, in particular section 19, which provides in no uncertain terms that all Courts shall conform to the Ordinance, and section 9 which prescribes the statutory rent for all premises and, having regard to the declared object of the Ordinance, one is driven to the conclusion that there can be no increases save those expressly permitted by the Ordinance and that the Court itself is not free to increase the rent as it pleases but is bound by the provisions of the Ordinance and may only increase in the cases permitted by section 6 (2). Be that as it may, there can be no doubt whatever that where an application is made to the Court to increase the rent on any of the grounds set out in section 6 (2) the Court is precluded from allowing a greater increase than that permitted by the sub-section. If it did allow a greater increase it would be disregarding the provisions of the Ordinance and disobeying the mandatory provisions of section 19. Moreover, any other interpretation would lead to the absurd result that a landlord could obtain a greater increase by applying to the Court than by proceeding under section 6 (2). The Law being as I have stated I now come to the merits of the present case. Section 6 (2) provides that when the landlord is responsible for the whole of the repairs he may increase the rent by an amount not exceeding 5 per cent of the

net rent. This percentage increase is irrespective of the costs of the repairs which the landlord may be called upon to make from time to time to keep the premises in good and tenantable repairs. Therefore the maximum increase which the Court could have allowed in the present case is 5 per cent of the net rent payable by the individual tenants, *viz.* 2*s* per week in the case of the first appellant and 1*s*-3*d* in the case of the second and third appellants. But it was established that the liability previously borne by the landlord in respect of conservancy and lighting charges had been transferred to the tenants and that to that extent the rent must be deemed to have been increased (*vide* section 8 (1)). As the increase was in the region of 12*s*-6*d* per week at least and greatly exceeds the increase permissible for repairs no increases ought to have been allowed at all. This appeal accordingly succeeds. The order of the Court below is set aside without costs in the Court below but with costs assessed at £14-0*s*-0*d* in this Court.

HIGH COURT, LAGOS

GEORGE OSHIN .. .. APPELLANT

v.

INSPECTOR-GENERAL OF POLICE .. RESPONDENT

[HIGH COURT: DE LESTANG, C.J.; 24th October, 1960]
(Appeal No. LD/51CA/60)

Criminal Law—Stealing—S. 390 *Criminal Code—Ingredients of Offence—Conviction for Obtaining by False Pretences—S.* 419 *Criminal Code—S.* 174 (2) *Criminal Procedure Ordinance and S.* 39 *High Court of Lagos Ordinance.*

By falsely pretending that the price of a drum of dye was £25 the appellant received from the purchaser £19 more than he should and appropriated this sum. He was convicted of stealing the £19.

HELD : (1) To constitute stealing there must be either a taking or a conversion and there can be neither when the property in the thing, the subject of the theft, has passed to the appellant which was the case here.

(2) As the facts disclosed a clear case of obtaining money by false pretences a conviction for that offence was substituted.

K. Sofola for the Appellant.

J. O. Williams and *O. A. Esin* for the Respondent.

DE LESTANG, C.J. :—The appellant was convicted on a charge which read as follows :—

That you George Oshin on the 21st day of January, 1960 at about 12 a.m. at Elegbata Street, Lagos stole the sum of nineteen pounds (£19) property of Nimota Alake and thereby committed an offence punishable under section 390 of the Criminal Code.

He appeals on the sole ground that the evidence does not support the charge. The facts which the learned Magistrate found proved are very simple. On the 21st January, 1960, the complainant came to Lagos to purchase some dye. She met the appellant, whom she did not know before, outside a shop and he offered to assist her in her produce. He took her to several shops and finally to C.F.A.O. There he made enquiries and was told outside the complainant's hearing that the firm had dye in stock and that the price was £12-10*s*-0*d* per drum. He took the complainant aside and informed her that the price was £25-0*s*-0*d* per drum. She asked him to obtain a reduction of £1-0*s*-0*d* on each drum and after examining them handed over to him £48. The appellant delivered the two drums to her on a lorry after he had gone the complainant became dissatisfied with her purchase.

On the following day she went to C.F.A.O. with the appellant to return the dye. The firm agreed to take back the goods and refund the money. They refunded the price paid which was £25. The appellant, however, said that the complainant had only given him £29 and in the course of the morning refunded the balance of £24 to her. This left £19 unpaid and it is in respect of that sum that the appellant was tried and convicted.

As there was evidence reasonably to support the learned Magistrate's findings of fact the question is do these facts constitute theft as charged. Section 383 C.C. defines stealing in these words :—

S. 383 (1)

A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing.

Subsection (4) also is important and reads :—

In the case of conversion, it is immaterial whether the thing converted is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it. It is also immaterial that the person who converts the property is the holder of a power of attorney for the disposition of it, or is otherwise authorised to dispose of the property.

To constitute stealing there must therefore be either a taking or a conversion. There can, however, be neither a taking nor a conversion when the property in the thing, the subject of the theft, has passed to the accused. In the present case it is clear that when the complainant handed over to the accused the £48 she intended him not only to have the possession but also the property in the money since in exchange for it she got the two drums of dye she wanted. It follows that the subsequent conversion of the £19 could not amount to stealing. This, however, does not mean that no offence has been committed. In my view the facts which I have stated above disclose a clear case of obtaining money by false pretences contrary to section 419 *C.C.* It is plain that, but for the appellant's statement that the price of each drum was £25, the complainant would not have parted with the £48. That statement was clearly false and could only have been made with intent to defraud.

As section 174 (2) Criminal Procedure provides that :—

When a person is charged with stealing anything and it is proved that he obtained the thing in any such manner as would amount under the provisions of the Criminal Code to obtaining it by false pretences with intent to defraud he may be

convicted of obtaining it by false pretences with intent to defraud although he was not charged with that offence.

Acting under the powers conferred upon this Court by section 39 High Court of Lagos Ordinance 1955 I alter the conviction to one of obtaining £19 by false pretences contrary to section 419 *C.C.*, the sentence passed to be the same.

The appeal will accordingly be dismissed.

HIGH COURT, LAGOS

J. F. OYEDELE .. .. APPELLANT

v.

BEN AWOMODU .. .. RESPONDENT

(HIGH COURT : DE LESTANG, C.J. ; 24th October, 1960)

(Appeal No. LD/53CA/60)

Criminal Law—S. 451 *Criminal Code—Ownership of Property no Defence.*

Jurisdiction—The Limitation imposed by Section 14(2) *of the Magistrates' Court (Lagos) Ordinance applies to both civil and criminal proceedings.*

The facts are fully stated in the judgment.

HELD : That to constitute the offence of wilful and unlawful destruction of a building contrary to *s.* 451 Criminal Code it is sufficient to prove that the destruction of the property was caused wilfully and unlawfully and that an owner may be guilty of such an offence in regard to his own property.

Cases referred to :—

Salako v. Inspector-General of Police, CR. APP LD/9CA/58 unreported.

E. Esan for the Appellant.

H. A. Odufalu for the Respondent.

DE LESTANG, C.J. :—This is an appeal in a private prosecution in which the appellant was convicted of wilful and unlawful destruction of a mud building contrary to section 451 C.C. and was bound over on his own recognizance in the sum of £50 to keep the peace.

Before the trial commenced the appellant claimed ownership of the land on which the hut stood while the complainant alleged that it belonged to a third party and that he was in lawful occupation of it. The appellant took the preliminary point that as the case raised an issue as to title to land the learned Magistrate had no jurisdiction to try it. The learned Magistrate adjourned the case for a ruling on the point but although there were six such adjournments spread over a period of two months he never in fact gave any ruling. Neither did he in his judgment deal with the question of jurisdiction satisfactorily. The appellant raises the same question of jurisdiction in this appeal.

Section 14 (2) of the Magistrates' Court (Lagos) Ordinance provides that a Magistrate shall not exercise jurisdiction in any cause or matter which raises any issue as to the title of land. This subsection is to be found in a section dealing with Civil jurisdiction

of Magistrates and at first sight it would appear to relate to Civil jurisdiction only. The subsection however uses the expression "any cause or matter" and "cause" is defined in section 2 (1) of the Ordinance as including Criminal proceedings. That being so it follows, in my view, that the limitation imposed by section 14 (2) applies to both Civil and Criminal proceedings. This appears to be the view which this Court took in *Salako v. Inspector-General of Police*, CR. APP. LD/9CA/58 unreported. The question, therefore, for decision in the present appeal is whether the issue of title was raised *bona fide*. In other words was title to the land relevant in the proceedings. It is contended for the appellant that title was relevant because (*a*) ownership of land carries with it ownership of everything attached thereto such as buildings fixed to the land, and (*b*) that a person cannot be convicted of damaging his own property. I agree with (*a*) but not with (*b*). Section 451 C.C. provides that any person who wilfully and unlawfully destroys any property is guilty of an offence. It will be observed that the section refers to "any property" and that it does not expressly exclude property owned by the accused. To constitute an offence it is sufficient in my view to prove that the destruction of the property was caused wilfully and unlawfully. Of course in the majority of cases there would be nothing unlawful in destroying one's own property so that it is only in special circumstances that an owner may be guilty of such an offence in regard to his own property. One such case in my view would be where the property is in the possession of another person. In the present case the complainant was in occupation of the hut and had been so in occupation for a number of years. He was a tenant within the Recovery of Premises Ordinance and any steps taken by the owner to recover possession otherwise than under the provisions of the Ordinance would be unlawful. In my judgment therefore the act of the appellant in destroying the hut in these circumstances was clearly unlawful. It follows from this view that the issue of title was not relevant to the decision of the case and that the Magistrate had jurisdiction to try it. The appeal is dismissed with costs which I assess at £10-10*s*.

Before leaving this case I have an observation to make. This was a private prosecution and the complainant made a complaint on oath before the Magistrate and applied for a warrant of arrest to be issued. The learned Magistrate only issued a summons as he was properly entitled to do but on the return date of the summons he ordered the accused to file an affidavit. There is no provisi

in the law for such an order and I have no hesitation in saying that it is quite wrong. On the return date the accused should simply have been charged and his plea taken. After he had pleaded not guilty a date should then have been fixed for the trial of the case.

HIGH COURT, LAGOS

GEORGE AGBAIFO .. .. APPELLANT

v.

INSPECTOR-GENERAL OF POLICE .. RESPONDENT

[HIGH COURT : DE LESTANG C.J. ; 24th October, 1960]
(Appeal No. LD/52CA/60)

Criminal Law—Obstructing—Police Officers—S. 356 (2) *Criminal Code—Meaning of 'Obstructing'.*

A Police Officer acting on suspicion searched a car on the highway and found in it ten tins suspected of containing illicit gin. While he was investigating the matter the owner of the tins caused the car to be driven away with the result that the tins disappeared. The owner was convicted of obstructing a police officer in the execution of his duty.

HELD : That 'obstructing' means making it more difficult for the Police to carry out their duties and that in causing the car to be driven away with the tins the appellant impeded the police officer in the execution of his duties and was properly convicted.

Case referred to :—

Hinchliffe v. Sheldon (1955) 3 N.E.R. 406.

S. O. Lambo for the Appellant.

J. O. Williams for the Respondent.

DE LESTANG, C.J.—The appellant was convicted of obstructing a police officer in the execution of his duty contrary to section 356 (2) Criminal Code. He appealed against his conviction and his appeal was dismissed on the 19th October, 1960. I now give my reasons for the dismissal.

The facts which the learned Migistrate found proved are very simple and may be stated in a few words. A police constable was on beat duty from 10 p.m. to 6 a.m. when at 11.45 p.m. he saw a car in Ajeniya Street surrounded by a number of people. He approached and saw with the persons a tin which he suspected contained illicit gin. He caused the driver to open the boot of his car and in it saw ten full tins of what he thought was illicit gin. As a result of what the driver told him he sent him after taking his particulars to fetch the alleged owner of the gin. The driver left and returned later with the accused. I quote what next happened from the evidence of the Police Constable.

In consequence of what he said I asked accused if he owned the gin and he said he owned both the car and the illicit gin. I asked accused what his name was and he said it was John Oluke and that he was a Police Sergeant No. 1034. I asked him how he got the tins of illicit gin. He said "No, No No" and then he asked the driver to go. The driver got into his car and quickly drove off. The car is LC 9644. I asked accused why he asked the driver to go away and he said he did not ask the driver to go away and that he knew nothing of the car and the gin. I told him I was taking him to the Police Station."

Later on he added :—

I had wanted to take both the driver and the alleged owner, the car and tins of illicit gin to the Police Station.

As a result of the departure of the driver and car the tins of gin in the car disappeared.

For the appellant Mr Lambo contended that since the Police Constable had not indicated that he was going either to arrest and detain the driver or to seize the car the conduct of the appellant did not constitute obstruction.

It is well settled that "obstructing" means making it more difficult for the police to carry out their duties. *Vide Hinchliffe v. Sheldon* (1955) 3 *N.E.R.* 406 *and E. and E. Digest* volume 15, page 856, paragraph 5279. It was clearly the duty of the Police Constable in the present case at least to take the illicit gin to the police station to be used as an exhibit in the case. It seems perfectly clear also that had the appellant not interfered the Police Constable would have done this but was frustrated by the action of the appellant who incidently was a police sergeant, an officer superior in rank to the Police Constable. This is no doubt the reason why the Police Constable did not immediately object to what the appellant did although he complained about it soon afterwards. In my view the conduct of the appellant in telling the driver to go away with the car and the gin impeded the Police Constable in carrying out his duties and amounted to obstruction.

HIGH COURT, LAGOS

BENNETT OTIJI AND ANOTHER .. .. APPELLANT

v.

INSPECTOR-GENERAL OF POLICE .. RESPONDENT

[HIGH COURT : DE LESTANG C.J. ; 25th November, 1960]
(Appeal No. LD/57CA/60)

Criminal Law—Official Corruption, s. 116 (1) *Criminal Code—Ingredients of offence—Alteration of conviction to one under s.* 404 *Criminal Code—s.* 39 *High Court of Lagos Ordinance—s.* 179 (1) *Criminal Procedure Ordinance.*

Two Police Constables, in order to extort money from one Sutherland, falsely informed him that his lorries had caused obstruction and were overloaded and demanded money not to prosecute Sutherland's drivers. They were convicted of corruptly asking and corruptly receiving money contrary to s. 116 (1) Criminal Code.

HELD : (1) That to constitute an offence under section 116 (1) in the circumstances of this case it is necessary to establish that the money was asked or received "on account of anything to be afterwards omitted to be done with a view to corrupt or improper interference with the due administration of justice." But since no offence had or was suspected of having been committed there could be no corrupt or improper interference with the administration of justice in omitting to take steps to bring the matter to the Court and the Police Constables were wrongly convicted under that section.

(2) As all the ingredients of an offence under section 404 Criminal Code are comprised in an offence under s. 116 (1) this is a proper case in which the appelate Court should exercise its powers under s. 39 High Court of Lagos Ordinance and applying s. 179 (1) Criminal Procedure Ordinance alter the convictions to convictions under s. 404 Criminal Code.

G. N. Okafor for Appellant No. 1 (Bennett Otiji).

J. M. Bassey for Appellant No. 2 (Ganiyu Sanusi).

F. G. Peters for the Respondent.

DE LESTANG, C.J. :—The two appellants were tried jointly with two other persons and convicted on the following two charges :—

1*st Count*.—That you Bennett Otiji and Ganiyu Sanusi, on or about the 11th day of May, 1960, at Ebute Metta, Lagos, being persons employed in the Public Service in any capacity not judicial for the prosecution or detention or punishment of offender corruptly asked from one Mr Benjamin K. Sutherland some money in order that the drivers of his two lorries might not be prosecuted for causing obstruction, and you thereby committed an offence punishable under section 116 (1) of the Criminal Code.

2nd Count.—That you Bennett Otiji and Ganiyu Sanusi, on or about the 11th day of May, 1960, at Yaba, Lagos, being persons employed in the Public Service in any capacity not judicial for the prosecution or detention or punishment of offender corruptly received from one Mr Benjamin K. Sutherland the sum of £2 in order that the drivers of his two lorries might not be prosecuted for causing obstruction, and you thereby committed an offence punishable under section 116 (1) of the Criminal Code.

The facts which the learned Chief Magistrate found proved and which are no longer in dispute are the following :—

One Sutherland, a timber exporter, uses for the purpose of his business a portion of the Olotto foreshore as a timber beach. The timber is carried to the beach by lorries. Early on the morning of the 11th May two of his lorries driven by Modupe and Jimoh respectively arrived on the beach with a load of timber from Ijebu-Igbo. A short while later the appellants and another policeman came to the beach in a police vehicle. They asked the drivers independently to produce their driving licences and certificates of insurance and road worthiness, which they did. Jimoh enquired what offence he had committed and was told that he had overloaded his lorry. He denied the charge. The policemen, after examining the documents, returned them to the drivers, but they did not then go away. When Sutherland arrived at the beach at about 9.00 a.m. they were still there apparently waiting for him as they went up to him and, after ascertaining from him that he was the owner of the two lorries, informed him that his lorries had caused an obstruction in Griffiths Street that very morning. He replied that it was not true. Whereupon they told him that an A.S.P. had seen the two lorries cause the obstruction and had sent them to follow them. They refused to disclose the name of the A.S.P. but made it quite clear that if Sutherland would give them something, clearly meaning money, they would take care of the A.S.P. and no action would be taken. Mr Sutherland said he had no money with him but arranged for them to come to his house at 11.30 that morning. They agreed and left. Later, as arranged, they went to Mr Sutherland's house where he was waiting for them and where they received from him £2 in order to settle the matter. A trap had however been laid for them and they were arrested by other policemen in hiding in the house who had witnessed the payment.

The appellants appeal on various grounds. The principal ground common to both appellants is that there can be no conviction under section 116 (1) Criminal Code unless either an offence has been committed or there is reasonable ground for suspecting that an offence has been committed. It is contended for the appellants that no offence was committed in the present case by either of the drivers and that the allegation was pure invention on the part of the policemen in order to obtain money from the drivers' employer, Sutherland. The respondent, while conceding that section 116 (1) does not apply where no offence has been committed or is suspected of having been committed, contends that an offence of overloading might have been committed and that the police officers so believed.

There can, in my opinion, be no doubt that there was no reasonable grounds for anyone to believe that an offence had been committed and that the policemen merely made up the allegations of obstruction and overloading at different times in order to extort money from Sutherland. To constitute an offence under section 116 (1) in the circumstances of this case it is necessary to establish that the money was asked or received "on account of anything to be afterwards omitted to be done with a view to corrupt or improper interference with the due administration of justice." It is plain that where no offence has or is suspected of having been committed there can be no corrupt or improper interference with the administration of justice in omitting to take steps to bring the matter to the Court. Indeed, the taking of such steps and not the omission to take them would constitute interference with the administration of justice. This ground of appeal therefore succeeds, and it is unnecessary for me to consider the other grounds as I hold that the appellants were wrongly convicted of offences under section 116 (1) Criminal Code.

This does not mean however that they must be allowed to go free. Section 39 (*a*) High Court of Lagos Ordinance provides that the Court may on an appeal against conviction alter the finding while maintaining the sentence, etc., of course the Court will only exercise this power very sparingly and only alter the finding in a clear case and where the appellant would have been properly convicted of the altered offence by the trial Court. Section 179 (1) of the Criminal Procedure Ordinance provides that :—

In addition to the provision hereinbefore specifically made whenever a person is charged with an offence consisting of several particulars a combination of some only

of which constitutes a complete lesser offence in itself and such combination is proved but the remaining particulars are not proved he may be convicted of such lesser offence or may plead guilty thereto although he was not charged with it.

In my view all the ingredients of an offence under s. 404 Criminal Code are comprised in section 116 (1) Criminal Code so that under section 179 (1) Criminal Procedure Ordinance a person charged with an offence under section 116 (1) may properly be convicted of an offence under section 404 although he was not charged with it. It follows therefore that the appellants could have been convicted of an offence under section 404 by the learned Chief Magistrate and the question is whether this is a proper case in which this Court should exercise its powers under section 39 High Court of Lagos Ordinance. In my view this is such a clear case of policemen corruptly demanding and taking money under colour of their employment that it would be a negation of justice to allow them to go free. For these reasons although the ground of appeal succeeds I alter the lower Court's finding to the following :—

The accused (appellants in this case) are acquitted of the offences charged under section 116 (1) Criminal Code but are convicted of (1) demanding and (2) taking money contrary to section 404 Criminal Code. The sentences passed will remain the same.

The appeal is dismissed.

HIGH COURT, LAGOS

E. OMOREGIE .. .. APPELLANT

v.

TAHAN SAIDI .. .. RESPONDENT

[HIGH COURT : DE LESTANG, C.J. ; 28th November, 1960]
(Appeal No. LD/50A/60)

Landlord and Tenant—Order for possession set aside on Appeal—Right of ejected Tenant to repossession.

An order for possession of premises made in the Magistrate's Court was set aside on appeal. The tenant, who had been evicted in pursuance of the order execution of which the Court refused to stay, applied for an order for repossession. Meanwhile the premises had been re-let to a third party.

HELD : That since a successful appellant should be returned to the same position he was before the judgment appealed from the tenant was entitled to an order that the landlord restore possession to him.

Cases referred to :

Ayiwoh v. Akurede 20 *N.L.R.* 4

A. A. Adesina for the Appellant.

A. O. Sikuade for the Respondent.

DE LESTANG, C.J. :—The facts giving rise to this appeal are as follows :—

The appellant was a tenant of certain premises known as 22A Jebba Street West, Ebute Metta, belonging to the respondent. The respondent obtained an order for possession against the appellant in the Magistrate's Court. The appellant appealled and unsuccessfully sought a stay of execution pending appeal. He accordingly obeyed the order of the Court and delivered up possession to the respondent. In due course, however, his appeal was successful and the order for possession made by the lower Court was set aside. Unfortunately the appellant did not there and then ask for an order of repossession. He made that application several days later to this Court which held that the application should be made in the Court below and that this Court was *functus officio*. Whereupon the appellant applied to the Magistrate's Court for an order that the respondent do restore possession to him. The learned Magistrate dismissed the application on two grounds (1) because he thought that if he granted the application he would in effect be sitting in appeal over this Court which had dismissed the

previous application and (2) because since a third party had been granted a lease of the premises an order for repossession would not be effective.

The appellant appeals on the ground that the decision is unreasonable and that the learned Magistrate ought to have followed the case of *Ayiwoh v. Akurede* 20 *N.L.R.* 4.

Mr Sikuade for the respondent conceded that the reference of the learned Magistrate to the previous application of the appellant to this Court was wrong. He maintained, however, that he was right to refuse the application on the ground of the new letting. He sought to distinguish Ayiwoh's case on the ground that no intermediate letting was proved in that case.

The principle is quite clear that a successful appellant must be restored to the same position he was in before the judgment reversed was obtained. The appellant has been wrongly ejected from the premises and he is entitled to an order that the respondent do restore possession to him. The fact that the respondent pending the appeal let the premises to a third party who went into occupation without notice is not a matter which can be considered at this stage. It will be considered if and when a writ of restitution or possession, etc., is applied for. In my view the appellant is entitled to the order sought and the learned Chief Magistrate was wrong not to give it him. I therefore allow this appeal set aside the order of the Court below together with the order for costs and direct that an order be made that the respondent do restore possession to the appellant. The appellant will have the costs both in the Court below and in this Court which I assess at 4 guineas (four) and 16 guineas (sixteen) respectively.

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE PROVISIONS OF SECTION 2 (2) OF THE LAND (PERPETUAL SUCCESSION) ORDINANCE CAP. 98 EX PARTE THE CHERUBIM AND SERAPHIM SOCIETY

[HIGH COURT: DE LESTANG, C.J.; 12th December, 1960]

(Suit No. M/178/60)

Mandamus—discretionary power—discretion properly exercised—mandamus does not lie.

An application by the Cherubim and Seraphim Society for incorporation under the Land (Perpetual Succession) Ordinance having been refused by the Minister empowered to deal with such application, the Society sought an order of *Mandamus* directed to the Minister to hear and determine the application according to law.

HELD: (1) That when a statute confers a discretion to do or not to do a particular thing the Court will not by *Mandamus* dictate that it be done, and provided that the discretion has been exercised *bona fide* and upon relevant material, will not interfere by *Mandamus* to correct an error either of law or fact in the determination of the subordinate tribunal because the Court, in determining whether or not *Mandamus* should issue, is not exercising appellate jurisdiction. But if it were shown that the Minister in exercising his discretion had taken extraneous matters into consideration the Court could issue a *Mandamus* to hear and determine according to law.

(2) That since the Minister had exercised his discretion on proper material the Court had no occasion and indeed no right to examine the manner in which or the principles upon which that discretion was exercised.

Cases referred to:

Julius v. The Bishop of Oxford 1880 5 *A.C.* 214.

Regina v. Cotham 1898 1 *Q.B.* 802.

Rex v. Monmouthshire Justices, ex Parte Heaver 1913 109 *L.T.* 788.

Rex v. L.C.C. 1915 2 *K.B.* 466.

The Queen v. The Vestry of St. Pancras 1890 24 *Q.B.D.* 371.

G. O. K. Ajayi for the Applicants.

S. O. Okunribido for the Respondent.

DE LESTANG, C.J. :—On the 24th October, 1960, the Cherubim and Seraphim Society, hereinafter referred to as the applicants, were granted leave to apply for an order of *Mandamus* directed to the Minister of Lagos Affairs requiring him to exercise his discretion conferred upon him by section 2 (2) of the Land (Perpetual Sucession) Ordinance and in particular to hear and determine the applicants' applications for a certificate of incorporation thereunder according to law.

The facts giving rise to this application are not in dispute. In 1925 the Eternal Sacred Order of the Cherubim and Seraphim Society was founded. In 1930 the Order split into two factions. One faction retained the original name of the Order and the other adopted the name of the Cherubim and Seraphim Society. Both societies are non-trading and non-profit making religious bodies and are registered as such under the Companies Ordinance. It would appear that the Eternal Sacred Order of the Cherubim and Seraphim Society are also incorporated under the Land (Perpetual Succession) Ordinance but the date of that registration is not in evidence, nor is it indeed relevant in these proceedings. Suffice it to say that subsequent to that date the applicants applied to the Minister of Lagos Affairs for a certificate of registration of their Trustees as a body corporate under the Ordinance. On the 6th May, 1960, the Minister replied as follows :—

> I have the honour to refer to your application and to inform you that the name of your body is liable to be confused with that of the Eternal Sacred Order of the Cherubim and Seraphim, a body which is already incorporated under the Ordinance.
>
> In the circumstance I am directed to say that your application cannot be registered unless and until the body adopt's a name which is not capable of being confused with the Eternal Sacred Order of the Cherubim and Seraphim.

On the 18th June, 1960, the applicants wrote to the Minister again requesting a review of his decision but the Minister by his letter of the 22nd September maintained his original decision. Whereupon on the 22nd October, the applicants filed an application for leave to apply for an order of *mandamus* which as I have said before was granted. The order is sought on several grounds which may be summarised thus :—

> That the Minister failed to exercise the discretion vested in him by section 2 (2) of the Land (Perpetual Succession) Ordinance.

Section 2 (1) of the Ordinance provides for application for registration by societies like the applicants. Section 2 (2) then provides that :—

> If the Minister, having regard to the extent, nature, and objects and other circumstances of such community, body or association of persons, shall consider such incorporation expedient, he may grant such certificate accordingly, subject to such conditions or directions generally as he shall think fit to insert in such certificate, and particularly relating to the qualifications and number of the trustees, their tenure and avoidance of office, the mode of appointing new trustees, the custody and use of the common seal, the amount of land which such trustees may hold, and the purposes for which such land may be held and used.

Mr Ajayi for the applicants concedes that the section confers a discretion on the Minister to grant or refuse on application but he contends that it also imposes a duty on him to hear and to consider the application, which, he says, the Minister has not done in the present case because he has allowed his mind to be influenced by irrelevant considerations, namely the similarity of the names of the applicants and the Eternal Sacred Order of the Cherubim and Seraphim Society and the likelihood of confusion. He contends further that the section prescribes the matters which the Minister may consider and that these do not include the name of the body or association seeking incorporation. Mr Ajayi further contends that the Court can compel the Minister not merely to hear and determine the application but also to issue a certificate forthwith because, since the only objection to the incorporation is bad, the Minister must inevitably grant the application.

Mr Okunribido for the Minister concedes that there is a duty on the Minister to hear and determine the application. He contends however that the Minister has a discretion whether to grant or refuse the application. He contends also that the Minister has exercised his discretion which, he says, is similar to the discretion conferred by the Church Disciplinary Act upon the Bishop of Oxford in *Julius v. The Bishop of Oxford* 1880 5 *A.C.* 214 and that the Court cannot interfere with it by *Mandamus*.

In Julius's case their Lordships after construing the statute came to the conclusion that it conferred upon the Bishop a complete discretion to issue or decline to issue a commission. Now it is well settled that when a statute confers a discretion to do or not to do a particular thing the Court will not by *Mandamus* dictate that it be done, and, provided that the discretion has been exercised *bona fide* and upon relevant material, will not interfere by *Mandamus* to correct an error either of law of fact in the determination

of the subordinate tribunal because the Court, in determining whether or not *Mandamus* should issue, is not exercising appellate jurisdiction. *Regina v. Cothan* 1898 1 *Q.B.* 802. *Rex v. Monmouthshire Justices, Ex Parte Heaver* 1913 109 *L.T.* 788. But (assuming that the Minister has not already heard or determined according to law) the Court can secure by *Mandamus* that the Minister exercises his discretion upon relevant materials and without allowing his mind to be influenced by extraneous considerations. I do not think that anything in Julius's case detracts from the now well-established rule that where it is shown that the subordinate tribunal has, in exercising its discretion, taken extraneous matters into consideration, the Court may issue a *Mandamus* to hear and determine according to law. *Rex V. L.C.C.* 1915 2 *K.B.* 466 at page 475. *The Queen v. The Vestry of St. Pancras* 1890 24 *Q.B.D.* 371.

That being so, the principal question for decision here is whether the Minister has taken extraneous matters into consideration. This is a short but by no means easy question to decide. Mr Ajayi strenuously argued that since the law will not grant the exclusive use of a name to a non-trader, the name of the applicants is irrelevant and cannot be considered at all by the Minister. I am unable to agree with this argument for two reasons : firstly, because, as I shall show presently, there is nothing in the section to exclude consideration of the name and, secondly, because it would in my view be wrong for the Minister to admit bodies or associations of identical names to be incorporated as this would obviously lead to confusion. It thus becomes a matter of degree as to when similarities of names are likely to lead to confusion or not and this is a matter clearly within the absolute discretion of the Minister over which this Court has no control. I have said that the name of the association is not excluded from the matters which the Minister may consider. Those matters are set out in the section as "the extent, nature, objects and other considerations of such community body or association of persons". In my view the words "and other considerations" are wide enough to include the name of the association, etc. Moreover it will be seen from the Schedule of the Ordinance that one of the particulars which must be included in the application for a certificate is "the proposed title of the corporate body", thus showing clearly that the name of the association is a relevant consideration.

It follows that the Minister has, in my view, exercised his discretion and as Lord Cairns said in Julius's case this Court has

not "any occasion or indeed any right to examine into the manner in which, or the principles upon which, that discretion has been exercised".

Had I taken the opposite view and held that the Minister had not exercised his discretion at all I would not have ordered him to grant a certificate but only to hear and determine the application according to law because the section empowers the Minister to impose conditions and directions, etc., in the certificate which this Court could not possibly do for him. In the result the application is dismissed.

JONAH DURU .. .. APPELLANT

v.

INSPECTOR-GENERAL OF POLICE .. RESPONDENT

[HIGH COURT : DE LESTANG, C.J.; 30th December, 1960]
(Appeal No. LD/71CA/60)

Criminal Procedure—Amendment of charge —S. 163 *Criminal Procedure Ordinance—date in charge—"on or about".*

Jonah Duru was charged with giving a bribe "on or about the third day of May 1960". The evidence was that the money was received between 5th and 7th May 1960. On the day fixed for judgment the Magistrate before delivering judgment of his own motion amended the charge to read "on or about 5th to 7th of May 1960". He then complied with s. 164. Criminal Procedure Ordinance and delivered judgment convicting Jonah Duru.

HELD : (1) That though the date of the offence should be alleged in the charge, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence.

(2) That the appellant could have been properly convicted without any amendment because the date stated in the charge was "on or about".

(3) That having regard to the wide terms of section 163 Criminal Procedure Ordinance an amendment immediately before judgment is not necessarily fatal.

Cases referred to :

R. v. Severo Dossi 13 Criminal Appeal Reports 158.

G. N. Okafor for the Appellant.

J. O. Williams for the Respondent.

DE LESTANG, C.J. :—The appellant was jointly charged with one Omigie with official corruption. Omigie pleaded guilty and was duly sentenced. The appellant pleaded not guilty and the case proceeded against him alone, Omigie being called as a witness for the prosecution. The case for the prosecution in brief was that the appellant enlisted the help of Omigie to give to a Government Official, Mr Tella, £30 in order to secure the appellant's promotion and that the appellant provided the £30 which Omigie transmitted to Mr Tella.

The first ground of appeal is that the learned trial Chief Magistrate misdirected himself when he held that Exhibits D and D 1 were written in accused's own hand, because there was no evidence as to whose handwriting Exhibits D and D 1 were.

It is true that there was no direct evidence that the letters in question were in appellant's handwriting but there was clear evidence from Omigie that they were the letters of the appellant and since they are in longhand and the signatures thereon were in the same handwriting as the rest of the letters the learned Magistrate could properly infer that they were in the handwriting of the appellant. There is no substance in this ground of appeal.

The second ground of appeal is that the learned trial Chief Magistrate *erred* in law in admitting the correspondence between the 1st accused and Mr Tella and acting on them since the two accused persons were not charged with conspiracy.

Since there was ample evidence to show that Omigie was helping the appellant and that they were acting in concert I am of opinion that the letters which Omigie wrote to Mr Tella in furtherance of the common purpose was admissible against the appellant. This ground of appeal also fails.

The third ground of appeal is that the learned trial Chief Magistrate *erred* in law in amending the charge after the defence for the 2nd accused had closed.

It is alleged in the original charge that the offence was committed "on or about the third day of May 1960". The evidence showed that Mr Tella received the money between the 5th and 7th May. On the day fixed for judgment the learned Chief Magistrate before delivering the judgment of his own motion amended the date in the charge to read "on or about 5th to 7th day of May 1960". He then recharged the appellant who pleaded not guilty and elected summary trial and did not require any witnesses to be recalled. It is contended that it was wrong to make the amendment at that stage and that the appellant was prejudiced thereby. I am unable to agree. Section 163 Criminal Procedure Ordinance provides that :—

> Any court may alter or add to any charge at any time before judgment is given or verdict returned and every such alteration or addition shall be read and explained to the accused.

Having regard to the wide terms of this section which empower the Court to amend "at any time before judgment is given or verdict returned" an amendment at this late stage is not necessarily fatal. It depends on the nature of the amendment. In the present case the amendment was unnecessary and immaterial. Without the amendment the appellant could have been properly

convicted of the offence charged since the date stated therein was "on or about". Moreover the date was not material to the charge. As Atkin, J. said in *R. v. Severo Dossi* 13 *Criminal Appeal Reports* 158 *at pages* 159 *and* 160 :—

> From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. "And although the day be alleged, yet if the jury finds him guilty on another day the verdict is good but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony ; and the same law is in the case of an indictment".....Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment.

Furthermore it is clear that the appellant could not have been prejudiced as he was given the opportunity which he declined to take advantage of to recall the witnesses or to call evidence. The appeal is dismissed.

HIGH COURT, LAGOS

OKOYE EDE .. .. APPELLANT

v.

INSPECTOR-GENERAL OF POLICE .. RESPONDENT

[HIGH COURT: DE LESTANG, C.J.; 30th December, 1960]
(Appeal No. LD/77CA/60)

Criminal Procedure—Submission of No Case Wrongly Overruled—Evidence Supplied By Defence—Conviction of Accused—Error in Law—Appeal—s. 38 *High Court of Lagos Ordinance.*

The accused was charged jointly with two other persons. At the close of the case for the prosecution there was no evidence at all against him. A submission of no case was, however, overruled by the Court. Whereupon the defence called evidence which implicated the accused and he was convicted. He appealed.

HELD : That when a judge wrongly rules that there is a case to answer he gives a wrong decision on a question of law entitling the appellant to have his appeal allowed unless the case can be brought within the provisions of section 38, High Court of Lagos Ordinance.

Cases referred to :—

R. v. Abbott 39 *CR. APP. Rep* 141

Rex v. Akinpelu Ajani and Others 3 *W.A.C.A.* 3

R. v. Power (1919) 1 *K.B.* 572

G. B. A. Akinyede for the Appellant.

F.G. Peters for the Respondent.

DE LESTANG, C.J.:—The appellant was jointly tried and convicted with two other persons who have not appealed of stealing four mahogany logs. He appeals on the general ground that the decision is unreasonable and cannot be supported having regard to the evidence. Now it is plain that at the close of the case for the prosecution there was no evidence at all against the appellant. A submission of no case made on his behalf was, however, overruled by the learned Chief Magistrate. The appellant and his co-accused then gave evidence and a witness was also called by accused 2. The result was that both accused 2 and the witness gave evidence implicating the appellant which the learned Chief Magistrate accepted and relied on to convict the appellant.

This being the position the prosecution, relying on the decision in *R. v. Abbott* 39 *CR. APP. REP* 141, intimated that it did not support the conviction of the appellant. Before that decision the

law on the point in this country was as stated in *Rex v. Akinpelu Ajani and Others* 3 *W.A.C.A.* 3, when after reviewing the English cases the Court said at page 7 :—

> And that is how the law stands to-day, and it appears to amount to this, that in cases where the prosecution has made out *no* case against an accused, but in spite of that he is called upon by the Court to enter upon his defence instead of being discharged :—
>
> (*a*) If at the close of the case for the prosecution his Counsel, if he was represented, made no submission, he can be properly convicted upon evidence subsequently given, and ;
>
> (*b*) If at the close of the case for the prosecution, he, being unrepresented and probably completely ignorant of procedure, made no submission, he can be properly convicted upon evidence subsequently given and ;
>
> (*c*) If at the close of the case for the prosecution he or his Counsel made a submission which was wrongly overruled then, if either he or his Counsel took any part in the subsequent proceedings, an appeal against a conviction resulting from those proceedings will fail ; but
>
> (*d*) If at the close of the case for the prosecution he or his Counsel made a submission, which was wrongly overruled, and then refused to take any part in the subsequent proceedings, he will be "quite safe", *i.e.* apparently certain to get a possible conviction quashed on appeal.

In arriving at these conclusions the W.A.C.A. relied *inter alia* on *R. V. Power* (1919) 1 *K.B.* 572. That case was, however, explained in R. V. Abbott. In the latter case the appellant and another were indicted together for forgery. At the close of the case for the prosecution a submission was made on behalf of the appellant that there was no evidence against him fit to go to the jury. The trial judge rejected the submission and refused to withdraw the case from the jury, although the prosecution had then established no case against the appellant. Evidence was then given by the other accused incriminating the appellant. The appellant and his co-defendant were convicted. On appeal against conviction it was held that the appellant was entitled to have his appeal allowed as the judge had come to a wrong decision in point of law in rejecting the submission of no case and in leaving the case to the jury when there was no evidence against him at the close of the case for the prosecution. It was also held that in those circumstances the Court of Criminal Appeal was not obliged to take into account the adverse evidence given against him when the case was wrongly left to the jury.

I find this case difficult to understand because it seems to me to conflict with previous decisions of the Court of Criminal Appeal. Be that as it may it does not decide that a wrong ruling on a submission of no case will invariably be fatal to a conviction. Where

a judge wrongly rules that there is a case to answer he gives a wrong decision on a question of law and in such a case the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso to section 4 of the Criminal Appeal Act which is similar to the provisions of section 38, High Court of Lagos Ordinance. That section permits the Court to dismiss the appeal if it considers that no substantial miscarriage of justice has occurred. For the Court to apply the section, the evidence must be clear and reliable. The evidence does not come up to the standard in the present case and therefore section 38, High Court of Lagos Ordinance, cannot be applied.

The appeal accordingly succeeds and the conviction and sentence of the appellant are set aside. A verdict of acquittal will be entered.

HIGH COURT, LAGOS

NURU A. YESUFU .. .. APPELLANT

v.

INSPECTOR-GENERAL OF POLICE .. RESPONDENT

[HIGH COURT: DE LESTANG, C.J.; 30th December, 1960]
(Appeal No. LD/76CA/60)

Criminal procedure—several counts—decision necessary on each count—sentences necessary in respect of each conviction.

The facts are not material and appear fully from the judgment.

HELD : That it is a well settled rule of practice that when an accused person is tried on a charge containing several counts there must be a decision on each count and a sentence in respect of each count on which there is a conviction.

B. N. Onyekwere for the Appellant.

O. A. Esin for the Respondent.

DE LESTANG, C.J. :—The appellant was tried on a charge containing seventeen counts. Eight of the counts *viz.* counts 1, 3, 5, 7, 9, 11, 13 and 15 were for fraudulent false accounting contrary to section 438 (3) Criminal Code. The others were for stealing contrary to section 390 (6) Criminal Code. The learned Acting Chief Magistrate acquitted the appellant on all the counts of fraudulent false accounting because he was of the opinion that the prosecution had failed to prove that the West African Airways Corporation (Nigeria) Ltd., who are stated in all the charges to be the employers of the appellant, were so in fact. As regards the counts of stealing the learned Acting Chief Magistrate in the first paragraph of his judgment acquitted the appellant on count 17 but towards the end of his judgment he said :—

In any event without reference to the remaining counts before the Court the aggregate of which is £345-17*s*-9*d*. I find accused guilty of stealing the money as there is nothing forthcoming from the accused to show that he had authority at the time he sat on the money to so sit on it.

I find him guilty of stealing the money belonging to his Department and in any event contrary to section 390 (6) of the Criminal Code.

He then adjourned the case for six days so as to give an opportunity to the appellant to make restitution of £345-17*s*-9*d* to "the West African Airways Corporation" and when restitution was not made he sentenced him to two years imprisonment with hard labour.

Two grounds of appeal were argued. The first is "that the conviction was based on a charge not before the Court" in other words that it was not proved that the West African Airways Corporation (Nigeria) Ltd. were the employers of the appellant as alleged in the counts of stealing. There is in my view no substance at all in this ground of appeal and the learned Chief Magistrate was completely misled by defence counsel's submission on the point. It is quite true that no witness testified expressly that the appellant was employed by the West African Airways Corporation (Nigeria) Ltd. Many witnesses including the appellant himself referred to appellant's employers as the West African Airways Corporation and the learned Chief Magistrate accepted the submission that there was nothing to show that West African Airways Corporation was the same firm as West African Airways Corporation (Nigeria) Ltd. In coming to this conclusion, however, it would seem that he ignored very cogent documentary evidence. I refer to the receipts which the appellant issued in the course of his employment which clearly give the name of his employers as "West African Airways Corporation (Nigeria) Ltd." There was thus clear evidence that appellant was employed by West African Airways Corporation (Nigeria) Ltd. and that this is the firm which the witness called West African Airways Corporation for short. The appellant is therefore fortunate in having been acquitted on the charges of fraudulent false accounting on this ground.

The other ground of appeal is that the "learned trial Magistrate *erred* in law by not specifying in his judgment on what counts the accused was found guilty and what sentences were allotted to such counts." There is substance in this ground of appeal as it is a well settled rule of practice that when an accused person is tried on a charge containing several counts there ought to be a decision on each count and a sentence in respect of each count on which a conviction is recorded. It is clear, however, from the relevant portion of the judgment which I have quoted that in the present case the learned Chief Magistrate ignored that practice with the result that it is by no means clear on which counts the appellant was convicted. Having regard to the finding that the appellant stole the aggregate amount of £345-17*s*-9*d* which is approximately the sum total of all the monies involved in all the counts of stealing (the correct amount being £344-14*s*-3*d*) a possible inference is that the intention of the Chief Magistrate was to convict the appellant on all the counts of stealing. But this inference is negatived by the express finding of acquittal on count 17 which reduces the aggregate amount of the thefts to £240-5*s*-3*d*. It is thus impossible to say accurately on which counts of stealing the appellant was convicted.

The uncertainty is rendered still more uncertain by the fact that the guilt of the appellant on counts 2 and 10 was not established. Although the appellant admitted in a statement to the police that he had not accounted to his employers for the amounts in these two counts the evidence shows beyond doubt that he received these two amounts by cheques and that the cheques were paid into his employers' bank account. He could not, therefore, have stolen the money concerned in these two counts. The result is that the conviction is so vague that it cannot stand and must be set aside. I have considered whether a new trial should not be ordered but I have come to the conclusion that it would not be fair on the appellant to do so.

The appeal is accordingly allowed, the conviction set aside and a verdict of acquittal on all the stealing counts entered.

HIGH COURT, LAGOS

HARMSEN VERWEY AND DUNLOP N.V. PLAINTIFFS

v.

MOSES T. O. NOTTIDGE (Trading under the name and style of Nottidge Brothers and Company .. .. DEFENDANTS

[HIGH COURT OF LAGOS: COKER, J.; 2nd May, 1960]
(Suit No. LD/8/59)

Agreement under Seal by Limited Liability Company—Seal is necessary to make Company liable.

A limited liability company had sued the defendant N for balance of money due to it in respect of goods sold and delivered by the company to N. In the course of the transaction N and the Company executed an agreement under seal although none of the seals on the agreement was the common seal of the company.

HELD : The defendant is liable on the agreement to the company as the agreement nowhere seeks to make the company liable.

A. T. Dundas for Plaintiffs.

H. A. Lardner for Defendants.

COKER, J. :—By the writ of summons in this case the plaintiffs' claim against the defendant is for the sum of £4,398-1*s*-2*d* "being balance of amount together with interest due and owing to the plaintiffs by the defendant as per an agreement under seal between the parties dated the 9th day of May, 1958". Pleadings were ordered and filed. At the trial only the plaintiff's representative *Geert Quelle* gave evidence on behalf of the plaintiffs. The defendant did not give evidence and his Counsel indicated to the court that he would rely upon his submissions.

The witness testified to the effect that he met the defendant towards the end of the year 1955 and from that time started to do business with the defendant in his capacity as a representative of the plaintiff's company. The plaintiffs were selling printing papers and the defendant is a printer by profession. Between the months of October 1956 and February 1957, the plaintiffs sold to the defendant printing paper to the value of £14,100. This amount was covered by a series of Bills of Exchange drawn on the defendant in favour of the plaintiffs. These were all time bills and were made to mature after 90 days. The defendant duly accepted all the bills and at the time of acceptance executed promissory notes to cover as many of those bills as he did not then pay. In this way promissory notes to the value of £7,674-16*s*-8*d*

were executed by the defendant in favour of the plaintiffs. At maturity these promissory notes were not honoured and the plaintiffs continued to press the defendant for the settlement of the accounts. Eventually the parties came to some form of understanding and the defendant executed the document produced as Ex. B whereby he promised to pay to the plaintiffs "the whole sum of £7,674-16*s*-8*d* together with all interest and other charges thereon accruing since the 1st day of February, 1957 by instalments". The instalments were later set out in Ex. B and this document was signed sealed and delivered by the defendant and by two representatives of the plaintiffs.

The defendant had paid in all the sum of £6,020 leaving a balance on the value of the promissory notes of £1,654-16*s*-8*d*. The accrued interest at the agreed rate of 6 per cent per annum is now £847-6*s*-3*d* and the expenses of stamping the promissory notes total £7-15*s*-0*d*. The total amount now due from the defendant to the plaintiffs and now being claimed by the plaintiffs is £2,510-17*s*-11*d*.

As I indicated before the defendant did not give evidence but Counsel for the defendant submitted (*i*) that the document Ex. B was not properly executed by the plaintiffs in as much as the plaintiffs are a limited liability company and their seal had not been affixed to the document (*ii*) that at the time that Ex. B was executed, *i.e.*, the 9th day of May, 1958, the witness Quelle was not yet appointed a representative of the plaintiffs in as much as Ex. A was executed only on the 20th day of August 1958 and (*iii*) that as the claim has been founded upon a contract under seal the plaintiffs would not if they failed be entitled to relief in respect of the Bills of Exchange which in any case have not been produced before the court. With respect to the last submission I observe that it is not necessary to deal with this as in my view the case of the plaintiffs on the document Ex. B has been fully and properly put before the court. The observation which I propose shortly to make in respect of the first ground of submission will in my view also dispose of the argument of Counsel on this ground. With respect to the 2nd ground that the witness Quelle was not a representative of the plaintiffs at the time of execution of Ex. B it is to be noted that Mr Quelle was not cross-examined in the witness box by or on behalf of the defendant who quite apart from anything contained in Ex. A, had executed the document Ex. B which recites *inter alia* that the witness Quelle is one of the accredited representatives of the plaintiffs company. Although no

other document has been produced to this effect, yet the defendant by executing Ex. B is estopped from denying that at the material time the witness was a representative of the plaintiffs company.

I now deal with the first submissions of Counsel on behalf of the defendant. Counsel had submitted that the plaintiffs are a limited liability company, *i.e.*, a Corporation and that therefore they can only contract under seal. It is clear that the document Ex. B is an agreement under seal. Counsel, however, maintained that such a seal must be the common seal of the Corporation. I do not accept these submissions as a general statement of the law. My recollection of the law is that any contracts required by law to be under seal may be executed by a company under its common seal. This is necessary in order to charge the company with liability. In the present case, it is not sought to charge the plaintiffs with any liability. In my view therefore, and without attempting to decide upon them, these submissions are completely irrelevant to the liability of the defendant in this case and I would have come to the same conclusion about the liability of the defendant if the plaintiffs had not executed Ex. B at all. The plaintiffs are seeking to enforce the promise by the defendant contained in Ex. B. It is not being sought to make the plaintiffs liable on any part of the contract Ex. B and indeed the plaintiffs had given consideration and performed all their promises as set out therein. It is elementary law that a deed operates not only by way of estoppel but also by way of merger. Whatever be the position of the parties once they agree to reduce their rights and duties into writing under seal they are not only estopped from setting up an inconsistent position but they are also deemed to have merged all their rights within the four corners of the document. I therefore hold that whatever may be the legal advantage of any exercises into whether or not this document is properly executed by the plaintiffs, a decision on that ground is not relevant to this case. I have also indicated that I am satisfied that his deed was properly executed by the representatives of the plaintiffs company whom the defendant knew, acknowledged and indeed dealt with throughout this transaction.

I have now before me, apart from the deed, the evidence of the plaintiffs representatives and this evidence was neither challenged by way of cross-examination nor shewn otherwise to be inaccurate. I accept such evidence I find as a fact that as a result of the transaction between the parties whereby goods were sold and delivered by the plaintiffs to the defendant an amount of £2,510-17*s*-11*d*

is now due from the defendant to the plaintiffs and that this amount has not been paid by the defendant despite demands made by the plaintiffs. I give judgment against the defendant in favour of the plaintiffs for £2,510-17*s*-11*d* with costs which I fix at 60 guineas.

HIGH COURT, LAGOS

CHIEF FESTUS SAM OKOTIE-EBOH . . PLAINTIFF

v.

1. THE AMALGAMATED PRESS (OF NIGERIA) LIMITED . . . . . } DEFENDANTS
2. THE NIGERIAN PRINTING AND PUBLISHING COMPANY . . . .

[HIGH COURT OF LAGOS : COKER, J. ; 2nd May, 1960]
(Suit No. LD/23/60)

Defamation—Application to Strike out Defendants from action on grounds based on a resolution of issues of fact.

The plaintiff O. had instituted proceedings for libel against the defendants B and C, the libel being contained in a newspaper usually printed and published by the first defendants B. Immediately before the date of publication of the libel the 2nd defendants C, owing to an accident which happened in the premises of the 1st defendants B, were printing copies of the newspaper for and on behalf of the 1st defendants B. On being sued together for the libel the 2nd defendants C in this application are asking the court to strike them out of the action on the grounds that they were not in fact responsible for printing that particular issue carrying the alleged libel.

HELD : The liability of the 2nd defendants for printing the newspaper was an issue of fact and cannot be tried simply on affidavits without hearing evidence on all the other issues involved.

Cases referred to :—

Appleson v. H. Littlewood Limited (1939) 1 *A.E.R.* 464
Kelly's Directories Limited v. Gavin and Lloyd (1902) 1 CD. 631
Marchant v. Ford and Others (1936) 2 *A.E.R.* 1510

Chief M. E. R. Okorodudu for the plaintiff.

Chief F. R. A. Williams, Q.C. (Owodunni with him) for 1st Defendants.

J. G. Bentley for the 2nd Defendants.

COKER, J. :—This is an application by the second defendants herein for an order "pursuant to order 32 rule 19 RSC that the writ of summons and statement of claim be struck out as against the 2nd defendants on the ground that they are vexatious or an abuse of the process of the court and that judgment be given for the second defendants or for such order or orders as may be just".

In support of the motion three affidavits have been filed, one by Mr Bentley, described as a Solicitor to the 2nd defendants, another one by Mr Shonibare, described as Managing Director of the Amalgamated Press (of Nigeria) Limited (1st defendants) and the third by Mr Roberts, described as the Managing Director of the Nigerian Printing and Publishing Company Limited (2nd defendants). The substantial averment in all the affidavits is that on the date in question in this case the present applicants did not print the copies of the publication relied upon in this case. The affidavits do admit however that the applicants had, prior to the date in question, printed on behalf of the first defendants copies of the particular newspaper in question, that is, the Daily Service. Pleadings have been ordered and filed and indeed the present applicants had filed their statement of defence on the 20th day of March, 1960. It is to be observed that paragraph 6 of the statement of claim avers that the first defendants are the publishers of the newspaper in question and that the second defendants (*i.e.* the present applicants) printed the issue of the said newspaper on the material date.

By the provisions of Order 32, Rule 19 of the Rules of the Supreme Court, the court is empowered to "strike out any pleadings or part thereof where it appears to the court that such pleadings disclose no cause of action or no defence to the action or on the ground that it is embarrassing or scandalous or vexatious or an abuse of the process of the court." It is well to point out at this stage that that rule makes no provisions whatsoever for striking out a writ of summons as has been asked for in this application.

Arguing the application, Mr Bentley submitted that the affidavit of Mr Shonibare has confirmed the averments in his own affidavit to the effect that the name of the present applicant has been mistakenly inserted on the publication complained of by the first defendants and that the present applicants did not in fact print the newspaper on the material date. He therefore submitted that the present applicants are entitled at this stage to an order striking out the action as against them. He relied upon the affidavit of Mr Shonibare and also on the case which he cited of *Appleson v. H. Littlewood Limited* (1939) 1 AER 464.

The application was opposed by Mr Okorodudu who argued on behalf of the plaintiff that the court could not at this stage dismiss the applicants from the case because their liability depends upon the determination of issues of fact which could not be decided on

the affidavits before the court. In deed Mr Okorodudu contended that the affidavit of Mr Shonibare is inadmissible in evidence as it does not comply with the provisions of section 90 of the Evidence Ordinance Cap. 63.

As I indicated before the rule relied upon by Counsel for the applicants does not provide for striking out a writ of summons and to this extent this application is misconceived insofar as it is required by the applicants that the writ of summons be struck out as against them. Besides, the case relied upon by Counsel for the applicants is one in which the parties had previously agreed to exclude legal liability from the result of their actions in the transaction before the court. In that case the plaintiffs had brought an action to recover a sum of money alleged to have been due as a result of a football pool. The competition was subject to the usual rule described as a basic condition that the transaction should not be attended by any legal relationship, rights or duties or be legally enforceable or be the subject of litigation. In the events that had happened the plaintiff brought an action against the defendants and it was held by the Court of Appeal that it was a condition of entering into the transaction that they should not be subject to litigation and that as the plaintiff could not in any event have succeeded the action failed *in limine* and that the pleadings were rightly struck out. It is clear in this case that the basic condition of the transaction was that it should not be subject to litigation.

In the present case there is on the pleadings an averment to the effect that the name of the present applicants appears on the publication against which the plaintiff is complaining. Whether or not such a name does appear on the publication and indeed whether or not the appearance of such a name would not ground liability in the applicants are all matters of fact to be decided at the trial on their merits. I am now being asked without taking evidence to decide that issue of fact by the affidavits. I observe that two of the three affidavits have been sworn to by persons who are not parties to this action and who may not even be competent at the trial to give evidence on behalf of either of the parties. Besides, the provisions of section 90 of the Evidence Ordinance Cap. 63 are peremptory and it is clear that the affidavits of both Mr Shonibare and Mr Roberts are inadmissible in evidence unless the conditions prescribed by that section are complied with. I have no evidence before me that those conditions have been complied with.

The provisions of order 32 rule 19 of the Rules of the Supreme Court are similar to the provisions of Order 25 Rule 4 of the English Rules of Court and it has been held that the provisions of that rule could not be employed to strike out the pleading unless such a pleading is clearly demurrable. In the case of *Appleson v. H. Littlewood Ltd. Supra* referred to by Counsel for the applicants, Clauson L.J. observed at page 468 as follows :

> Having regard to the decision of the House of Lords in Rose and Frank Company *v.* J. R. Crompton & Brothers Ltd. it appears to me to be clear that the Statement of Claim is demurrable. In those circumstances the Judge could not possibly in my view have made any order other than the order he made.

A point similar to the point now argued was raised in the case of *Kelly's Directories Ltd. v. Gavin & Lloyd* 1902 1 Ch. D. 631 and that issue was resolved only after taking evidence at the trial.

As I indicated before the question of liability of the present applicants is one of fact. It may even be that it involves also a point of law. In my view, however, the determination of such issue can only rightly follow after evidence has been adduced in the proper way. In the case of *Marchant v. Ford & Ors.* (1936) 2 A.E.R. 1510 the Court of Appeal reversing the ruling of the trial judge held that the question of whether the defendants were a party to the publication was one of fact to be decided on the evidence at the hearing and that the claim in respect thereof should not have been struck out. Greer L.J. observed at page 1512 as follows :—

> I am not going to decide what will ultimately have to be decided at the trial—namely, whether or not the words which My Lord, misusing the English language as thus misused in the newspapers has called "blurb" were an invitation to readers to read the book which would justify the conclusion, at any rate *prima facie* that the printer of what is inside the cover is a party to the publication of the work to the public. That will be a matter proper for argument when the case comes up for trial.

I have considered all the arguments of Counsel and have checked upon the authorities as far as I can and have come to the conclusion that I cannot grant the application of the applicants on this motion. The application is therefore dismissed. The applicants shall pay to the plaintiffs the cost of the application which I fix at £10-10*s*-0*d*. I award no costs in favour of the first defendants as their Counsel indicated that he was not opposing the application.

SALU RUFAI ANIMASHAWUN .. .. PLAINTIFF

v.

COMPAGNIE FRANCAISE DE L'AFRIQUE OCCIDENTALE .. .. DEFENDANTS

[HIGH COURT OF LAGOS: COKER, J.; 9th May, 1960]
(Suit No. LD/247/59)

Hire Purchase Agreement—Payment of Instalments—Right of seizure by owners of properties let out on Hire Purchase.

The plaintiff A on the 12th May 1958 entered into Hire Purchase agreement with the defendants C.F. whereby the defendants let to him a minibus against the defendant's deposit of £400 and agreed monthly instalmental payments. The plaintiff defaulted with respect to the monthly instalments and as a result of this the defendants C.F. seized the said minibus and sold same pursuant to rights reserved to themselves under and by virtue of the H.P. agreement. The plaintiff A did not dispute that he was in arrears with the payment of his monthly instalments but contended that the defendants C.F. had agreed with him for a relaxation of the agreement to pay monthly instalments.

HELD: The burden of proving such a relaxation lies on the plaintiff and the defendants having established that the plaintiff was in arrears with his monthly instalments were entitled as they did to exercise their right to a seizure of the vehicle under Hire Purchase.

Cases referred to:—

Webster v. Higgin (1948) 2 *A.E.R.* 127.

Maclaine v. Gatty (1921) 1 *A.C.* 376.

for Plaintiff.

Benson for Defendants.

COKER, J.:—In this case the plaintiff claims against the defendants (1) specific performance by the defendants of their contract to deliver a vehicle minibus No. LC 9126 to the plaintiff or alternatively the sum of £1,000 being the value of the said vehicle, and (2) damages for the detention of the said vehicle LC 9126 until the same is delivered. Pleadings were ordered and filed.

The statement of claim avers that on the 12th day of May, 1958, the plaintiff entered into a Hire Purchase agreement with the defendants whereby the defendants let to him a Morris J.2 minibus No. LC 9126 and that at the time of signing of the agreement the plaintiff deposited with the defendants a sum of £400 and had paid since then a further sum of £640-8*s*-4*d* (six hundred and forty pounds, eight shillings and four-pence). The statement

of claim further avers that although the defendants verbally agreed with the plaintiff to extend the period of payment up to and including the 23rd day of February, 1959, and the plaintiff paid up the balance outstanding on the account of the 23rd day of February 1959, yet the defendants have failed or refused to deliver the said minibus to the plaintiff. The statement of defence on the other hand contends that after the signing of the agreement the minibus in dispute was delivered to the plaintiff but that thereafter the plaintiff failed in the punctual payment of the rents and that the defendants therefore had exercised their rights of seizure under the contract. The statement of defence further avers that the plaintiff kept two accounts covering two Hire Purchase transactions with the defendants and that the plaintiff defaulted in the performance of his obligations to pay up his instalments with respect to the two vehicles.

At the trial the plaintiff testified to the effect that on the 12th May, 1958, he executed the Hire Purchase agreement relating to the vehicle No. LC 9126. This agreement was produced as Ex. A. He admitted that on the 17th day of May, 1958, he also executed another Hire Purchase agreement with the defendants in respect of another minibus No. LC 9217. This other agreement was produced in evidence and marked Ex. E. The plaintiff further testified that he paid down a sum of £400 on Ex. A and although he paid the instalments as agreed the defendants seized the bus some time in December when all he was owing was just over £100. He later interviewed the defendants' Manager and there was an agreement whereby this vehicle was to be released to him if he paid the amounts then outstanding on Ex. A. The agreement reached at this interview was confirmed by letter dated the 17th February 1959 addressed to the plaintiff by the defendants and produced in evidence as Ex. B. On the 20th February 1959 his (plaintiff's) solicitor paid a sum of £58-3*s*-10*d* to the defendants under the cover of a letter dated 20th February, 1959. This letter was admitted in evidence as Ex. C and the receipt of this amount was acknowledged in writing by the solicitors to the defendants by their letter dated 25th February 1959 forwarding receipt from the defendants. The letter was admitted as Ex. D and the receipt as Ex. D 1. Under cross-examination the plaintiff admitted that at no time did he pay the instalments due on the vehicle at the agreed time and also that at no time did he pay the whole amount due on any of the instalments. He produced his receipts for payments made by him and these were admitted in evidence as Ex. F, F1/9. He was not in a position to say whether

or not the letter dated 15th January, 1959, admitted as Ex. G addressed to him by the defendants ever reached him, nor was he in a position to say whether or not it was he who wrote or gave instructions for writing the letter Ex. H (dated 19th January, 1959) to the defendants.

For the defendants Fatayi Uthman, described as the Accounting Manager of the defendants company, testified to the effect that the plaintiff's vehicles were seized as a result of persistent breaches by non-payment of rent by the plaintiff of the Hire purchase agreements Exs. A and E. The witness further testified that he was present at the interview between the Manager of the defendants company, the plaintiff and one Mr Abbas and he heard when the Manager made it clear to the plaintiff that he was not going to release either of the two vehicles to the plaintiff unless he was prepared to settle on both. He further testified that the two vehicles had since been sold by the defendants and that an account of the sales had been forwarded to the plaintiff by their letter dated 31st July, 1959 which was produced in evidence and marked Ex. J.

This action involves some of the more important issues contained in Hire Purchase agreements. To start with I wish to observe that it has been proved to my satisfaction that at the time the vehicle LC 9126 was seized by the defendants the plaintiff was in arrears of rent and was clearly in breach of the agreement Ex. A. By the provisions of Clause 8 of Ex. A, it is manifest that the defendants reserved unto themselves the right to seize the vehicle if *inter alia* the plaintiff was in arrears of rent. According to the plaintiff the vehicle was seized some time in December 1958. Ex. A contains a table showing the respective dates on which the various instalments were due and it is clear that the last instalment was due on the 12th day of November, 1958. I have accordingly examined the receipts Exs. F, F 1/F 9 and they show quite clearly as the plaintiff himself has admitted that at no time did he pay the instalment of rents at the time agreed upon. There can be no doubt therefore that the defendants were within their rights when the vehicle under Ex. A was seized. In my view at that time the Hire Purchase agreement Ex. A was duly determined by the owners.

In the same way the plaintiff admitted that with respect to the other vehicle LC 9217 covered by the agreement, Ex. E, he was in arrears with his rent at the time when that vehicle was seized. Clause 8 of Ex. E makes similar provisions for the seizure of the vehicle in case of non-payment of rent. The plaintiff testified to

the effect that at the time when the vehicle LC 9217 was seized he had paid a deposit of £350 and instalments totalling about £200. He agreed that he was also in arrears of rent. He went to the defendants' Manager early in 1959 apparently to discuss with him the position with respect to his vehicles. In the witness box the plaintiff did say that he went to the defendants' Manager to discuss with him only the vehicle No. LC 9126. This might well be so and indeed it would not be surprising that he went there to discuss the vehicle No. LC 9126 only because apart from the fact that he was in arrears with the other vehicle LC 9217, there is evidence which I accept to the effect that that vehicle was in a very bad state of repair.

Anyway I accept and prefer the evidence of the Accounting Manager of the defendants who testified to the effect that he heard the defendants' Manager when he told the plaintiff that he was not going to treat him with respect to only one of the vehicles. This is confirmed by the letter to the plaintiff produced and admitted as Ex. B. By that letter the time within which the plaintiff was supposed to settle was extended to the 23rd February, 1959. That letter reads as follows :—

> We refer to our conversation in presence of Mr Abbas of 3 Balogun Lane, Lagos and confirm that failing to settle the following on or before the 23-2-59 we shall immediately undertake the sale of the above vehicles without further notice.

Having received that letter the plaintiff consulted his solicitor and on the 20th February, 1959 the letter Ex. C was addressed by his solicitor to the defendants. By that letter the plaintiff's solicitor paid up the amount due on the vehicle LC 9126 and made no reference whatsoever to the payments due in respect of the other vehicle LC 9217. That letter Ex. C was supposed to be a reply to the letter Ex. B. No reference whatsoever was however made in that letter to the vehicle No. LC 9217. The solicitors to the defendants then replied by the letter Ex. D stating clearly that the defendants were not prepared to return either of the vehicles to the plaintiff unless he was prepared to pay up all amounts due on the other vehicle No. LC 9217.

As I indicated before in my view the seizure of the vehicle by the defendants under powers reserved to them in the agreements Exs. A and E clearly puts an end to the Hire Purchase agreements. *In* 19 *Halsbury 3rd Ed. page* 546 paragraph 882 the following passage occurs :—

If the owner exercises his right to resume possession on default in payment equity will not release the hirer from the effect of his default, even if nearly all the instalments have been paid and the arrears are tendered before action brought, the privisions not being in the nature of a penalty.

In the present case it is true that by the letter Ex. B the time of payment had been put forward to the 23rd February 1959 but in view of what I shall say shortly it is well to point out that Ex. B does not *eo ipso* re-commence the contract Ex. A. At the time of the seizure the plaintiff was in arrears with his rent and even if he paid up all the amounts due after the seizure and before the institution of proceedings against him, he will not be relieved of the consequences of his breach either at common law or in equity.

In my view the position therefore after the seizure of the buses was that both parties agreed to and indeed did enter into fresh agreement concerning the vehicles which had been let to the plaintiff under and by virtue of the agreements Exs. A & E. I will also observe that the plaintiff was well aware of this all along. In the witness box he pretended as though he had neither seen nor heard anything of Exs. G & H before they were shown to him in the box. I am satisfied however, not only from his answers to questions relating to these documents but also from his demeanour that he was lying when he said that he did not know about these documents. Eventually he admitted that he might have known about them. The document Ex. G (letter dated 15th January, 1959 addressed to him by the defendants) spoke about both vehicles and warned him that unless he paid the amount shown thereon that is £646-3*s*-7*d* both vehicles would be sold within 14 days. That letter was replied either by him or on his instructions by letter dated the 19th January, 1959. I am satisfied that the letter Ex. H was addressed on the instructions, at least, of the plaintiff to the defendants. That letter also deals with the two vehicles. Then came the letter Ex. B written after the interview with the Manager at which it was made clear to him that the defendants would only treat with respect to both vehicles and not otherwise. The position therefore is that there was a new contract entered into by both parties as a result of which the defendants agreed to defer the exercise of their powers of sale if the plaintiff would pay the amount shown in Ex. B at the time shown thereon. There was no letter or other evidence from or by the plaintiff whereby the contents of Ex. B were challenged or disputed. Instead of that by letter Ex. C dated 20th February, 1959 the plaintiff forwarded to the defendants

the payment covering only one of the vehicles. In those circumstances I take the view that the defendants were right to conclude that the plaintiff had no desire to fulfil his own part of the agreement reflected in Ex. B and that they were entitled as they did, to throw that fresh contract overboard.

It is open to the parties even during the pendency of a Hire Purchase agreement to enter into collateral agreements with respect to the subject matter of the Hire Purchase Agreements. In *Webster v. Higgin* (1948) 2 *AER* 127 the Court of Appeal affirming the judgment of the Lower Court held that it was competent to the parties to Hire Purchase Agreements to enter into collateral agreements at the same time and that nothing but clear precise wording in the Hire Purchase agreement would exclude such a collateral agreement once this was clearly proved.

In this case Learned Counsel for the plaintiff had argued that Ex. D from the defendants' solicitor stated that the defendants were acting under powers reserved to them in clause 7 of the Hire Purchase agreement, Ex. A. That clause provides that where there are two or more accounts kept by the owners in the name of the hirer in respect of two or more motor vehicles the owners may appropriate any monies paid to them by the hirer for "repairs or supply of parts or accessories or licence, insurance etc., in respect of said motor vehicle" in satisfaction of any amounts due on other vehicles. I take the view that *et cetera* referred to in that clause would only include matters *Ejusdem Generis* and would not cover payment in respect of rents. But whatever be the view of the parties as to the legal relationship created or established between them it is the duty of the court to apply to the set of circumstances presented in evidence the correct legal position and interpretation. In this case I am satisfied that the position after seizure of the vehicles was as I have described above. In those circumstances this action must fail.

I wish however to point out that the plaintiff has failed to establish his claims as set out on the writ of summons. By his writ the plaintiff has asked for specific performance to deliver the bus to himself. There is no dispute that at the time when Ex. A was executed the vehicle was delivered to the plaintiff. Indeed the plaintiff himself admitted this in the witness box. It is inconceivable that the plaintiff would now require the court to compel the defendants to deliver to him the vehicle after they had exercised their right of seizure under the agreement and indeed had sold the vehicle as advised by their letter to the plaintiff

Ex. J. The plaintiff has also asked in the alternative for the sum of £1,000 being the value of the said vehicle. In the witness box the plaintiff was unable to prove this value, as stated of the vehicle at the time of seizure. His evidence in this respect was as follows :—

> On the 23rd February, 1959 the value of the bus was about £900. I now say it was about £950.

Speaking for myself I do not know what figure to accept. This item constitutes special damages and it is settled law that special damages must not only be specially pleaded but must be so proved. Apart from this fact the plaintiff's evidence on this point stands singularly alone and having regard to the view which I have formed of the veracity of the plaintiff I think it is highly unsafe to act upon that evidence. Again the plaintiff has claimed damages for the detention of the said vehicle. No figure of damages has been quoted on the statement of claim nor was any such figure given in evidence during the hearing. In his evidence-in-chief the plaintiff testified to the effect that he was making a profit of £6 per day on the vehicle when it was on the road. Under cross examination he admitted that that evidence was not correct and indeed testified as follows :—

> I now say that there are some days on which I did not make any profits at all on the vehicle. On some days I did not even make up to £6. I now say also that I never myself went to any Insurance Company to insure the vehicles.

It is therefore clear that on the evidence before the court it is impossible to grant any of the reliefs for which the plaintiff has asked and whatever be the effect of the act of the defendants on the plaintiff it is correct to point out that he is the architect of his own misfortune and in a similar case, that is *Maclaine v. Gatty* (1921) 1 *A.C.* 376 page 388 Lord Birkenhead, L.C., observed as follows :—

> I have only to add that even if it be true that the attitude of the respondents has resulted in a harsh and difficult situation for the appellants that circumstance cannot produce any effect when once a clear view is reached upon the legal situation.

For the reasons which I have given therefore I hold that the plaintiff's claims in this case fail and I dismiss this action with costs to the defendants to be assessed.

ALHAJA SAFURATU AWELE .. .. PLAINTIFF

1. LAGOS EXECUTIVE DEVELOPMENT BOARD
2. JOHN ABDALLA } DEFENDANTS

[HIGH COURT OF LAGOS : COKER J. ; 9th May, 1960]
(Suit No. LD/336/58)

Lagos Town Planning Ordinance Cap. 103—*Acquisition of Landed Property at Balogun and Murray Streets Lagos under Statutory Powers—Re-allocation of Land to previous owners pursuant to provisions of Lagos Town Planning Ordinance Cap.* 103—*Discretion of Board with regard to the Re-distribution of Land among previous owners after reclamation.*

The plaintiff A has instituted proceedings against the defendant the L.E.D.B. and one J. for a declaration that the allocation of reclaimed land by the L.E.D.B. to the defendant J. was irregular, illegal and void and also for orders setting aside the purported allocation of land by the L.E.D.B. to the 2nd defendant and for an injunction restraining the 2nd defendants from building or otherwise developing the said piece or parcel of land. The plaintiff A. and the 2nd defendant J. were owners of lands more or less adjoining each other at the time when by virtue of powers vested in the L.E.D.B. the lands were acquired under the Lagos Town Planning Ordinance Cap. 103. Lands so acquired were subsequently reclaimed by the L.E.D.B. by the provisions of section 35. The L.E.D.B. is supposed, after reclamation, to re-distribute the land among the original owners offering to each of them as far as possible the actual land site which was acquired from him. In the present case in view of redevelopment and planning, it was not possible to re-allocate to the plaintiff the actual land site which was acquired from her and a portion of her land (which was all of it that was available for re-distribution) was added to a part of the 2nd defendant's original land and allocated to the 2nd defendant J. The plaintiff A. was offered, and indeed accepted, through her Counsel, another piece of land near to her original holding. The present action by her is to set aside that allocation and give to her the land which was allocated to the 2nd defendant.

HELD : The provisions of the Lagos Town Planning Ordinance vested the L.E.D.B. with a discretion to allocate lands on re-distribution to previous owners as far as practicable within or on their original holding and unless it is shown that that discretion was not exercised at all or was exercised *male fides* the court will not interfere in the exercise of same.

K. A. Kotun for Plaintiff

Soremekun for 1st Defendants.

COKER, J. :—In this case the plaintiff's writ is endorsed as follows :—

The plaintiff's claim against the defendants is for a declaration that the allocation by the 1st defendants of the piece or parcel of land situate at Central Lagos facing Balogun Street, and known as Plot No. 16 in Sub-Area 3 within the Central Lagos Planning Scheme Area to the 2nd defendant is irregular, illegal and void. The

plaintiff's further claim is for an order setting aside the purported allocation of the said piece or parcel of land to the 2nd defendant and directing the reallocation of the said piece or parcel of land to the plaintiff.

The plaintiff's further claim is for an injuction restraining the 2nd defendant from building or otherwise developing the said piece or parcel of land.

Pleadings were ordered and filed. By the statement of claim the plaintiff avers in effect that she was the owner of a piece of land at Central Lagos known as 24 Murray Street, Lagos but now known as plot 16 sub-area 3. The statement of claim further avers that the 2nd defendant was the owner of another piece of land over 200 yards away from the plaintiff's property. The statement of claim further avers that the two pieces of land have now been acquired by the first defendants, pursuant to the provisions of the Lagos Town Planning Ordinance Cap. 103 and that on a redistribution of land in the sub-area concerned the land acquired from the plaintiff had been sold to the 2nd defendant by the 1st defendants, despite the protests of the plaintiff. The statement of defence of the 1st defendants avers that the 2nd defendant had been granted land which includes the original holding of the plaintiff and states reasons for assigning the particular property to the second defendant. The statement of defence of this defendant also avers that plot No. 15 in sub-area 3 had been reassigned to the plaintiff and that the offer of this land was duly accepted by or on behalf of the plaintiff. The statement of defence of the 2nd defendant adopts in substance the statement of defence of the first defendants and avers further that he had paid a sum of £26,600 for the land assigned to him by the first defendants and also erected thereon a building at a cost of over £25,000.

At the trial Raliatu Disu described as the attorney of the plaintiff, gave evidence on behalf of the plaintiff. She produced a Power of Attorney which was admitted in evidence as Ex. D. She testified to the effect that the plaintiff was the original owner of the property No. 24 Murray Street, Lagos and produced the Certificate of Title covering the land and this was admitted as Ex. E. She produced a plan showing the relative position of the properties belonging to the plaintiff and the defendant before the acquisition and this was admitted as Ex. F. The second defendant's property before the acqusition was known as No. 38 Balogun Street. She produced another plan of the sub-area in question showing plot No. 16 which has now been sold to the second defendant. This plan was admitted as Ex. G. She testified further to the effect that she protested on behalf of her mother the plaintiff to the first defendants against the assignment to the second defendant of the land

described in Ex. G. Under cross-examination she admitted that the plaintiff's land was covered by a lease for 41 years from the 1st August, 1946. The land Certificate covering the lease was produced and admitted in evidence as Ex. H. She also admitted that Messrs A. Lawson & Co., Solicitors, of 24 Kakawa Street, Lagos, had the written authority of the plaintiff to negotiate with the L.E.D.B. and settle the compensation payable in respect of the property No. 24 Murray Street, Lagos. This written authority was produced in evidence and admitted as Ex. J.

On behalf of the first defendants Paul Howard Abbey described as the Estates Officer of the L.E.D.B. testified to the effect that he was responsible for making recommendations to the Plot Allocation Committee of the L.E.D.B. with respect to the allocation of lands in sub-area 3 and that he recommended that Plot No. 16 be offered to the 2nd defendant and plot No. 15 to the plaintiff. He gave as his reasons for making the recommendation that the claims of both the plaintiff and the 2nd defendant were duly considered by him by a method in which he recorded points in favour of the respective claimants against the various considerations of which the L.E.D.B. is bound to take cognisance. He came to the conclusion that the 2nd defendant scored a higher number of points than the plaintiff and he accordingly made his recommendations to the Committee and the recommendations were accepted by the Committee.

As I understand the plaintiff's complaint, it is to the effect that the plot now covering the land on which her original holding stood should have been allocated to her and not to the second defendant. In this connection her Counsel has relied upon the provisions of section 35 (*c*) and (*d*) of the Lagos Town Planning Ordinance Cap. 103. These subsections read as follows :—

A redistribution of holdings comprised in any scheme shall be effected in the following manner :—

(*a*) .....

(*b*) .....

(*c*) By the assignment so far as is practicable to as many original owners as is possible having regard to the provisions of this scheme of one or more final holdings equivalent or proportionate in extent and value or both combined to their respective original holdings.

(*d*) By the preservation as far as possible to each owner of such special advantages in the way of position frontage or otherwise as were attached to his original holding.

It is clear that what section 35 (*c*) envisages is that the Board on reassigning the lands in the particular sub-area should assign as far as is practicable to the original owners one or more final holdings equivalent in extent and value to their respective original holdings or proportionate in extent and value to their respective original holdings. I cannot find in this section anything which imposes upon the L.E.D.B. a duty to reassign to a holder of land which had been acquired identically the same land which had been originally acquired. Nor do I see that the section confers any rights upon a person whose land has been acquired to insist that the L.E.D.B. should allocate to him the identical land which had been acquired from him.

In this case quite apart from the evidence of Mr Abbey to the effect that the second defendant scored a higher number of points than the plaintiff, there is evidence that both the plaintiff and the second defendants had lands within the sub-area concerned. In the statement of claim it was said that the 2nd defendant's land was over 200 yards away from that of the plaintiff. In her evidence the plaintiff's attorney said the property of the 2nd defendant was about 600 feet away from the plaintiff's land. The plan produced in evidence by the plaintiff's witness, Ex. F confirms however that :—

(1) both the plaintiff and the 2nd defendant had lands within the same locality. The plaintiff's land was bounded by Murray Street and Palm Church Street, *i.e.*, the plaintiff's land had frontages on two roads.

(2) the 2nd defendant's land was bounded by Balogun Street, Balogun Square, Murray Street and indeed on the 4th side by open land. It occurs to me that the 2nd defendant's land before the acquisition had frontages on all its four sides.

(3) the 2nd defendant's land was larger than the plaintiff's land.

Besides there is evidence to the effect that at the time of acquisition the 2nd defendant's land was held in fee simple in possession by the 2nd defendant himself whereas the plaintiff's land was subject to the lease, Ex. H.

Apart from all these facts, there is evidence which I accept to the effect that as far back as the 4th November, 1957 plot No. 16 was offered to the 2nd defendant and plot No. 15 was offered to the plaintiff. The offer of the plot was made direct to the plaintiff and

not through her solicitors. By letter dated 10th February, 1958 the solicitors of the plaintiff accepted unconditionally the offer of plot No. 15 which had been made to her. This letter is admitted in evidence as Ex. C. On the 12th February, 1958 by letter admitted as Ex. C.1 the plaintiff's solicitors wrote to the L.E.D.B. regarding plot No. 15 as follows :—

> With reference to our letter of the 10th February, 1958 we are instructed by our client to say that she is forwarding an appeal to your Board for a substantial reduction in the reconveyancing charges.

As a result of this the letter, Ex. A2 dated 7th August, 1958, was written to the plaintiff through her solicitors, Messrs A. Lawson & Co. There is also evidence which I accept to the effect that plot No. 16 covered by plan Ex. G was duly conveyed by the L.E.D.B. to the 2nd defendant by virtue of a conveyance dated 1st February, 1958. A copy of this conveyance was produced and admitted as Ex. C2 and the consideration shown for the conveyance of the land was £26,616 (twenty six thousand, six hundred and sixteen pounds).

I wish to observe that before evidence was taken in this case Counsel for the plaintiff indicated to the court that some correspondence were agreed between the parties and he produced these documents which were admitted by consent and marked Exs. A, A1/5, B, B1/6, C, C1/2. It is clear from Exs. B4 and B5 that whilst Messrs A. Lawson & Co. were acting on behalf of the plaintiff, she had also engaged another solicitor, Mr G. B. A. Akinyede to act for her as well. The letters in Exs. A, A1, A3, A4, A5, B1/6 referred to her abortive protests against the allocation of plot No. 16 to the 2nd defendant. As far back as the 8th August, 1957 (*see* Ex. B) Mr Akinyede had been in communication with the L.E.D.B. in respect of the property of the plaintiff. She was paid compensation in respect of the property on the 23rd September, 1957 yet her letter of authority to Messrs A. Lawson & Co. (Ex. J) was dated 24th August, 1957. It is only reasonable to come to the conclusion that she was oscillating between Messrs A. Lawson & Co. and Mr Akinyede with respect to the compensation business.

She then decided to engage Messrs A. Lawson & Co. for the business of the reallotment of land to her. This is clear from Ex. C (dated 10-2-58) and Ex. C1 (dated 12-2-58). After this it seemed as if a new light dawned upon her and she was attempting to retract the acceptance which had already been given on her behalf. The letters Ex. B1 (dated 21-3-58) Ex. A (dated 1-4-58) Exs. B2 and B3 (same letter dated 14-4-58) Ex. A1 (dated 17-4-58) and Ex. A2 (dated 2-8-58) were all created as a result of her fruitless endeavours to ventilate her afterthoughts.

After receiving the letter Ex. A2 from the L.E.D.B. on 2-8-58 and not being satisfied with the position she went back to an old solicitor friend, Mr G. B. A. Akinyede and the letters Ex. B4 (dated 18-8-58) Ex. A3 (dated 22-8-58) Ex. B5 (dated 8-9-58) and Ex. A5 (dated 16-10-58) were all created as a result of the abortive intervention of Mr G. B. A. Akinyede. Even then she did not leave the situation entirely to Mr Akinyede. Ex. A4 (dated 19-9-58) suggests that she had herself written to the Minister of Lagos Affairs, etc., on the 2nd September, 1958. I am not surprised : this was followed up by another letter dated in November 1958 (Ex. B6) written on her behalf by yet another person.

A perusal of these letters shows conclusively how inconsistent the plaintiff was and some of her letters, in particular Exs. B1 and B2 are not only tendencious but are clearly ill advised. It is easy to see that Messrs A. Lawson & Co. would not, after writing the letter Ex. C1, support the plaintiff in her further manoeuvres. I am however satisfied that the plaintiff did employ Messrs A. Lawson & Co. to act for her and in that capacity they accepted for her the offer of Plot No. 15. It is significant that although the letter offering plot No. 15 was sent to the plaintiff it was taken by her to Messrs A. Lawson & Co. for action by that firm of solicitors. I wish also to observe that on the 10th March, 1958 the plaintiff paid to the L.E.D.B. the sum of £2,062 by cheque as deposit in respect of land, *i.e.*, plot No. 15 which had been offered to her. This cheque was paid in by the plaintiff's solicitors on that date. It is only reasonable to presume that it was the plaintiff herself who paid this money to her solicitors with instructions that the money be paid over to the L.E.D.B. If, in the face of all these facts, the plaintiff chose to engage the services of another Counsel for the purpose of retracting the acceptance of the offer which had been properly made to her I take the view that she must herself be responsible for the consequences which may follow on a failure to secure that end. I will say, however, that the plaintiff having accepted the offer which was duly and properly made to her cannot be now heard to say that she did not accept.

Once this position is accepted it beats my imagination how the plaintiff can now come and ask this court not only to declare the allocation of plot No. 16 to the defendant as irregular, illegal and void but also to set aside the allocation of the said piece of land to the 2nd defendant.

Besides there is one point which although not fully argued at the trial is worthy of consideration by the court. The 2nd defendant by the document Ex. C2 has had plot No. 16 conveyed to him. He paid £26,616 (twenty six thousand, six hundred and sixteen pounds) for that property and his S/D avers that he has now erected thereon a building worth over £25,000. By paragraph 15 of the statement of claim the plaintiff avers that the 2nd defendant had been warned against developing the property contained in Ex. G. The first defendants deny, by paragraph 11 of their statement of defence, the allegation contained in paragraph 15 of the statement of claim and put the plaintiff to the strictest proof thereof. Paragraph 11 of the statement of defence of the 1st defendants was adopted by the 2nd defendant. At the trial there is not a scintilla of evidence to the effect that the 2nd defendant was at any time warned either against accepting the allocation to himself of plot No. 16 or indeed of developing that land. In my view, therefore, that averment in the statement of claim is not proved.

The position in law therefore is that the 2nd defendant had purchased the legal estate and he being a 3rd party to the controversy between the plaintiff and the 1st defendant it must be shown in order to disentitle him that he was not a purchaser of the legal estate for value without notice. As I said before there is no evidence that he was warned and I hold therefore that the second defendant is a *bona fide* purchaser of the legal estate in Ex. C2 for value without notice. The 2nd claim for setting aside the allocation to him therefore fails.

With regards to the 3rd claim *i.e.*, for an injunction restraining the 2nd defendant from building or otherwise developing the said piece of land that claim must also fail. It is to be observed that by this claim the plaintiff has asked for a perpetual injunction, a remedy which is only available at the instance of an owner of a freehold estate. The plaintiff has not proved that she is the owner of the legal estate in this land, or that she was entitled to such an estate. That claim therefore fails.

With regard to the first claim it would be seen that the plaintiff has asked for a declaration that the allocation of plot No. 16 to the 2nd defendant is irregular, illegal and void. As I indicated before I accept and prefer the evidence of Mr A. Abbey as to the considerations which induce the Board to allocate that plot to the 2nd defendant. I do not accept the testimony of the plaintiff's attorney to the effect that Messrs A. Lawson & Co. were not employed by the plaintiff to treat with the L.E.D.B. over the re-allocation of land to the plaintiff. The proved and/or accepted facts of this case all

support a contrary view. The plaintiff who executed Ex. J and wrote the letters Exs. B1 and B2 never gave evidence herself and on specific points of importance the evidence of plaintiff's attorney is unreliable. I am also satisfied that whereas the land originally belonging to the plaintiff had two frontages, that belonging to the 2nd defendant had four. The 2nd defendant in this connection clearly has a better claim to more frontages than the plaintiff. Furthermore if the argument of the plaintiff to the effect that she was entitled to get back her original land be carried to its logical conclusion the result will be that she herself will not be entitled to plot No. 16 as this covers not only the land acquired from the plaintiff but also other lands or parts of lands acquired from other persons.

I am satisfied that this is neither the meaning nor the intention of sections 35 subsection (*c*) of the Lagos Town Planning Ordinance Cap 103 to which I alluded earlier. I am satisfied that the allocation of plot No. 16 to the second defendant had been properly done by the L.E.D.B. by virtue of statutory powers conferred upon the L.E.D.B. and that the allocation had been made as far as practicable in accordance with the provisions of sections 35 (*c*) of the Ordinance. The claim for a declaration that the allocation of plot No. 16 to the 2nd defendant is irregular, illegal and void therefore also fails.

It follows that the plaintiff's claims fail on all grounds and I will dismiss this action. Plaintiff's case is accordingly dismissed.

I order that the plaintiff do pay the costs of the 1st and 2nd defendants to be assessed.

1. A. G. R. NYLANDER
2. E. A. P. THOMAS .. .. .. PLAINTIFFS

v.

1. ADOLPHUS OLA
2. SOKUNBI .. .. DEFENDANTS

[HIGH COURT : COKER, J., 17th May, 1960]
(Suit No. LD/159/58)

Land at Ebute Metta—Registration of Titles Ordinance Cap. 197 *and Investigation of Title thereunder. Procedure where Title to land is being litigated both before the Registrar of Titles and the High Court at the same time.*

The plaintiffs N. & T. instituted proceedings against the defendants O. & S. for possession of land situate at Ebute Metta and also for damages and injunction. The Conveyance of the land appeared to have been registered by the 1st defendant under the Land Registration Ordinance Cap. . The 1st defendant O sold the land to the 2nd defendant who thereupon lodged all his documents with the Registrar of Titles for a certificate to be issued pursuant to the provisions of the Registration of Titles Ordinance Cap. 197. Notices as prescribed by that Ordinance were issued and duly served and the plaintiffs, having opposed the application for registration of the 2nd defendant's title, instituted the present proceedings claiming possession, damages and injunction.

HELD : That on those facts proved before the court the case of the plaintiffs must be non-suited, as any trial in the circumstances will operate prejudicially against the 2nd defendant whose documents were still on deposit with the Registrar of Titles and who would therefore be unable to produce those documents at the trial.

HELD ALSO : That whilst proceedings before the Registrar of Titles are pending with respect to the registration of Title to a particular piece of land, it is not competent to a party opposing the application to institute at the same time legal proceedings for title to the same land against the same applicant in another court.

Chief O. Moore (Agbebi with him) for Plaintiffs.

A. A. Otuyalo for Defendants.

COKER, J. :—In this case the plaintiffs claim possession of a piece or parcel of land situate at Strachan Street, Ebute Metta and also damages and injunction. The original defendant to the action was one Adolphus Ola but by order of Court dated 20th of October, 1958, the 2nd defendant by name, Shokunbi, was joined as party to the proceedings. After evidence was taken by the court from both sides it transpired that it was necessary to

subpoena the Registrar of Titles in order to produce the Documents of Titles deposited by the 2nd defendant with that officer for registration, pursuant to the provisions of the Registration of Titles Ordinance Cap. 197. This document, *i.e.*, the Conveyance executed in favour of the 2nd defendant by the 1st defendant and covering the land in dispute was produced in evidence and was admitted without objection from the Counsel for the plaintiff as Ex. O. The witness who produced Ex. O. Jonathan Hyde, testified to the effect that registration was still pending with respect to that Title and that a Requisition addressed to the 2nd defendant in respect of the Title was still unanswered.

In his address to me Counsel for the plaintiff submitted that the court could not take cognisance of the document Ex. O. in as much as that document has not been registered in accordance with the law and that the position therefore is that the 2nd defendant has not been able to prove his title. On the other hand, Counsel on behalf of the defendants submitted that the proper cause was to adjourn this case *sine die* in order to await the registration of the 2nd defendant's title.

Before I decide on the merits of this case, it is necessary for me to decide on this point which certainly stands at the threshold of the whole matter. It is clear that at the time of execution of Ex. O., the 1st defendant divested himself of his legal title (if any) in this land which thereafter became rested in the 2nd defendant. There is no doubt also that this 2nd defendant had done all that he was required by law to do in that he had deposited his title deeds with the registrar of Titles. An unregistered document cannot of course, be produced in evidence in a court of law. It cannot even be pleaded but provisions are made in the Registration of Titles Ordinances whereby the Registrar in connection with his duty of investigating titles submitted to him for registration can admit evidence which would otherwise be inadmissible in a court of law. Section 9 (1) of the Registration of Titles Ordinance Cap. 197 reads as follows :—

> In investigating a title with a view to first registration, the registrar may accept and act on less than legal evidence or less than the evidence ordinarily required by conveyancers *if he is satisfied of the truth of the facts to be proved*, and may act on evidence of the same facts adduced before him in other proceedings.

That raises in my view the question as to whether or not with respect to a title which has been submitted to the Registrar of Titles for registration the court has jurisdiction to take a case

involving land, the subject matter of that title. By the provisions of section 8 (1) of the Registration of Titles Ordinance Cap. 197 which reads as follows :—

> Application to be registered as an owner under this ordinance shall be made to and the title to the Land or lease shall be investigated by the Registrar in the prescribed manner.

the applicant for registration of title is bound to submit his documents to the Registrar of Titles for registration. Until and unless his title is registered and a Land Certificate issued he is in the position that he cannot produce in court the document of his title, even though the legal position is that the legal estate had been transferred to him by his own vendor.

In my view therefore it operates prejudicially against him if in proceedings in a court of law his opponent were able to produce his own Conveyance and he was not able to do so merely because his documents of Titles effecting the same land were still being investigated by the registrar. The Registration of Titles Ordinance makes elaborate provisions for advertisement of applications for registration of title and it is the duty of the Registrar of Titles especially in a case where the party claiming against the applicant had a Conveyance registered in his name and the records of it are available to the Registrar of Titles, to take such registered document into account. Indeed the Ordinance prescribes that such a person should be served by the Registrar of Titles with notice of the application.

In the present case it is clear from the evidence that no notice whatsoever has been served upon the present plaintiffs whose registered Conveyance, produced as Ex. B was clearly registered many years ago. There is evidence that the application of the 2nd defendant had been advertised, but the owner of the land which is being claimed by another person is not bound to read the newspaper every day in order to know whether or not someone else is trying to claim his land, or to register that land in his own name. In those circumstances, it is the duty of the Registrar of Titles to serve not only the person whose title had been already registered with respect to that land but also adjoining occupiers of properties with adequate notices of the application to register the property in question.

In view of all the foregoing matters, I will not decide this case on the merits and will therefore non-suit the plaintiff. I will also direct that the Registrar of Titles shall serve the necessary

notice on the plaintiff in this case and that in accordance with the provisions of the Registration of Titles Ordinance he should investigate the conflicting claims of the parties and adjudicate on it accordingly and that all the documents produced in the case should be returned to their respective owners.

This case is therefore non-suited and it is hereby ordered as follows :—

(1) All the exhibits produced in the case should be returned to their respective owners or to the person who produced them.

(2) The Registrar of Titles is hereby instructed to serve on the plaintiffs herein a notice of the proposed Registration in favour of the 2nd defendant and if there be a conflict to proceed as provided by section 9 (2) of the Registration of Titles Ordinance Cap. 197 to investigate the relative claims of the claimants.

(3) That a copy of this judgment, including the orders herein made be forwarded by the Registrar of this court to the Registrar of Titles.

With respect to costs I propose to make the 1st defendant pay the costs of this proceedings. There is evidence which is admitted by the 1st defendant himself not only that he was warned several times by the plaintiff against erecting a building on the land but also that he received letters from, or on behalf of the plaintiffs to the effect that the plaintiffs claimed the land in dispute and also that he should refrain from building on the land. This defendant never even told the plaintiffs that he had sold and conveyed the land to the 2nd defendant let alone write any letters in reply to the letters addressed to him. If only the plaintiffs had known that the 1st defendant was no more claiming the land it may well be that this proceedings would not have been instituted, at any rate in the present form. In these circumstances I take the view that the 1st defendant should pay the costs of the proceedings.

(*a*) the 1st defendant shall pay the plaintiff's costs fixed at 20 guineas.

(*b*) the 1st defendant shall pay the 2nd defendants costs fixed at 20 guineas.

SOLOMON NASSAR .. .. .. APPELLANT

v.

OLADIPO MOSES .. .. .. RESPONDENT

[HIGH COURT : COKER, J., 20th May, 1960]
(Suit No. LD/222/58)

Contract—Specific Performance of Defendant's Promise to Transfer Plots of Land to Plaintiff—Measure of Damages in Case of Refusal to Execute Contract—Whether Illegality affects the Contract where Defendant may not assign without the consent of the L.E.D.B.

The plaintiff N. instituted this proceedings against the defendant seeking specific performance of a contract between the parties for an assignment to him, plaintiff, by the defendant of lands to be procured by the defendant from the L.E.D.B. or in the alternative for damages for breach of contract. The defendant was a member of the L.E.D.B. and indeed a member of the sub-committee of the L.E.D.B. dealing with the allocation of plots of land at Apapa. In pursuance of the contract between them the plaintiff made several monetary advances to the defendant which were acknowledged in writing by the defendant, who also executed written promises to transfer the lands to the plaintiff. The defendant eventually got the lands leased to himself by the L.E.D.B. but refused to assign those lands to the plaintiff. Urging that (1) the agreement between him and the plaintiff (if any) was illegal and (2) that in any case the contract as claimed by the plaintiff was not established.

HELD : That on the evidence proved (1) the existence and substance of the contract was in issue of facts and the evidence abundantly established that there was such a contract. (2) that there was no illegality pleaded or proved it being the duty of a party alleging illegality to particularise same and establish such illegality at the trial. (3) that the defendant being under a duty to get the consent of the L.E.D.B. to assignment cannot be compelled to get such consent nor can the L.E.D.B. be compelled by the plaintiff to grant the necessary consent and that in the circumstances damages measured by well established rules will be sufficient compensation for the plaintiff.

Cases referred to :

Synge v. Synge (1894) 1 *Q.B.* 466
Montefiore v. Menday Motor Co. Ltd. (1918) 2 *K.B.* 241
Hyams v. Stuart King (1908) 2 *K.B.* 696
Mogul Steamship Co. v. McGregor Gow & Co. (1892) *A.C.* 25
Brewer v. Broadwood (1883) 22 *C.D.* 105
Chidiak v. Coker (1954) 14 *W.A.C.A.* 506
Forrer v. Nash 55 *E.R.* 858

Oladipo Moore (*Agbebi with him*) *A. O. Bickersteth* for plaintiff

V. O. Munis (*Okorodudu and Sagoe with him*) for defendant.

COKER, J.—In this case the plaintiff "seeks specific performance of the defendant's promise to transfer....plots (of land) to the Plaintiff or in the alternative the plaintiff claims £12,100-3*s*-7*d* (twelve thousand one hundred pounds, three shillings and seven pence) as special and general damages for breach of contract." Pleadings were ordered and filed.

The plaintiff's statement of claim avers in substance that the defendant, a member of the Lagos Executive Development Board offered to obtain for the plaintiff :—

(1) a residential plot of land at Apapa if the plaintiff would pay him a commission of £250 ; and

(2) a commercial plot of land at Apapa if the plaintiff would pay him a commission of £500.

The statement of claim further avers that the Plaintiff accepted the offer and did pay to the defendant a total sum of £750 for both plots of land but that not only would the defendant (who in the meantime had obtained leases of both the residential and the commercial plots in his own name) not transfer the leases to the plaintiff but also that the defendant had attempted to transfer such leases to other persons in breach of his contract with the Plaintiff.

On the other hand the amended statement of defence of the defendant denies all the averments of fact in the statement of claim and urges that the Plaintiff's action be dismissed as it is an abuse of the process of court. The statement of defence ends with two paragraphs which read as follows :

(6) the defendant will contend at the trial that there was a commercial project discussed by himself and O. Nassar and Sons (Nigeria) Ltd. The latter failed to carry out what was verbally agreed.

(7) there was no agreement between plaintiff and defendant as alleged by the plaintiff or at all and the defendant will contend at the trial that the alleged agreement which is denied by the defendant is an illegal one and does not conform with section 4 of the Statute of Frauds.

It will be observed that the amended statement of defence filed alleges illegality simply by saying that the agreement relied on by the plaintiff if any is an illegal one. By an application to the court dated the 24th day of April, 1959 the defendant sought to amend

his original statement of defence. The amendment sought was incorporated in the Notice of Motion and attached to the Notice of Motion was an affidavit sworn to by the defendant and containing a paragraph to the following effect

> that after my convalescence I was able to tell my solicitor the whole fact of my case.

An order was made on this motion by me on the 27th day of April, 1959, and the defendant was ordered to file an amended statement of defence "incorporating the amendment hereby granted." Clearly the amendment sought and obtained did not contain an averment that the agreement was an illegal one. The defendant was therefore wrong to include in the amended statement of defence filed by him pursuant to the order of court, such a plea, which plea had been included without any authority whatsoever by or from the court.

Besides, and this is most important, when a party pleads illegality the particulars of such illegality must be set out in the pleadings. *See Willio v. Lovick* (1901) 2 *K.B.* 195. *See* also the provisions of order 32 Rule 13 of the Rules of the Supreme Court. I am, therefore, satisfied that the plea of illegality now raised was included in the statement of defence without the leave of court and that in any case it was not properly pleaded. I will, therefore, and do strike out the relevant words appearing in paragraph 7 of the amended statement of defence. Furthermore, that paragraph in the last line avers that the agreement does conform with section 4 of the Statute of Frauds. This is an apparent error as it is clear that the amendment sought and obtained by the defendant was to the effect that the agreement did not conform with section 4 of the Statute of Frauds. During his address at the end of the case learned Counsel for the defendant obtained an order amending the statement of defence accordingly so that the word "not" now stands sandwiched between the words "does" and "conform" appearing in that paragraph. In all those circumstances and taking into account the amendment already made that paragraph now reads as follows :—

> (7) there was no agreement between plaintiff and defendant as alleged by the plaintiff or at all the alleged agreement which is denied by the defendant does not conform with section 4 of the Statute of Frauds.

I must point out also that this does not debar the court from performing its undoubted duty of taking cognisance of and dealing with illegality if it subsequently becomes an issue in the case.

OLATUNJI AJOSE ADEOGUN described as the Secretary to the L.E.D.B. produced as Ex. A the Government copy of the lease of a residential plot of land in the L.E.D.B. Apapa layout, plot No. 2010 in favour of the defendant. The leasee in Ex. A is the defendant and the term is 90 years from the 1st day of July, 1957. He also produced as Ex. A1 the Government copy of the lease of a commercial plot of land in the L.E.D.B. Apapa layout plot No. 2712. The leasee on Ex. A1 is the defendant and the term is 90 years from the 1st day of April, 1958. The witness further produced :—

(1) the L.E.D.B. file dealing with the land in Ex. A—this was admitted as Ex. B.

(2) L.E.D.B. files dealing with the land in Ex. A1—these were admitted as Exs. C and C1, and

(3) under cross-examination a copy of the L.E.D.B. "Regulations 1954" dealing with the Apapa Town Planning Scheme (Western Area). This was admitted as Ex. D.

The witness further testified that the defendant is a member of the sub-committee of the L.E.D.B. dealing with the allocation of plots of land at Apapa ; that a covenant not to assign without the consent of the L.E.D.B. is implied in all leases by virtue of the provisions in Ex. D and that the defendant has not asked the L.E.D.B. for permission to assign either Ex. A or Ex. A1 to the plaintiff although he had applied to sub-let a portion of Ex. A1 to the United Africa Company Limited.

The Plaintiff ALBERT SOLOMON NASSAR testified to the effect that he was the Managing Director or the company known as S. Nassar & Sons (Nigeria) Limited and that after meeting the defendant about the end of the year 1956 the defendant offered him his services with respect to procuring both a residential plot and a commercial plot of land for him in the L.E.D.B. Apapa layout. He further testified as follows :—

At his house we talked over what we discussed at the office and the defendant suggested that I should give him a consideration of £500 for the commercial plot and £250 for the residential plot. The amounts were to be paid to him as his remuneration for getting the two plots for me. I agreed to this and we left the matter at that.

The plaintiff further testified that after this the defendant collected from him at various times a total amount of £740 in cash and goods (provisions) to the amount of £149-8*s*-9*d*. The various amounts and the goods are evidenced by chits and documents signed by the

defendant and admitted in evidence as Exs. EL U, Z, AA, BB, CC, DD, KK, LL and Exs. EE, EE1/37. During the month of February 1957 the defendant handed over to the plaintiff letters from the L.E.D.B. offering to the defendant the lease of the land in Ex. A. These two letters were produced and admitted in evidence as Exs. F and F1. On the 16th February, 1957 the defendant wrote to the Plaintiff suggesting that payment be made for the residential plot as described in Ex. G. On the 21st February, 1957 the defendant asked the Plaintiff to return Exs. F and F1 to him. This was by letter admitted as Ex. E. The witness further testified that he did not return these documents.

During the same month of February 1957, the Plaintiff continued, the defendant introduced him to a Mr Mickie who was the L.E.D.B.'s Apapa Estate Officer. At the office of Mr Mickie the defendant was present with the Plaintiff. Mr Mickie was apprised of the fact that the defendant had only applied for plot No. 2010 (Ex. A) on behalf of the plaintiff. Mr Mickie said he knows the Plaintiff already and indicated that if the plaintiff wanted the lease in his (that is, plaintiff's) name, the matter would have to go before the Board but if he wanted it in the name of the defendant he, Mickie, would approve of it right away. The Plaintiff was also advised to apply for the lease of the commercial plot Ex. A1. The Plaintiff further testified that he did so apply and his application in the name of his company, S. Nassar and Sons (Nigeria) Limited appears on page 13 of the file Ex. C1. The application was acknowledged by the L.E.D.B. on the 26th March, 1957 as per the letter produced and admitted in evidence as Ex. G. The Plaintiff, the defendant and Mr Mickie later went on a tour at Apapa of both the residential and the commercial plots in the layout including the plots of land in Exs. A and A1. The defendant thereafter wrote a letter to the plaintiff (admitted as Ex. K) intimating the plaintiff of the result of his discussion with the "L.E.D.B. chief" described by the plaintiff as Mr Henderson.

The defendant had by his letter Ex. L (dated 2nd May, 1957) requested the plaintiff to pay for the plot Ex. A at once. The plaintiff testified that he did not follow the course suggested by the defendant in Ex. L but sent for the defendant who came. At that meeting it was agreed that he should and he did pay the defendant a sum of £250 on account of the land in Ex. A as well as an amount of £276-8*s*-0*d* as shown in Ex. F1. The cheque for the payment of the rent was admitted as Ex. M and the receipt

admitted as Ex. O. The sum of £250 was paid in cash to the defendant who then signed an undertaking admitted as Ex. N. This undertaking reads as follows :—

> This is to confirm that I undertake to transfer to Messrs Nassar and Sons (Nigeria) Limited the above plot (No. 2010) immediately the lease has been prepared by the L.E.D.B.
>
> I hereby confirm that Messrs Nassar and Sons have paid all the rent and expenses in connection to this plot and therefore the transfer will be effected at no extra charge.

On the same day the defendant brought and handed over to the Plaintiff the original lease of the residential plot Ex. A. The defendant later advised the plaintiff to request a lawyer to prepare the assignment for him. The Plaintiff further testified that he then requested Mr S. O. Lambo, a Lagos lawyer to prepare the assignment for him and he gave the original lease to Mr Lambo. He further testified that as he did not receive his papers from Mr Lambo he wrote him (*i.e.*, Lambo) a letter to which he received the reply admitted as Ex. P. The Plaintiff produced another undertaking dated 3rd October, 1957 by the defendant to transfer the land in Ex. A to him. This was admitted as Ex. Q. In the meantime further rent on the land was due and the Plaintiff paid same. *See* Ex. R and cheque Ex. R1.

With regards to the commercial plot Ex. A1 the Plaintiff further testified, he received a letter dated 8th May, 1957 from L.E.D.B. stating that the L.E.D.B. would prefer this site being developed for hotel purposes. This letter was admitted as Ex. S. The defendant then suggested to the Plaintiff that he should allow him, the defendant, to apply for the commercial plot (which was then advertised) in his own name as the competition was very strong. The Plaintiff procured the plans for development of the site and he got these plans prepared by Messrs Architects Co. Partnership of Lagos and by letter admitted as Ex. T the defendant applied to the L.E.D.B. for the plot in Ex. A1 and submitted the plans prepared by the plaintiff. After this, on the 3rd October, 1957 the defendant obtained a sum of £300 from the plaintiff on account of land in Ex. A1 and executed the undertaking admitted as Ex.U.

The plaintiff further testified that after the plot in Ex. A1 was officially allocated to the defendant in January, 1958 the defendant refused to transfer the land to him unless the plaintiff would give him, defendant, a motor car. The plaintiff was not willing to do this but on the advice of his solicitor he took with him the balance of £200 due to the defendant on the deal concerning Ex. A1

(see cheque admitted as Ex. V) and the indentures of assignment of both lands in Exs. A and A1 (Exs. V1 and V2) and went to the defendant at his house in company of the solicitor. The defendant did not accept Ex. V and would not execute Ex. V1 and/or Ex. V2. He said he was sick and would see the plaintiff later. He never did. The plaintiff went on that as nothing else was heard from the defendant he put a notice in the Daily Times issue of the 25th June, 1958 warning the public not to negotiate with the defendant about the assignment of the lease in Ex. A1. The notice was produced and admitted as Ex. W.

The plantiff further testified that as a result of Ex. W he was seen by the General Manager of the United Africa Company Limited who told him that the U.A.C. Ltd., were also interested in the plot in Ex. A1. Before this the plaintiff had fenced the land in and installed a sign board bearing his name on the land. He also built a shed on it. Under cross-examination the plaintiff said he knew the land he bargained for and that the promise of the defendant was in writing.

For the plaintiff the following witnesses gave evidence :—

(1) ADAMO SOLOLA, carpenter, who testified that on the instructions of the plaintiff he built a shed on a land at Apapa near the Apapa club and that he was paid about £81 for the job. Later the shed was pulled down overnight after the defendant had removed the sign board of the plaintiff and planted his own on the land.

(2) SIGISMUND OLANREWAJU LAMBO, Barrister-at-Law, who testified to the effect that on the instructions of the plaintiff he forwarded to the L.E.D.B. the original of the lease of land in Ex. A together with other documents. As the documents were not returned to him by the L.E.D.B. as they should have been and on receiving information to the effect that the defendant had collected the documents from the L.E.D.B. without his authority he wrote the letter admitted as Ex. MM dated 9th April, 1958 to the defendant. No reply was ever sent by the defendant to this letter and indeed to subsequent reminders sent to the defendant by the witness.

(3) ALAN KENNETH HARMER VAN RICHARDS, partner in the firm of Messrs Architects Co. Partnership, who testified to the effect that in the year 1957 he prepared the plans admitted As Exs. NN1/3 on the instructions of the plaintiff and purporting to show the scheme for development of plot No. 2712 in the L.E.D.B. Apapa layout. The plaintiff paid his firm a sum of 250 guineas.

The defendant OLADIPO AMOS, described as a business man, testified to the effect that he was introduced to the plaintiff by one Mr Turner late in 1956 or early 1957 and that both of them had discussions about his (*i.e.* defendant's) becoming a Director in the plaintiff's company—S. Nassar & Sons (Nigeria) Limited. This business was not concluded and it was then agreed that the defendant should work for the company until arrangements about the Directorship were finalised. He went on as follow:

I spent a lot of my time on the business of the company. I went to the shop sometimes, attended the telephone, looked around the shop.

The defendant further testified that he is the registered leasee from the L.E.D.B. of plots Nos. 2010 and 2712 and that it was not correct that he acquired the plots for the plaintiff but that it was agreed that if the question of Directorship materialised then he, defendant, would have to transfer the plots to the company. He further testified that in respect of the commercial plot the plaintiff's company never paid any rents and that in respect of the residential plot the company paid the rents on his, defendant's behalf. With regards to the monies paid by the plaintiff to him the defendant testified that they were for services rendered.

The defendant finally testified that as the plans for the Directorship fell through he made other arrangements about his lands. He arranged for a building to be erected on plot No. 2010 which is now sublet to Messrs. Vivian, Younger & Bond Ltd. With respect to the other plot No. 2712 he was still making arrangements for developing same. He denied having ever agreed to sell away his rights on both lands for a total amount of £750.

Under cross-examination by Counsel for the plaintiff the defendant testified that it was part of the arrangements made with the plaintiff that as a Director he should buy shares. He however did not know the amount of shares he was supposed to buy. He, defendant, was working for the company as a "would-be Director". The defendant admitted executing Exs. N, Q and U but denied that he had refused to transfer lands to the plaintiff. The defendant further testified that he was aware that the plaintiff had to erect a building on the land before he, defendant, could assign the lease of the land. He admitted that he had contracted to sublet a portion of plot 2712 to the United Africa Company Limited and that in this connection he had received a motor car on account from the United Africa Company Limited. He admitted that Exs. K and L written by himself refer to the residential plot No. 2010.

The only witness for the defence was CHARLES MODUPE TURNER, Director and Estate Agent who testified to the effect that it was he who introduced the defendant to the plaintiff around November or December 1956 as the plaintiff had requested him, witness, to introduce him, plaintiff, to a "trustworthy and influential man" who could see the L.E.D.B. to get his (plaintiff's) plans approved. He produced the promissory note executed in his favour by the plaintiff to pay him £500 for plaintiff's plan about his land at Victoria Street, Lagos. This was admitted as Ex. 00. He also produced other documents by which he had done business with the plaintiff. These were admitted as Exs. PP and PP1. He further testified that he was aware that the plaintiff promised to make the defendant a Director of this (plaintiff's) company if the defendant got land for him at Apapa. Under cross-examination he said that he was surprised at the contents of Exs. Q and U and that the defendant never discussed with him the matters described or contained in those documents.

In his final address to the court, Counsel for the defendant submitted that the palaintiff's case must fail because :

(1) the documents Ex. N, Q and U do not comply with the provisions of section 4 of the Statute of Frauds.

(2) the contract between the parties was an illegal one. It runs counter to the public policy of the country.

(3) There was no concluded contract between the parties as there was no consideration.

(4) the court cannot decree specific performance in favour of the plaintiff as the subject matter of the contract has materially altered. On the other hand learned Counsel for the plaintiff submitted that the public policy stated to be infringed was no more than the policy of the L.E.D.B. and contended that the defendant should not be allowed in equity to hold what he obtained for and on behalf of the plaintiff.

It is clear that the first question to be resolved is whether or not there was a concluded contract between the parties in this case. On the plain facts of this case it is easy to see that the plaintiff was speaking the truth and that the defendant was not a witness of truth. Quite apart from the oral testimony of the plaintiff to the effect that the defendant agree, to obtain the lesses of the lands in question in this case, and then transfer to him Exs. N, Q and U all executed by the defendant, show conclusively not only that he had received monetary consideration from the plaintiff

but also that he received such consideration in order to transfer to the plaintiff or to the plaintiff's order the plots Nos. 2010 and 2712. The documents Exs. E, L, Z, AA, BB, CC, DD, KK, EE, EE1/37 admitted to be executed by the defendant satisfy me that the defendant did collect the monies and provisions stated on them on account of the same transaction between the parties. The conduct of the defendant in making the plaintiff pay the rent for the plot No. 2010 or two years, the phraseology employed in his letters Ex. G, K and L, his delivery of Exs. F, F1 and the original of Exs. A, A1 to the plaintiff, his failure to reply to the letters from Mr Lambo, (one of which is Ex. MM), his agreement to let the plaintiff pay the rents on one of the plots although the receipts were issued in his, defendants, name, his writing and forwarding of the letter Ex. T to the L.E.D.B. when clearly all the plans he forwarded were the plans belonging to the plaintiff (Ex. NN, NN1/3)—all point to the irressitible conclusion that he was operating in pursuance of the agreement so graphically described by the plaintiff. I have no hestitation whatsoever in accepting and preferring the evidence of the plaintiff and in this connection I reject as an afterthought the suggestion of the defendant that he was negotiating a deal with the plaintiff to become one of the Directors in the plaintiff's company. I do not exclude the possibility of any discussions having taken place as to his becoming a Director of the plaintiff's company but I find and hold that such talks if there be were entirely *do hors* the agreement involved in this case and clearly have no relevance to the case. In this connection I regret to observe that I cannot understand the evidence of the witness for the defence. His evidence was directed throughout to only piece of land and he knew nothing whatsoever of the matters contained in Exs. N, Q and U. Both the plaintiff and the defendant agreed that right from the onset they had always talked of two pieces of land. The evidence of the defendant's witness therefore, to say the least, does not refer to the transaction in issue in this case.

I am satisfied that as between the parties there was a concluded contract whereby the plaintiff should pay the defendant £250 for the residential plot and £500 for the commercial plot and that the defendant should then obtain the leases of those lands, *i.e.*, plots Nos. 2010 and 2712 from the L.E.D.B. in the defendant's name and then transfer them to the plaintiff or to this order. By acceptance of the evidence of the plaintiff is supported by the fact that as early as February 1957 the defendant had told Mr Mickie the L.E.D.B.'s Apapa Estate Officer that he was to transfer plot No. 2010 to the plaintiff. As I pointed out before the documents

Exs. N, Q and U are most vociferous and indeed are conclusive. I find that the contract as stated above is established by the plaintiff. Exs. N and Q show quite clearly the consideration agreed upon by them with regards to the commercial plot. All the Exs. N, Q and U show that the defendant had received the agreed consideration requisite for him to be called upon by the plaintiff to perform his own part of the contract. The argument by the defendant's Counsel to the effect that there was no concluded contract between the parties owing to lack of consideration therefore fails. I find and hold that as between the parties there was a concluded contract by which on the payment by the plaintiff to the defendant of the amounts given in evidence the defendant was to:

(1) obtain in his own name from the L.E.D.B. the leases of the lands described in these proceedings: and thereafter
(2) transfer or assign such leases to the plaintiff or to his order.

Before I proceed to consider the other points raised by Counsel in his address it is opposite at this juncture to consider whether or not there has been a breach by the defendant of the concluded contract. By Exs. N and Q the defendant acknowledged the payment to himself of all expenses and rents in connection with plot No. 2010 and promised to transfer the land on obtaining the lease. He did obtain the lease: indeed the lease Ex. A is dated the 5th day of October, 1957. Apart from his acknowledgment there is abundant evidence to show that the total amount of £250 as agreed upon was paid to the defendant by the plaintiff. Yet he would not ransfer. He had now erected a building on that plot of land and had let it out to Messrs Vivian Younger and Bond Ltd. and he has incurred liabilities totalling £11,000 upon the house. By paragraph 25 of the statement of claim the plaintiff avers that :—

> the defendant has now refused to transfer the two plots Nos. 2010 and 2712 or any of them to the plaintiff.

The amended statement of defence neither admits nor denies this paragraph and paragraph 7 of the statement of defence avers that there was no agreement between the plaintiff and the defendant as alleged by the plaintiff or at all. There is therefore evidence that the defendant is in breach of the contract with respect to plot No. 2010 and I so find.

In Ex. U the defendant acknowledged the receipt of £300 from the plaintiff. That exhibit reads as follows :—

> I, Mr *Oladipo* Amos confirm that I have received from Mr A. S. Nassar, the sum of £300 with a view of obtaining for him from the L.E.D.B.—one plot of land size 3 acres adjacent to Apapa Club. Upon obtaining this plot and making

the necessary transfer to him, I shall be entitled to another £200 making a total of £500. In case I fail to make the necessary arrangements for obtaining the said land for him I will refund to Mr Nassar in full on demand the sum of £300 already taken by me.

It is known that the balance of £200 will be given to me upon completion of the transfer of the said plot.

Quite apart from the provisions which the defendant had received from the plaintiff "*on account*" the promise of the defendant to transfer the commercial plot No. 2712 to the plaintiff is peremptory and the balance of money due to him, if any, was not to be paid until after the transfer. Even if this were not so the action of the defendant in pulling down the plaintiff's fence on the land, his insistence that the plaintiff should give him £1,000 or a motor car before he could transfer this plot of land to him, his clandestine agreement with the U.A.C. Limited to transfer a portion of that plot to them, are all matter which show conclusively that the defendant never intended to fulfil his contract with respect to this plot No. 2712. It is open to a party to a contract to sue the other party for breach of same even in anticipation of the time agreed upon for performance. If it is manifest that by his conduct and his acts that his defaulting party had made himself unable to fulfil his part of the contract at the agreed time, *see Synge v. Synge* (1894) 1 *Q.B.* 466. In the present case the defendant obtained the lease Ex. A1 on the 20th day of March, 1958 and yet he witness box he was very would not transfer. In the adamant and would not even askthe L.E.D.B. for their consent for him to assign. I find therefore that with respect also to plot No. 2712 the defendant was in breach of his contract with the plaintiff to transfer that land.

During his argument after the conclusion of the evidence I requested Counsel for the defence to refer me to the particular part or portion of section 4 of the Statute of Frauds violated by the documents Exs. N, Q and U but Counsel was unable to do so. These documents refer to plot No. 2010 by number and to the commercial plot by description. The documents carry the consideration involved and are all signed by the defendant who is now sought to be charged. In those circumstances I am at a loss to appreciate the argument of Counsel that the provisions of section 4 of the Statute of Frauds have been complied with. That section reads *inter alia* as follows :—

and ..... from and after the said fower and twentieth day of June no action shall be brought .... upon any contract or sale of lands tenements or hereditaments or any interest in or concerned in them ... unless the agreement

upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the parties to be charged therewith or some other person thereunto by him lawfully authorized."

As I indicated above Counsel was unable to refer me to the particular portion of this section infringed and I cannot see that there is any substance in or foundation for this submission. This ground of contention therefore also fails.

Counsel argued also that the contract between the parties was an illegal one as it runs contrary to public policy. I had already alluded to the position of the pleadings with respect to this contention but I stated clearly that if such a plea was raised by the evidence or otherwise during the proceedings it would be the duty of the court to consider and adjudicate upon such a point. It is most difficult if possible at all to pin-point the evidence upon which the defence relies to make this plea. It is admitted that the defendant is a member of the sub-committee of the L.E.D.B. dealing with the allocation of plots of land at Apapa and that indeed the defendant had prostituted his position for money in order to obtain the lesses of the two plots of land in question. Apart from this the witness AJOSE ADEOGUN described as the Secretary of the L.E.D.B., said no more than that :—

as a general rule we do not consent to an assignment of vacant plots.

Under cross-examination the plaintiff testified *inter alia* as follows:—

I know that as a foreigner it would be difficult for me to get a piece of land at Apapa from the L.E.D.B. I know that the defendant is member of the L.E.D.B.

Then I consider the Regulations produced in evidence and admitted as Ex. D. By the provisions of section 5 (v) the lessee of land from the L.E.D.B. is precluded from assigning his lease unless he secured thereto the consent of the L.E.D.B. such consent not be unreasonably witheld for the reason stated. Section 10 of the Regulations however, provide as follows:—

The Board may vary or exclude the covenants and conditions implied in any lease by these Regulations and may impose such additional covenants, terms and conditions in any lease as it thinks fit.

On the face of all these it is impossible to resist the conclusion that what the defendant has picked upon was no more than the policy of the L.E.D.B. and certainly no general policy of the law of the land. Counsel for the defendant had referred to the case of *Montefiore v. Motor Co. Limited* (1918) 2 K.B. 241. In that case it was held that a contract whereby a member of the Government Board was to use his office in order to obtain funds for financing a

private company could not be enforced as it was contrary to public policy. In this case, however, it is to be observed that no evidence has been adduced as to whether or not the plots of land in dispute were allocated to the defendant because he was a member of the L.E.D.B. It occurs to me that anyone else would have, in the circumstances, obtained the leases which the defendant obtained. The question which I may not now answer is as to what time and under what conditions such a person would obtain such lease: In my view anyway the rule laid down in the case cited by Counsel is not applicable to the present case.

The contents of EX. D show clearly the policy of the L.E.D.B. but concludes with a rule which states that any of the regulations contained in Ex. D might be varied at any time by the Board. If there be an infraction of the regulations that clearly is a matter for the Board and not a proper defence to the performance of a contract.

In order to raise effectively the defence that a contract should not be enforced on the grounds of public policy it is necessary to prove that the enforcement of such a contract necessarily affects adversely the public morality or general policy of the law of the realm. In *Byams v. Stuart King* (1908) 2 K.B. 696 at page 726 Farewell L.J. observed as follows:—

> Everyone is entitled to enforce if he can, the performance of a moral obligation, at any rate so long as it is done by the person for himself, and so long as no more than the full performance of the obligation is required.

In that case the defendant, a bookmaker, had opposed the enforcement against him of a contract to pay his debt to another bookmaker on the grounds of public policy. Upon the issue as to whether or not the enforcement of the contract offends public morality, the President, Sir Gorell Barnes observed at page 708 as follows:—

> . . . if there be no illegality nor unlawfulness in the contract and there be good consideration, I cannot see on what grounds it can be suggested that the courts could refuse to give effect to it.

The Court of Appeal held that the plaintiff was entitled to judgment against the defendant in terms of his amended claim. *See* also *Mogul Steamship Company v. McGregoe Gow & Company* (1892) A.C. 25 where the House of Lords held that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits and since they had not employed any unlawful means the plaintiffs could not on the grounds of public policy succeed in an action for

damages against the defendants. In the present case I do not see how the plaintiff could be said to have employed any unlawful means nor could I see that the plaintiff has done anything more than seek to increase his profits and expand his business. On the other hand it is the defendant who not only in order to employ his office but also for monetary consideration has contracted with the plaintiff to secure for him plots of land at Apapa. It seems to me that the defendant could not in those circumstances with any propriety set up the defence that the contract runs contrary to public policy.

I am satisfied that there is in this case an abuse of his office by the defendant. That, however, is not a matter for this court, it is well to point out that persons holding responsible public offices should be aware of their responsibilities and their conduct should as much as possible be beyond reproach. As I said before this is a matter for the L.E.D.B. and I propose to send a copy of this judgment to the Chairman of the Board for any action that he may deem necessary in the circumstances.

I take the view that it is competent to all parties to enter into contracts of agency as the type involved in this case within the limits permitted by the public policy of this country, and that in this particular case there is nothing impinging on the public policy of this country. The defence as to illegality of contract therefore also fails.

Counsel for the defence finally argued that the court cannot decree specific performance because the subject matter of the contract has materially altered. The contract which I find was concluded by the parties involves the procuring of lessees of vacant lands and the transfer of such leases to the plaintiff or to his order by the defendant. With respect to the residential plot No. 2010 the evidence is to the effect that a building now stands upon it and that indeed the premises had been sublet to a third party Messrs Vivian Younger & Bond Limited, against whom no notice of any adverse claims had been proved. With respect to the commercial plot No. 2712 the evidence is to the effect that that plot has now been leased to the defendant and that it is still vacant. It is manifest that with regards to this latter plot there can be no question of the subject matter having materially altered. There can be no doubt also that with respect to the residential plot No. 2010 there is such a change in the nature of the subject matter that it would be inequitable and indeed unreasonable to order that the property in its present state should be transferred to the plaintiff for the consideration proved. Besides it is pro-

vided as against a lessee by section 5 (V) of the Regulations, Ex. D made by the L.E.D.B. pursuant to the Apapa Town planning Scheme as follows :—

> Not to assign, sublet or otherwise part with the possession of land comprised in such lease or any part thereof without the previous consent of the Board.

The effect of this provision which is an implied covenant in any building lease granted by the L.E.D.B. is that the lessee cannot assign without first obtaining thereto the consent of the lessors.

The L.E.D.B. is not a party to this proceedings nor would the Board be bound to consent to the assignment of a lease at the instance of a party ordered to do so by the court. In *Chidiak v. Coker* (1954) 14 WACA 506 the Court of Appeal held reversing a judgment of the lower court that an assignment which requires the prior consent thereto of the Governor is invalid and ineffective unless such consent was obtained before its execution. Both Exs. A and A1 are building leases and both are subject to the conditions contained in the Regulations Ex. D with respect to assignment. Indeed the position is that where the defendant failed to obtain the consent of the L.E.D.B. to an assignment to the plaintiff the plaintiff is entitled to repudiate the contract and claim his money back. In *Brewer v. Broadwood* (1883) 22 Ch. D 105 at page 109 Fry L.J. citing *dictum* of the Master of the Rolls in *Forrer v. Nash* 55 E.R. 858 observed as follows :—

> I think there is great good sense in the view which the Master of the Rolls expressed in the case of *Forrer v. Nash* that where a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person the purchaser as soon as he finds that to be the case may say 'I will have nothing to do with it.' That was the case here and on that principle the defendant was justified in repudiating the contract.

In those circumstances I will not order specific performance either of the residential plot Ex. A or the commercial plot Ex. A1 for the reasons stated above. The defendant will therefore pay to the plaintiff damages in lieu of specific performance.

The measure of damages is related to the injury suffered (and clearly within the contemplation of both parties) by the offended party as a result of the breach of his convenant by the other party. In paragraph 28 of the Statement of Claim the plaintiff sets out the particular of the amount being claimed by him as special damages. It is needless to say that every one of the items of expenditure stated therein except solicitor fees of £109-13*s*-10*d* has been proved to my satisfaction and I hold that the plaintiff

is entitled to all the amounts claimed as special damages less the solicitors fees. The amount therefore to which the plaintiff is entitled as special damages is £1,990-9*s*-9*d*.

With respect to general damages it is to be observed that it was within the contemplation of both parties that the plaintiff would erect buildings on the lands so transferred to him. These sites are now lost to the plaintiff and the chances of his erecting buildings on the plots of land are completely frustrated. I have no evidence of the size of building contemplated on the residential plot but from Exs. NN, NN1/3 it is easy to see the development project contemplated by the plaintiff or his company on Ex. A1. In his evidence the defendant himself testified as follows :—

> In any case the assignee would have to put up a building on the land before I assign. I am aware that the plaintiff had prepared a plan and is ready to put up the building. I have no doubt that Mr Nassar is ready and able to build on the land.

The lease in Ex. A had been granted to the defendant since the 5th October, 1957 and the lease in Ex. A1 since the 28th March, 1958. Not only has the plaintiff lost the benefit of the lands and the possible rents in the future, but he has also lost the rents which he could have received from the buildings on the sites since the creation of the leases Exs. A and A1. I will, however, take into consideration the time that would necessarily have been taken up in erecting the buildings. I have considered all the circumstances of this case and have come to the conclusion that a sum of £3,000 (three thousand pounds) fairly represents the amount of general damages suffered by the plaintiff as a result of the infraction by the defendant of his contractual rights. I therefore fix the figure of general damages at £3,000 (three thousand pounds).

I therefore give judgment against the defendant in favour of the plaintiff for a total amount of £4,990-9*s*-9*d* (four thousand, nine hundred and ninety pounds, nine shillings and nine pence) made up of :—

(*a*) Special damages of £1,990-9*s*-9*d*.

and

(*b*) General damages of £3,000-*0s*-*0d*.

I also order that the defendant do pay to the plaintiff the costs of this proceedings which I fix at 150 guineas.

(*Sgd.*) G. B. A. COKER
Judge

REGINA .. .. APPELLANT

v.

MICHAEL AKPAN .. .. RESPONDENT

(HIGH COURT: COKER J., 21st June, 1960)
(Suit No. LA/17C/60)

Criminal Law and Procedure—Burglary and Stealing—evidence of Finger Prints may be conclusive even though the only evidence available against the accused.

The accused in this case was charged with burglary and stealing contrary to the specified provisions of the Criminal Code. At the trial it was proved that the house of the complainant was burgled and that properties worth over £100 were stolen therefrom. Police investigation revealed that the burglar had entered into the house by removing some louvres from one of the back windows creating an aperture sufficiently large enough to admit his person into the house. At the trial it was proved that the finger print impressions on the louvres removed were identical with the standard or admitted finger prints of the accused.

HELD : That where the court is satisfied of the identity of the finger print impressions that may be regarded as sufficient evidence connecting the accused with the crime and justifying his conviction for the offences with which he was charged.

Cases referred to :

1. *R. v. Castleton* (1909) 3 *Car.* 74.
2. *R. v. Bacon* (1915) 11 *Car.* 90.

F. G. Peters, Crown Counsel, for Prosecution.

In this case the accused stands charged on the amended information filed on two counts as follows :

STATEMENT OF OFFENCE—1ST COUNT

Burglary, contrary to section 411 (1) of the Criminal Code.

PARTICULARS OF OFFENCE

MICHAEL AKPAN, in the night of 23rd day of January, 1960 at Ikoyi, Lagos did break and enter the dwelling house of Valentine Archibald Robinson, with intent to commit felony therein namely to steal therein.

STATEMENT OF OFFENCE—2ND COUNT

Stealing contrary to section 390 (4) (*b*) of the Criminal Code.

PARTICULARS OF OFFENCE

MICHAEL AKPAN, in the night of the 23rd day of January, 1960 at Ikoyi, Lagos, stole from the dwelling house of Valetine Archibald Robinson, one suit case, one dinner suit, one lounge suit, one Millimetre Agfa Camera, one Imperial Portable typewriter, a leather brief case, two pairs of shoes, one bedspread, five long sleeve white shirts, one box Camera Kodak 620, and one pair of sandals, value £106. (One hundred and six pounds) property of Valetine Archibald Robinson.

The case for the prosecution is that on the night of the 23rd January, 1960, the accused did break and enter into the dwelling house of Valetine Archibald Robinson of No. 9 Ruxton Road, Ikoyi, and stole therefrom the articles listed in the second count of the information valued at about £106. At the trial three witnesses gave evidence for the prosecution.

VALETINE ARCHIBALD ROBINSON, Executive Officer in the Ministry of Transport and Aviation testified to the effect that on the 23rd January, 1960, he was living at No. 9 Ruxton Road, Ikoyi and that at about 7.20 p.m. on that night he went out in order to visit some friends. Before he left his house, he securely fastened all the windows and locked all the doors of the house. He returned home just before midnight and opened the door of the house with the key. On entering into his bedroom he found that some of his papers were scattered on the ground, a drawer from a chest left partly drawn out and some coathangers lying about. He suspected that something was wrong and he examined all his windows. He found that one of the windows in the spare bedroom was open, otherwise all the doors and windows were intact. With respect to the window in the spare bedroom he observed that about 8 or 10 louvres of the window had been removed. He later made a report to the police and investigation started by the police. He enumerated the articles listed in the second count as his properties which were stolen on the night of the 23rd January, 1960.

INSPECTOR FAGBEMI, attached to the "B" Division Lagos Police testified to the effect that consequent upon the report of the 1st prosecution witness he proceeded to his house at Ruxton Road, Ikoyi, where he saw a window with some of its louvres removed. The louvres so removed were lying on the ground outside the house. After examining the louvres he collected them and sent them to the C.I.D. headquarters for expert examination. He confirmed the condition in which the first prosecution witness had met the house

upon his return on the previous night. He produced, and this was admitted as Ex. A, one of the louvres from the window in the spare bedroom of No. 9 Ruxton Road. He had seen on examination of Ex. A some finger prints on it and indeed that was one of the reasons why he sent the louvres to the CID. Later, the witness further testified, on the 15th March, 1960 the accused was arrested and brought to the Police Station in respect of another offence and in the course of his investigation of the case he took the finger prints of the accused and sent them to the CID as a matter of routine. He produced the chart on which he took the finger prints of the accused and this was admitted as Ex. B.

DANIEL UWAEZEOKE, Lance Corporal of Police attached to the Finger Print Section of the CID Headquarters testified to the effect that on the 24th January, 1960, he received, from the 2nd prosecution witness, some louvres containing finger prints. He powdered the louvres and was able to discover some clear impressions. He identified the louvre, Ex. A, as one of those sent to him by the 2nd prosecution witness on the 24th January, 1960 and as one of the louvres which he powdered. After this he took a photograph of the impressions of Ex. A and filed it in his office also as a matter of routine. Later on the 15th March, 1960 or thereabout, Ex. B containing the finger prints of one Michael Akpan was sent to him and he discovered that the finger prints on Ex. B are the same as the finger prints on the photos which he had printed on the 24th January, 1960. He then mounted representations of both sets of finger prints on the chart which he produced and was admitted as Ex. D. He pointed out to the court that there are at least 16 characteristics of similarity between the two sets of finger prints.

The accused elected to give evidence on oath stating that he had no witnesses. In his defence he testified to the effect that he was not in Lagos on the 23rd January, 1960 but was in his home town Calabar. He denied having burgled the house of Mr Robinson or having stolen therefrom the properties enumerated in the 2nd count of the information.

It is worthy of observation that there is not a single article of property recovered from or with the accused in connection with this incident. In his defence and also throughout his cross-examination the accused had emphasised the fact that not one of these properties has been found on him or within his control. The only evidence that connects the accused with this crime is that of the similarity of his accepted finger prints to the finger prints discovered on the louvre Ex. A.

In *R. v. Castleton* (1909) 3 *C.A.R.* 74 the only evidence connecting the accused with the crime of burglary with which he was charged, was the finger prints upon a candle left behind. The Lord Chief Justice delivering the judgment of the Court of Criminal Appeal observed as follows :—

> We are clearly of opinion that this application must be dismissed. The suggestion has been made that these finger prints may have been put there by someone else, but that suggestion was disposed of by the jury who decided upon the evidence before them. Our attention has been drawn to the photographs of the impressions of the finger prints. Looking at the middle finger particularly as well as to the index finger of the right hand, we agree with the evidence of the expert at the trial.

In this case it is manifest from the evidence that whoever broke into the dwelling house of Mr Robinson on the night of the 23rd January, 1960 had gained entrance into the house by the window from which the louvres had been removed.

I accept the evidence of Inspector Fagbemi to the effect that Ex. A is one of the louvres removed from the window of the spare room in the premises in question. I also accept the evidence of the finger print expert to the effect that after Ex. A was powdered some impressions became obvious and that on the chart Ex. D the representation on the left side is a correct copy of such impression. I am also satisfied that the representation on the right side of Ex. D is a correct copy of the enlarged photographic reproduction of the finger prints in Ex. B. It is easy to see on close examination let alone any examination with a magnifying glass that the two representations are peculiarly similar. The finger print expert had enumerated 16 characteristics of resemblance. I am satisfied myself from a visual examination of Ex. D that the finger prints on both sides look strikingly alike. They are indeed identical.

I come to the conclusion that the finger prints left on the louvre Ex. A are identical with the finger prints of the accused taken by Inspector Fagbemi on the 16th March, 1960 and reproduced in Ex. B.

I have already pointed out that in his defence the accused stated that he was not in Lagos on the 23rd January, 1960. It is needless for me to say that this is not true. I am satisfied that the accused had always been in company of friend or confederate of his at premises at Lawrence Road, Ikoyi and had used that opportunity to study the conditions at the neighbouring houses. He himself admitted that it was possible to see the back of houses at Ruxton Road from his friend's place at Lawrence Road.

I conclude without any doubt whatsoever in my mind that it was the accused who, on the night of the 23rd January, 1960, went to the premises of Mr Robinson, removed some louvres from the window of the bedroom of which Ex. A is one, entered into the house through aperture thus created and made away with the articles of property enumerated by Mr Robinson. In *R. v. Bacon* (1915) 11 C.A.R. 90 the Court of Appeal held that evidence showing the identity of finger prints of the accused with those of a wanted person was sufficient in the absence of any other explanation to connect the accused with the unsolved crime. I have come to the same conclusion in this case which I have set out at some length. I hold that the prosecution has proved its case and I find the accused guilty on both counts of the amended information as filed. I convict him accordingly.

HIGH COURT, LAGOS

REGINA .. .. COMPLAINANT

v.

SUNDAY JOMBO .. .. ACCUSED

[HIGH COURT : COKER J., 4th July, 1960]

(Suit No : LA/15C/60)

Criminal law and Procedure—Burglary and Stealing—Possession of goods recently stolen by Burglary is evidence from which it may be inferred that the possessor was in fact the Burglar.

The accused was charged with burglary and stealing of properties stolen from a house at Apapa. Most of the goods alleged stolen were found in his possession on the day following the night on which the premises of the complainant were burgled. The accused was not found anywhere near the premises burgled at the material time and in defence urged that he owned most of the properties himself.

HELD : That where the court is satisfied that the goods found in the possession of the accused were those recently stolen as a result of a burglary the court is entitled to draw the inference on those facts that the accused was the burglar.

Cases referred to :

1. *R. v. Palmer Iyakwe* (1944) 10 *W.A.C.A.* 180
2. *R. v. James Loughlin* (1951) 35 *C.A.R.* 69.

O. Folarin, Crown Counsel, for Prosecution.

In this case the accused stands charged on the amended information on two counts as follows :—

STATEMENT OF OFFENCE : FIRST COUNT

Burglary, contrary to section 411 (1) of the criminal Code.

PARTICULARS OF OFFENCE

SUNDAY JOMBO in the night of 11th day of September, 1959 at No. 17B Badagry Road, Apapa, did break and enter the dwelling house of Mr Macfarlane with intent to commit felony therein, namely to steal therein the property of Mr Macfarlane.

STATEMENT OF OFFENCE : SECOND COUNT

Stealing, contrary to section 390 (4) (*b*) of the Criminal Code.

PARTICULARS OF OFFENCE

SUNDAY JOMBO in the night of 11th day of September, 1959 at No. 17B Badagry Road, Apapa, stole one Contax Camera, one p air Binoculars 14×10 by Ross, one Travelling clock, one leather p urse containing a sum of one pound and two shillings, one China

clock, one decorative commando knife in red leather scabbard, eleven packets of cigarettes and some quantity of foreign used stamps, all valued £330-17*s*-0*d* property of Mr Macfarlane.

At the trial four witnesses gave evidence for the prosecution.

THOMAS OKWUDIBONYE, Inspector of Police attached to Denton Police Station testified to the effect that on the 15th September, 1959 he was attached to the CID Division Apapa. At about 1.20 a.m. on that day he went out with a contingent of policemen on a raid. Near the junction of Ladipo Oluwole Road and Marine Road he observed that three men were moving by the edge of the road and were trying to hide. He, together with other policemen quickly drove to the spot in the police Landrover which was carrying them. He jumped out of the vehicle, stopped the men and enquired from them where they were coming from. He identified the accused as one of the three men he saw on that day. One of the men told him that they were returning from Ajegunle and were going to the Marine quarters. The accused told him, witness further said, that they were going to the Marine quarters. As he was not satisfied with the explanation he directed that they should be taken to the Police Station for further enquiries. The three of them were then put in the Landrover and driven to the Police Station. The witness did not accompany them when they were taken to the Police Station, but the Landrover after dropping the three men at the Police Station came back for the witness. When he, witness, returned to the Station he met the three men at the Police Charge Office and in the presence of the accused, a Police Constable brought out the knife, Ex. E and told him that the knife was discovered in the Landrover at the spot where the accused person was sitting. The witness further testified that he therefore ordered that all the three men should be searched and other articles and property which had been the subject of other cases were discovered on the accused. He then prepared a Search Warrant for execution on the premises of the accused. At the house of the accused, the witness further testified, the accused opened his door with the key handed to him by his servant and the house was searched. The witness further testified as follows—

I saw so many things that he could not account for. The articles included :—

(*a*) A purse found under the matress of his bed ; the purse contained a £1 note and 2 shillings. . . . . .

In his wardrobe I saw some used foreign stamps. I asked the accused how he came by them and he said he was a collector when he was serving under and Army Officer. . . . . .

The purse was produced in evidence and admitted as Ex. B and the bundle of used foreign stamps was produced and admitted as Ex. C. The accused and the policemen who executed the Search Warrant then endorsed the Search Warrant at the back by signing their names. The accused was then taken back to the Police Station.

The witness further testified that at the Station he consulted the list of reports of cases of burglary and later drove out in the Police van with the accused to various complainants in the area. One Mr Green, the witness further testified, claimed some towels recovered from the accused. One man living at No. 26 Point Road, Apapa claimed a torchlight recovered from the accused. The accused was carrying the torchlight on that night. Mr Macfarlane, the third prosecution witness in this case, claimed the purse Ex. B and the bundle of used foreign stamps, Ex. C. He also claimed the knife Ex. E as his own. The accused in turn claimed the ownership of Exs. B and C but disclaimed the knife Ex. E. The witness finally testified that Mr Green, the man living at Point Road and Mr Macfarlane had previously reported to the Police at Apapa that their premises had been burgled. Under cross-examination by the accused the witness testified that the torchlight claimed by the man at Point Road, Apapa, was recovered from the accused and that the amount of £1-2*s*-0*d* was in the purse Ex. B when it was recovered during the Search.

GEORGE DEKE, Police Constable No. 257 attached to the C.I.D. Apapa testified to the effect that on the 12th September, 1959 he was on duty at the C.I.D. office Police Station Apapa and that Mr Macfarlane reported to him a case of burglary and stealing at his house 17B Badagry Road, Apapa. In the course of his investigation he discovered that the burglary was committed on the night of the 11/12th September, 1959. On the 15th September, 1959 after the accused was arrested and brought in by the 1st prosecution witness Inspector Okwudibonye he went out to search the house of the accused. At the house of the accused Exs. B and C along with many other properties were recovered in his presence. When Mr Macfarlane reported the burglary he gave to the police a list of the properties which had been stolen away from his house. The list includes a commando knife, a wallet containing £1-2*s*-0*d* and some used foreign stamps. On the 17th September, 1959, the witness further testified, he charged

the accused with burglary and stealing and the accused later made a statement which he recorded and produced in evidence as Ex. D. This witness further testified under cross-examination that at the house of the accused many things were recovered from his room which various persons had claimed and which were the subjects of other cases.

NOEL MACFARLANE, described as Managing Director of Steward & Co. Ltd., of Burma Road, Apapa, testified to the effect that early in the morning of the 12th September, 1959 his steward boy named Dennis woke him up to tell him that there had been a burglary in the house. He went downstairs and discovered that a window in the kitchen had been broken and that an aperture was created large enough to admit a man. He made a rapid survey to ascertain what had been stolen and immediately reported to the Police Station at Apapa. On the night of the 11th September, 1959 he had returned home with his family at about 10 p.m. He fastened all the windows and locked the doors of the house with the exception of the kitchen windows. The kitchen doors and windows were to be locked by the steward. The witness further testified that the kitchen was situated within and forms part of the house. There is a door between the kitchen and the main house which was always open. When he came down in the morning the door was open. During his first look round he found that some cigarettes had been stolen from a chest in the living room. He also found missing an oriental china clock, a decorative knife, a large box and a bag containing used foreign stamps. After a thorough search he discovered that apart from the articles mentioned above he had also lost a camera, a new pair of Ross Binoculars, a wallet containing £1-2-0*d* and other articles. He estimated the value of all these properties at about £330-17*s*-0*d*.

About three or four days after his report, the witness further testified, an Inspector of Police came to the house and asked him whether he could identify certain articles. He had come in a Landrover containing other persons and he identified at the Police Station as his own, the commando knife Ex. E, the bundle of stamps, Ex. C and the wallet Ex. B. He testified that his wife kept an amount of £1-2*s*-0*d* in the wallet at the time it was stolen. Under cross-examination by the accused he testified that the stamps in Ex. C looked very much like his own, that most of the stamps in Ex. C are Belgian stamps and he kept a large number of such stamps. He testified further that he had bought the wallet Ex. B, in Cairo, Egypt in 1953.

The last witness for the prosecution was DENNIS ONYUIBI described as a cook and steward to Mr Macfarlane in September 1959. He remembered the night of the 11th September, 1959. On that night he closed at about 10.30 p.m. Before he closed he locked all the doors and windows of the kitchen. There were four windows and two doors of the kitchen. There was a door between the kitchen and the main house but this door was usually left open and unlocked. He took the keys of the doors and windows locked by him with him to the boys quarters. On the morning of the 12th September when he resumed duty at about 6.30 a.m. he found that one of the kitchen glass windows had been broken and the window opened. He was sure that he had fastened the window on the previous night and that it was not broken. He reported to the Macfarlanes and they both came down with him. Under cross-examination by the accused, the witness testified that he knew the wallet Ex. B as the property of the Macfarlanes and the commando knife Ex. E as the property of Mr Macfarlane.

The accused elected to give evidence on oath and stated that he had no witnesses. He testified to the effect that early in the morning of the 15th September, 1959 at about 2.30 a.m. he was in company of two other men at the junction of Oladipo Oluwole and Badagry Roads. He further testified that he was a sand digger and as his business involved the watching of the tides he had to go very early in the morning to his station. He was going to work normally on that morning when the first prosecution witness arrested him and his two friends, put them in the Landrover and took them to the Police Station. At the Station they were all searched and later locked up in the cell. At the Station the first prosecution witness, Inspector Okwudibonye came to him, accused, holding a bundle and inside the bundle he saw many things for instance, shoes, shirts, shorts, knife, etc. On being asked whether they knew anything about them they all said that they did not. The accused further testified that the knife Ex. E was shown to him and he disclaimed it. Later in the morning his house was searched and his properties were packed away. On the way back to the Police Station the first prosecution witness had collected the amount of £1-2*s*-0*d* which he had with him (accused) and after collecting this money from him had put the money into the wallet, Ex. B. The accused claimed the wallet Ex. B as his own. He said he bought it from a Hausa man at Cow Market along the Marine Road, Apapa. He also claimed the stamps Ex. C as his own. They had been given to him by one Major Warner for

whom he worked whilst in the army. He denied that he ever burgled any house. Under cross-examination by Crown Counsel he testified that he was working as a sand digger for one Baba Raimi but that he did not know where he lives. He denied that he ever told the first prosecution witness that he was coming from Ajegunle and going to Marine Quarters. He testified to the effect that he collected the stamps Ex. C and also that he was surprised that the Macfarlanes had said that they kept an amount of £1-2*s*-0*d* in the wallet Ex. B. He testified further that the first prosecution witness had lied to the court when he said one Mr Green claimed the towel found in his house and also that a man at Point Road claimed the torchlight which he was holding. He denied that he signed the warrant Ex. A at the back and claimed that he had had the wallet Ex. B for four years.

It is clear from the evidence that the case for the prosecution is that on the night between the 11th/12th September, 1959 the accused burgled the house of Mr Macfarlane and stole therefrom the articles listed in the second count of the information. The wallet Ex. B, a parcel of stamps Ex. C, and the commando knife Ex. E, were the only three articles of property recovered from the accused. In his evidence the accused testified to the effect that the commando knife did not belong to him and that it was not found in the part of the Landrover where he was sitting after being arrested at Marine Road.

I take the view that the prosecution witnesses were speaking the truth when they said that the knife Ex. E, was recovered in that part of the Landrover where the accused was sitting and that this information was conveyed to the first prosecution witness in the presence of the accused. At that time the accused did not challenge the statement and in my view did not do so because he was thinking out a defence. Before me his evidence in defence was full of lies and contradictions. He had claimed the wallet Ex. B, as his property which he had bought and kept for four years. When asked about the apartments in the wallet he was unable to say how many apartments were contained in the purse. It is significant that an amount of £1-2*s*-0*d* was found in the wallet. It will be recalled that the Macfarlanes had claimed not only the purse but also that the exact amount of £1-2*s*-0*d* had been left in the wallet at the time when it was stolen. Mr Macfarlane testified, and I prefer and accept his testimony, to the effect that he had bought the wallet Ex. B., in Cairo in Egypt. The wallet Ex. B, bears an inscription of soldiers dressed in

oriental uniforms. I am satisfied that the wallet Ex. B really belongs to Mr Macfarlane and not to the accused as claimed by him. I am satisfied that Mr Macfarlane was speaking the truth when he said that his wife kept an amount of £1-2*s*-0*d* in the wallet. With regards to the knife Ex. E, Mr Macfarlane claimed it and said that he had made the knife himself whilst he was in the army. The accused however disclaimed ownership of the knife but in view of my comments above I think it is unnecessary to say in so many words that I accept Mr Macfarlane's testimony to the effect that the knife Ex. E, belongs to him. So with the parcel of stamps Ex. C. I am satisfied that the accused was telling lies when he said that a Major Warner had given the stamps to him. Indeed it is difficult to pin-point the evidence of the accused on this point. He first told me that his master who gave the parcel of stamps to him was Major Hartman; then he changed the name to that of Major Warner. Under cross-examination by Crown Counsel he said that he himself had collected the stamps. I am satisfied that his evidence is no better than the old and hackneyed story of accused persons found in possession of stolen properties.

As I indicated before there is no direct evidence that the accused burgled the house of Mr Macfarlane on the date and time named in the charge. It is however clear from my acceptance of Mr Macfarlane's evidence and that of his steward that on the night between the 11th/12th September, 1959 the premises No. 17B Badagry Road were burgled. One of the windows in the kitchen was broken and a hole sufficiently large to admit a man was made thereby. In the morning the window which had been locked the previous night was found open. It is also clear that whoever entered into the house must have done so through the broken or opened window and then through the door leading from the kitchen into the main house (which was always and indeed on that occasion left open) and then into the main house from where the various articles of property listed in the 2nd count of the information were stolen. I am satisfied that Mr Macfarlane and the witness Dennis Onyuibi were speaking the truth when they said that in the morning they found the kitchen window open and the house disturbed.

I have already pointed out that there was no direct evidence that the accused burgled the premises in question. There is evidence which I accept however that Exs. B, C and E properties of Mr Macfarlane which were stolen on the night of the burglary, *i.e.*, 11-9-59 were found in the possession of the accused on the

morning of the 15th September when he was arrested by the Police. In *R. v. Palmer Iyakwe* (1944) 10 *W.A.C.A.* 180 the West African Court of Appeal held that the appellant should not have been convicted of burglary and stealing but certainly of receiving stolen property where the only evidence against him in support of the burglary was that goods stolen in a burglary were found in his possession *five months* after the burglary. *Kingdon C.J.*, delivering the judgment of the West African Court of Appeal observed as follows :

> We are of opinion that in these circumstances the doctrine of recent possession cannot operate in such a way as to make it proper for the appellant to be convicted of the burglary and stealing.

In the present case the burglary was committed three days before the date on which the accused was apprehended. I am satisfied that the circumstances as to the possession were different from the case of Iyakwe *Supra* where the West African Court of Appeal was concerned over the recentness of the possession by the appellant. In *R. v. James Loughlin* (1951) 35 *C.A.R.* 69 the only evidence against the accused in a charge of breaking and entering was that he was found in possession of the stolen property soon after the breaking. The Court of Appeal pointed out that on that evidence it was proper for the trial court to convict the appellant on the charge of house breaking and stealing. The Lord Chief Justice delivering the judgment of the court observed as follows :—

> The learned Deputy-Chairman started his summing-up by saying this : 'There is no evidence that he in fact was the person who broke into these premises, except the fact that he was found in recent possession of this stolen property, if you find that proved. Therefore, to simplify matters, I shall not ask you for a verdict on the first count, and you will concentrate on the second count of receiving'. Now, it is too often the case, where a man is charged with housebreaking and the evidence against him is that soon after the breaking and entering he is in possession of the property, that the Court directs the jury that there is no evidence that he broke and entered and tells the jury to concentrate on the receiving. That is not the law. If it is proved that premises have been broken into, and that certain property has been stolen from those premises, and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker and if he is, it is inconsistent to find him guilty of receiving, because a man cannot receive from himself. That is what is so often done. It is perfectly good evidence of the prisoner being the housebreaker that he is found in possession of property stolen from a house quite soon after the breaking.

It is needless for me to say that I respectfully agree with that decision and indeed I take the same view of the facts of this case. My acceptance of the evidence for the prosecution witnesses

confirms the view which I take that the possession of Exs. B, C and E by the accused is clear evidence from which it is inferrible that the accused was the burglar who, in the night of the 11th/12th September, 1959 entered into the house of Mr Macfarlane by breaking through a window in the kitchen and stole therefrom the articles listed in the 2nd count of this information.

I have no hesitation whatsoever in coming to the conclusion that the prosecution has proved its case and I find the accused guilty on the two counts of burglary and stealing as charged on the amended information and I convict him accordingly.

JOSHUA ANDERSON RICKETTS .. .. PLAINTIFF

v.

J. A. SHOTE .. .. DEFENDANT

[HIGH COURT, COKER, J.; 6th September, 1960]
(Suit No. LD/9/59)

Land at Ebute Metta—Order for Possession where Title Involved—Series of Conveyances without evidence of possession may not by themselves create a right to possession.

The plaintiff R had sued the defendant S for possession of "the premises situate and being No. 4 Iya Agan Lane" at Ebute Metta in Lagos. The plaintiff at the trial exhibited and produced a series of conveyances dating from as far back as the 9th day of March, 1928 to the time of the action in favour of himself and his predecessors in title. There was no evidence that he or any of his predecessors had actually been in physical possession of the land in question which was immediately before the action unbuilt. The defendant, on the other hand, claimed title by virtue of a purchase from the original owners of the land Oloto Chieftaincy Family and also the fact that he has been, since the purchase by him, in possession of the land and expended money on same by completing the building started on the land by his own immediate predecessor in title.

HELD : That on these facts the plaintiff is not entitled to an order for possession and that the series of conveyances exchanged between the predecessors in title of the plaintiff could not by themselves constitute such acquiescence or laches against the original owners as to divest them of their rights in the property.

Cases referred to :

Alhaji Suleman and Another v. Hannibal Johnson (1959) 13 *W.A.C.A.* 213.

Chief Akinlolu Oloto v. John (1942) 8 *W.A.C.A.* 127.

Akpan Awo v. Cookey Gam 2 *N.L.R.* 100.

Akinlolu Oloto v. Administrator-General and Others (1946) 12 *W.A.C.A.* 76.

Mosalewa Thomas v. Preston Holder (1946) 12 *W.A.C.A.* 78.

Ramsden v. Dyson (1865) *S.C.L.R.* 1 *H.L.* 129.

Cairn Cross v. Lorrimer (1860) 3 *L.T.* 130.

Rennie v. Young (1858) 44 *E.R.* 939.

Caroline Morayo v. C. T. Okiade and Others (1942) 8 *W.A.C.A.* 46

Gerald Impey for Plaintiff.

A. Ogunsanya for Defendant.

COKER, J.:—In this case the plaintiff's Writ is endorsed as follows:—

The plaintiff claims possession of the premises situate and being No. 4 Iya Agan Lane, Olokodana, Ebute Metta, Lagos.

Pleadings were ordered and filed. By the amended Statement of Claim the plaintiff avers that the land the subject matter of this action was purchased by him from one M. S. Cole on or about the 9th day of March, 1928 and that he obtained a registered Conveyance therefor. Soon after the purchase by him he entered into possession and planted a vegetable garden thereon and that in 1934 he put a caretaker there who remained in possession of the land until 1945. In that year one GBADAMOSI BABA EGBE trespassed on the land and he instituted an action against the said Gbadamosi Baba Egbe and that the action was decided in his (plaintiff's) favour on the 20th day of January, 1955. The Statement of Claim finally avers that during the hearing of the said suit the said Gbadamosi Baba Egbe started the erection of a building on the said land and that the defendant now claims possession of the land and buildings.

By the amended Statement of Defence the defendant puts in issue all the averments in the plaintiff's Statement of Claim and avers that the land with the buildings at present in the possession of the defendant was purchased by the defendant from one BELLO RAJI who himself had purchased the right, title and interest of the Oloto Chieftaincy family in the said land. The Statement of Defence further avers that the Oloto Chieftaincy family were the titular owners of the said land under Native Law and Custom. The Statement of Defence finally contends that the plaintiff has no rights to the possession of the said land and that the defendant will rely on all legal and equitable defence open to him.

At the trial evidence was given by the plaintiff in support of his Statement of claim. He testified to the effect that he bought the land from one Rev. M. S. Cole and produced his conveyance which was admitted in evidence as Ex. D. After the purchase of the land from Cole he obtained from Cole the documents of title relating to the land in the possession of Cole. These were produced by him and were admitted in evidence as Exs. E, E 1 and E 2. He also produced a Deed of Mortgage executed by the late Rev. M. S. Cole in respect of the same property. This was admitted in evidence as Ex. F. Soon after he bought the property he entered into possession using the land as a vegetable garden for many years. Later he let the land to one MR ELUE who continued to use the land as a

vegetable garden. He, plaintiff, was living beside the land in dispute and during the time in question he collected from the land vegetables, paw-paws, oranges and other fruits. He produced, and these were admitted as Exs. K, K 1/27, the receipts which he issued to Mr Elue whilst he was his tenant. Round about the 14th September, 1945 he received a letter from the solicitor of one Mr Bello Raji indicating that the land was being claimed by the said Bello Raji. The letter was produced and admitted in evidence as Ex. G. He handed over Ex. G to his solicitor and had since heard no more about it. There was a fence on the land at the time he bought but he did not know who erected the fence. The fence was later pulled down in 1945 and on going to the land he met Bello Raji and Gbadamosi Baba Egbe and they told him (plaintiff) that they had pulled down the fence. He reported the matter to the police and later instituted proceedings against Bello Raji. He produced and this was admitted as Ex. H a certified true copy of the judgment in that case. He later instituted proceedings against Gbadamosi Baba Egbe and he produced a certified true copy of the final judgment in that case. This was admitted as Ex. H 1. About the same time, one AGORO instituted legal proceedings against him (plaintiff) and he produced a certified true copy of the judgment in the case between him and Agoro and this was admitted as Ex. H 2. Buildings were being erected on the land as far back as the time when the case in Exs. H and H 1 were going on in the court and indeed one of the buildings was being erected on the particular piece of land upon which this case is founded. He did not know who lived in the building but the defendant now occupies that building. He discovered during a search at the Lands Department that the defendant had registered a document of title to that land in his own favour. He produced and this was admitted as Ex. J a certified true copy of the defendant's conveyance as well as a certified true copy of the conveyance of the defendant's predecessor in title. This later conveyance was admitted in evidence as Ex. J 1.

Under cross-examination by Counsel for the defence he stated that his land stretches from Brickfield Road to Iya Agan Lane and that the portion edged yellow in the plan Ex. A (or A 1) is part of No. 19 Brickfield Road. He testified further that the defendant occupied a part of No. 19 Brickfield Road but he retracted this and said that the defendant did not occupy any part of No. 19 Brickfield Road. He was, however, certain that the land occupied by the defendant is part of the land litigated upon in Ex. H 1. He

testified that Brimah Olowora was his predecessor in title but that he did not know how he came to own the land. He admitted that the land in dispute originally belonged to Chief Oloto, and that the land now in dispute is known as No. 7 Oluwa Lane. The land formed a portion of what was sold by public auction in 1945. There was no building on the land then but a building now stands on it which was erected about 10 years ago. He protested against the sale of the land but the sale was carried out despite his protest and admitted that he did not institute any proceedings until now in respect of that land. He admitted that the judgment in Ex. H 2 related to property No. 31 Brickfield Road and not to any portion of the land shown in Ex. A. He also admitted that the address No. 4 Iya Agan Lane was a mistake and that the house next door to the property in dispute bears the municipal number 5 Oluwa Lane. He eventually admitted that he could not swear that the property in dispute was ever known as No. 4 Iya Agan Lane. He testified further, under cross-examination, that the building on the land in dispute was erected in 1945 by Gbadamosi Baba Egbe but that he did not know when Gbadamosi Baba Egbe left the property and the defendant went in. He saw the defendant for the first time on the property in 1958 and could not say who occupied the building between 1945 and 1958. He testified further that he never wrote any letters to the defendant although his lawyer might have written letters to the defendant.

SALISU AKANBI ALAKA, Licenced Surveyor, testified on behalf of the plaintiff to the effect that he prepared the plans admitted as Exs. A and A 1 on the instructions of the plaintiff and that the plans which are identical one with the other relates to properties at Brickfield Road and Oluwa Lane, Ebute Metta. He also produced a certified true copy of the Certificate of Purchase dated 15th March, 1945 in favour of one Bello Raji. He testified to the effect that the land covered by the Certificate of Purchase fell within the land edged pink in Exs. A and A 1. The Certificate of Purchase was produced in evidence and admitted as Ex. B. He also produced a certified true copy of a conveyance made the 20th day of November, 1945 between Bello Raji and one ASANI DOSUNMU and this was admitted in evidence as Ex. C. The witness testified to the effect that the area covered by the plan carried by Ex. C is the same as the area edged yellow in the plan Ex. A 1. He testified further that the lands shown in Exs. D, E, E 1, E 2 and F are the same land and that after a ground check with instruments he was satisfied that the plans in those exhibits related to the land shown by him and edged pink on the plan Ex. A or A 1. Under cross-examination by Counsel for the defence he testified to the effect that the land edged yellow in

Ex. A now bears the municipal number 7 Oluwa Street but that it used to be known as Iya Agan Lane. It was on quite a different road from Brickfield Road.

The defendant JOSHUA ADEGBENLE SHOTE testified to the effect that he bought the property No. 7 Oluwa Lane on the 3rd June, 1956 at a public auction. The auctioneer was one *Mr Pereira*. He produced a copy of the auction notices which were posted on the premises and the surrounding areas and this was admitted in evidence as Ex. M. He paid £810 for the property. At the time he bought there was an uncompleted building on the land. He obtained a conveyance from his vendor Bello Raji and this was produced and admitted in evidence as Ex. N. He also produced the other documents of title which he obtained from his vendor and these were admitted in evidence as Exs. O, P, P 1 and P 2. After the purchase he completed the building and went into possession and has remained in possession ever since. He testified further that the property No. 7 Oluwa Lane now occupied by him used to be known as No. 14 Iya Agan Lane but never as No. 19 Brickfield Road. He testified that he does not claim through Gbadamosi Baba Egbe and that he had completed the building which was started by his vendor Bello Raji. Under cross-examination by Counsel for the plaintiff he testified to the effect that the land edged yellow in Ex. A 1 is his land and house and that he spent in all about £2,500 more to complete the building which was in course of erection at the time he bought. He had bought it at a sale by public auction and many other people attended the sale. At that time he (defendant) was living at No. 11 Brickfield Road and Mr Ricketts the plaintiff lived at No. 16 Brickfield Road. He did not know anything about the litigation between the plaintiff and Gbadamosi Baba Egbe and he was satisfied with his title after searching through the records at the Lands Registry in Lagos. He further testified that he claimed title through the Oloto family and that at the time he bought the property in dispute there was no fence on the land. He produced the approved building plan of the property and this was admitted in evidence as Ex. Q.

Both OLABOYE LALEYE, Licensed Auctioneer and a principal member of the Oloto Chieftaincy family and EMMANUEL JAIYESINMI OGUNDIMU the Chief Oloto of Lagos testified on behalf of the defendant. They testified in effect that the land, the subject matter of this proceedings originally belonged to the Oloto Chieftaincy family and formed part of the stool lands of that family. They further testified that the family allowed one BRIMAH OLOWORA a brickmaker to occupy the land as a customary tenant and that

this tenant paid customary tributes to the family for many years during which he was in possession of the land. He had no right to sell the property or alienate his interest in the land without the consent or permission of the Oloto Chieftaincy family. In the year 1945, these witnesses testified, the land was sold by an Order of Court at the instance of the execution creditor for the judgment debt and costs outstanding against the Oloto family. Before then the Oloto family had not parted with or disposed of their interest in the land and the family, and not the plaintiff, was in possession of the land.

In his address to me Counsel for the defendant submitted that the plaintiff's case must fail in-as-much as it was not established how Olowora, from whom the plaintiff claims, obtained a fee simple estate described in his document Ex. E 1. He further submitted that once it is established by a party in such proceedings that he derived title from the original owners the burden of proof shifts on the other side to show that it has a better title. He further submitted that the plaintiff sat back and watched the defendant improve the land, that laches and acquiescences therefore operated adversely against the plaintiff and that the plaintiff's claim should be dismissed. On the other hand Counsel for the plaintiff submitted that the plaintiff has established, by uncontraversial evidence of possession, that he is the owner of the land in dispute and that plaintiff has a long line of title covering many years. He therefore asks for judgment in favour of the plaintiff in terms of the Writ of Summons.

The defendant has put in issue the identity of the property claimed by the plaintiff and it is therefore necessary to make a finding on that point. The Writ claims possession of premises "situate and being No. 4 Iya Agan Lane, Olokodana, Ebute Metta, Lagos" but there is agreement between the parties that the property at present occupied by the defendant bears the municipal number 7 Oluwa Lane, Lagos. In his evidence the plaintiff testified that he did not know how that property came to be known as No. 4 Iya Agan Lane, although it is evident that he must have given that address to his solicitors at the time when the Writ was prepared. Eventually he admitted that he did not even know that that property was ever known as No. 4 Iya Agan Lane. The evidence of the defendant, however, is to the effect that although the property is now known as No. 7 Oluwa Lane it used to be known as No. 14 Iya Agan Lane. I think myself that the version of the defendant is the only reliable one and that the address given by the plaintiff in his Writ of Summons is a mistake for No. 14 Iya

Agan Lane. In my view, however, this does not affect the identity of the property which is now being claimed. The plans Ex. A and A 1 describe in the portion edged yellow, the property claimed by the plaintiff and now in the possession of the defendant. The defendant's conveyance Exs. J and N described the land bought by him as shown on a Deed of Mortgage dated 20th day of November, 1945 and duly registered. That mortgage was produced and admitted in evidence as Exs. L and P. Exs. L and P carry a plan which according to the evidence of the surveyor Alaka covers the same land as that shown in the conveyance Ex. C. Now Ex. C is one of the documents covering the title of the defendant in this case and the same surveyor testified that the area covered by Exs. C, L and P is the portion of the land coloured pink in the conveyance Ex. D which is the plaintiff's conveyance. It is therefore clear that the parties are not misled or confused by the description or location of the land or property in dispute and that the claim of the plaintiff relates to the property at present occupied by the defendant and shown in Ex. C and edged yellow in the plan Ex. A (and A 1).

The claim in this case is for possession of the property at present in the occupation of the defendant. In support of his claim the plaintiff has produced the conveyance to which I have referred and which established a chain of title dated from the 25th September, 1906. The root of title is the conveyance admitted in evidence as Ex. E 1. In that conveyance the land therein assured was described as having belonged to one Brimah Olowora "in fee simple in possession free from incumberances". The plan attached to this conveyance has been rightly described by the surveyor Alaka as a sketch and no more but it is clear from the evidence of this witness that it was possible from that sketch and the information supplied on it to identify the land shown in the sketch with that shown and edged pink in the plan Ex. A (or A 1). There is evidence which I accept to the effect that the land shown in Ex. A 1 is substantially the same as that shown in the plans carried by the conveyance Exs. D, E and E 2 and the mortgage Ex. F. Now these documents claim title through Brimah Olowora who was recited in Ex. E 1 as having possessed title in fee simple in possession. It should be borne in mind that an estate in fee simple is an estate under English law and characterised by peculiar incidents which are quite different from the incidents recognised by Native Laws and Customs. I am at a loss to appreciate from a reading of the document Ex. E 1 how Brimah Olowora could have possessed a fee simple estate based upon the document which has been

produced before me. I am not unmindful of the provisions of section 129 of the Evidence Ordinance Cap. 63 with regards to the presumptions that arise in favour of a document 20 years old or more, but in this case the defendant has put in issue the title of the plaintiff and in particular have contested that the plaintiff's predecessor in title Brimah Olowora could not and did not possess the interest which he (or his children) purported to convey by the document Ex. E 1.

I have come to the conclusion that the evidence of the witnesses OLABOYE LALEYE and EMMANUEL JAIYESINMI OGUNDIMU is a more reliable version of the history of the property in question. Laleye is a Licenced Auctioneer and a member of the Oloto Chieftaincy family. When he testified before me he could not have been less than 70 years old. Ogundimu is the present head of the Oloto Chieftaincy family and the Chief Oloto of Lagos. He is substantially familiar with the history of the land in dispute and he gives evidence in a forthright and convincing manner which satisfies me that he was speaking the truth. He himself could not have been less than 60 years old at the time when he gave evidence in this case. On the other hand the evidence of the plaintiff is to the effect that he did not know how Brimah Olowora obtained the fee simple estate in the land in question nor did he know any of the children of Brimah Olowora. The conveyance Ex. E 1 therefore stands alone with respect to the facts stated in the recital and despite the provisions of section 129 of the Evidence Ordinance to which I have referred I am not prepared to accept that Brimah Olowora ever possessed the fee simple estate in this land. On the other hand I am persuaded by the version of the defence that Brimah Olowora was a customary tenant of the Oloto Chieftaincy family on the land for many years paying a tribute of 1,000 bricks per annum and that unknown to the family after his death his children purported to sell the land by virtue of the conveyance Ex. E 1 to the vendor named in that document. It is significant that Brimah Olowora himself never executed any document purporting to alienate his interests in this land and it is the most elementary principle of customary laws that an unauthorised disposition of his interest by a customary tenant is not only void at law but renders the tenant liable to a forfeiture of his interest.

It is consequently necessary for me to examine (and I do so) the nature of the possession claimed by the parties in this case. With regards to the defendant I think his case is a very simple one. On or about the 15th day of March, 1945 pursuant to a Writ issued

out of this court and at the instance of the execution creditor the right, title and interest of the Oloto Chieftaincy family in the land in dispute was sold by public auction. At that time the evidence, which I accept, is to the effect that the present plaintiff was living at Brickfield Road more or less opposite the land in dispute in these proceedings. The plaintiff did say that he protested against the sale but that despite his protests the property was sold by public auction. No evidence apart from this statement of the plaintiff has been adduced to establish that he protested against this sale. At that sale one Bello Raji was the highest bidder and was declared the purchaser of the land shown and edged red in the plan accompanying the Certificate of Purchase Ex. B and P 1. The area edged red in Exs. B and P 1 is described by the surveyor as falling within the area edged pink in the plan Exs. A and A 1. If that is so (and I have no reason to disbelieve the evidence of the surveyor to this effect) it occurs to me that by that sale almost all the land claimed by the plaintiff and shown edged pink in Ex. A (or A 1) was sold at a public auction under an order of court on or about the 15th March, 1945. I shall advert to this point later in this judgment.

The defendant claimed that by virtue of that sale his predecessor in title entered in possession of that land and that at least 10 years ago a building was started on the particular land and although it was not then completed, after he purchased in 1956 he completed the erection without any protest whatsoever from the plaintiff and has since been in occupation of that building. The title of the defendant originated from the Oloto Chieftaincy family then through the Certificate of Purchase Exs. B and P 1, through the conveyance by Bello Raji to Asani Dosunmu in 1945 Exs. C and P 2, through the Mortgage on the 20th November, 1945 by Asani Dosunmu to one Ajoke Alli in Exs. L and P, through the conveyance dated 3rd May, 1956 between the said Ajoke Alli and Bello Raji in Exs. J 1 and O and finally to the conveyance on the 22nd day of June, 1956 by the said Bello Raji to the defendant in Exs. J and N. All these conveyances and instruments recite that possession was taken by the respective grantees therein described and although there is no direct evidence that they were in physical possession of the land the evidence which is admitted on both sides that an uncompleted building had stood on the land for over 10 years convinces me that the defendant's predecessors in title have, at any rate since 1945, exercised maximum acts of possession on the land in question.

With regards to the plaintiff the position is as I have stated before. His conveyances dated as far back as the 25th September, 1906. I have already expressed my views about the root of title recited in the conveyance Ex. E 1. The plaintiff testified that after he purchased the land and obtained his conveyance Ex. D in 1928 he entered into possession of the land and planted a vegetable garden thereon. This continued for many years but he could not say for how long he was actually in physical possession of this land. He later put one Elue in possession of the land as a tenant. Elue, unfortunately is now dead and was therefore unable to give evidence for the plaintiff. The plaintiff however produced receipts admitted as Exs. K, K 1/27 which he issued in favour of Mr Elue. The earliest of these receipts (Ex. K) is dated May, 21st 1934 and the latest of them (Ex. K 22) is dated 18th September, 1943. If Ex. K was the first receipt to be issued to Elue then the plaintiff could not by himself occupy the land for any longer than the six years between 1928 and 1934. There is nothing on these receipts to identify them with the particular land the subject matter of this proceedings, and assuming that they relate to the land in question the possession of Elue, at any rate so much of it as is proved before me, determined in the month of December 1943 according to the document Ex. K 22.

Now it is settled law that different considerations apply in order to find acquiescence on the part of the original owners in respect of lands over which they had granted occupational rights to strangers as distinct from lands over which no such rights were granted. The point was made clear by the Court of Appeal in the case of *Alhadji Suleman & Anor. v. Hannibal Johnson* (1951) 13 W.A.C.A. 213 where at page 215 the court observed as follows :—

> It is clear that when the original owners have granted rights of occupation to another the possession of the other is not adverse possession and the owners acquiescence therein is part and parcel of the grant and cannot affect the owner's reversionary rights. It is only therefore when it comes to the owner's knowledge that the tenant is alienating or is attempting to alienate the land that the question of acquiescence can arise.

Even if the plaintiff was in effective possession until December 1943 the evidence being no more than that the land was used as a vegetable garden I am not prepared to hold (considering the authority to which I have referred before and the fact that there is no evidence that the owners knew that their customary tenant or his children had purported to sell the land) that there had been such overt acts of possession as will establish acquiescence on the part of the original owners and operate to divest them of the titular interest which

they possess in the land. I think the Court of Appeal had put the point clear in the case of *Chief Akinlolu Oloto v. John* (1942) 8 W.A.C.A. 127 where at page 128 the Court observed that to suggest that when the strangers to whom occupational rights were granted gave up possession without notifying the original owners of that fact, the original owners should effectually resume ownership of the land would be no more than doing violence to logic and language. The plaintiff has asked that the original title of the Olotos be treated as extinguished and has invoked the decision in the case of *Akpan Awo v. Cookey Gam* 2 N.L.R. 100. It is to be observed however that that case does not relate to land over which occupational rights were ever granted ; moreover the evidence in that case, unlike the evidence in the present case, reveals a position in which from the nature and notoriety of the acts of possession relied upon, the inference of acquiescence on the part of the owners of the radical title, was irresistible.

There is evidence to the effect that the plaintiff instituted legal proceedings against Bello Raji (Ex. H), Gbadamosi Baba Egbe (Ex. H 1) and one Agoro (Ex. H 2). It is established by evidence which I accept that Ex. H 1 did not relate to the particular piece of land which is at present in dispute though it might have related to the entire land shown and edged pink in the plan Ex. A or A 1. No plan was attached to the judgment Ex. H 1 and whereas the evidence before me establishes that Gbadamosi Baba Egbe was never in possession of the particular piece of land on which the defendant's building now stands, the judgment Ex. H 1 was against Gbadamosi Baba Egbe. It is admitted by the plaintiff himself that the judgment Ex. H 2 did not relate to any portion of the land edged pink in Ex. A. With regards to the judgment Ex. H it is clear that the plaintiff's case against Bello Raji was dismissed for reasons stated in the judgment. The plaintiff had instituted action against Bello Raji for damages for trespass but he could not establish at the trial that the trespass was committed by Bello Raji himself or his agent. Besides no plan was attached to Ex. H and the Writ states no more than that it relates to plaintiff's land "situate at Brickfield Road, Ebute Metta." There is no evidence to identify the land claimed therein with that particular portion of land in dispute in this proceedings and although I am prepared to accept that that action relates to the land in dispute yet the decision in that case clearly precludes me from making any favourable findings based upon that judgment in favour of the plaintiff. The plaintiff has produced a letter dated 14th September, 1945 (Ex. G) written to him on behalf of the defendant's predecessor in title, Bello Raji. That letter

clearly relates to properties described therein as Nos. 19 and 31 Brickfield Road, Ebute Metta. I am not concerned in this proceedings with No. 31 Brickfield Road, Ebute Metta. The plaintiff's contention in this proceedings is that by No. 19 Brickfield Road he always meant the entire property edged pink on the plan Ex. A (or A1). If that is so it can be easily assumed that Ex. G suggests that the plaintiff was occupying No. 19 Brickfield Road, Ebute Metta (including the area now in dispute) at the time of the purchase by Bello Raji. Against this, however, there is the evidence of the uncompleted building standing on the land for many years to which I have referred and the letter Ex. G was not followed up. In my view the resultant position is that either at the time when Ex G was written the plaintiff was not in possession of the particular portion of land edged yellow in Ex. A (or A1) or after the receipt of Ex. G he gave up the possession of same.

In a case for recovery of possession the question for determination is which of the parties has a better right or title to the possession of the premises in question and once the plaintiff establishes a *prima facie* title to the possession of the land the burden shifts upon the defendant to show that he has a better right to the possession of the premises in question. *See Akinlolu Oloto v. Administrator-General and others* (1946) 12 *W.A.C.A.* 76.

And where both parties allege possession the law says that possession in law should be found in favour of the party who can prove title to the property in question. I have already described the nature of the titles of both parties and it must be remembered that when once a party to a proceedings of this nature has established a title originating from the rightful owners the duty cast upon the other side to clear his title is a very heavy one indeed. *See Mosalewa Thomas v. Preston Holder* (1946) 12 *W.A.C.A.* 78. In this case I am as satisfied that the title of the defendant originated from the Oloto Chieftaincy family admitted to be the original owners as I am that the plaintiff's title did not so originate. The defendant and his predecessors in title have been in possession for upwards of 10 years and this is manifest from the evidence of the plaintiff himself when he said as follows :—

> During the time I was fighting the cases in Exs. H, H1 and H2 I observed that buildings were being put on the land . . . . . a building was erected on the particular piece of land the subject matter of this suit. I do not know who lived in the building. At present that building is now occupied by the defendant . . . . . the land formed portion of what was sold by public auction in 1945. There was no building on the land then. This action is the first one I have taken in respect

of the same property. The house on it was built about 10 years ago ..... The building on the land in dispute was erected in 1945. It was then being erected by Gbadamosi Baba Egbe..... I do not know who occupied the building between 1945 and 1958. There was a case in court and so I did not make any enquiries.

In my view therefore the defendant has established not only that he has a title derived from the original owners but also that he and his predecessors-in-title have been in possession of that land for at least ten years.

It is also necessary to examine the position of the parties in equity after the considerations to which I have adverted, and the pleas of equitable defences raised in the Statement of Defence. The evidence of the plaintiff clearly establishes that as far back as 1945 a building was started on the land and that as from 1958 the building was completed and that the defence has since occupied that building. In his defence the defendant testified and I see no reason to doubt his testimony that he paid a sum of £810 for the uncompleted building and site and that thereafter he spent an amount of about £2,500 in order to complete the building. He produced a copy of the Auction Notices placarded before the sale was effected (Ex. M) and also the building plan covering the building on the site Ex. O. The plaintiff has given no evidence which satisfies me as to whether or not the defendant was warned or stopped at the time he was buying or investing money upon a property claimed by the plaintiff. In other words, the plaintiff was content to sit back and watch another person expend money on and improve his own property. If that were so (and I am convinced that this inference is irresistible from the facts) then the plaintiff cannot come into this court and expect that in equity he should be allowed to take advantage of the improvements undertaken by the defendant. In the case of *Ramsden v. Dyson* (1865) S.C.L.R. 1 H.L. 129 (or 149 Rev. Rep. 543) the House of Lords (Lord Cranworth L.C) stated the equitable principle at p. 549 as follows :—

> If a stranger begins to build on my land, supposing it to be his own, and I perceiving his mistake, abstain from setting him right, and leave him to persevere in his errors a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own.

See also in this connection *Cairncross v. Lorimer* (1860) 3 *L.T.* 130. I am aware that this principle will not apply where the stranger had spent the money with a full knowledge of the owner's title or where the owner is not in a position to know of the expenditure of money on his property. This contrary rule was laid down in

Rennie v. Young (1858) 44 *E.R* 939 and followed by the West African Court of Appeal in *Caroline Morayo v. C.T. Okiade and others* (1942) 8 *W.A.C.A.* 46. I have however considered the facts of the present case and in particular the conduct of the plaintiff himself, and I have come to the conclusion that this case is easily distinguished from *Caroline Morayo v. C.T. Okiade and others Supra* and that even in Equity the plaintiff's case must fail.

These points dispose of the contentions of the parties in this case and my findings involve that the plaintiff has not established a better title so as to enable him to obtain an order for possession of the premises the subject matter of this proceedings. I will therefore dismiss the plaintiff's case and the case is accordingly dismissed.

The plaintiff pay to the defendant the cost of this proceedings which I fix at 60 guineas.

HIGH COURT, LAGOS

LETITIA EFFUAH LEWIS .. .. .. PETITIONER

v.

RICHMOND BABATUNDE LEWIS .. .. RESPONDENT

[HIGH COURT, COKER, J.; 10th October, 1960]
(Suit No. WD/31/58)

Marriage and Divorce—Cruelty as a ground for Divorce

The parties in this case were married on the 18th November, 1950 at a Marriage Registry in London and thereafter lived together in Nigeria within the jurisdiction of the court. The wife petitioned the court for dissolution of her marriage with the husband respondent on the grounds of cruelty and the husband cross-prayed for dissolution of his marriage with the petitioner on the grounds of her adultery with a man cited.

HELD : 1. That the issue of cruelty was one of fact and that although no major incident can be proved the court will be justified in inferring legal cruelty where a series of acts, none of which is by itself outrageous or alarming, is done with the avowed purpose of injuring the other spouse and where such acts have the cumulative effect of causing the other spouse such mental or physical injury or the likelihood of such injury as would compel the court to interfere and relieve the suffering spouse.

2. That a high standard of proof is required to establish adultery as a matrimonial offence and unless facts of such character were forthcoming from a party alleging adultery the court could not find that it has been proved.

Cases referred to:

Blunt v. Blunt (1943) *A.C.* 517.

English v. English (1952) 2 *A.E.R.* 784.

Harris v. Harris (1829) 2 *H.A.G.G. E.C.C.* 376.

Russell v. Russell (1897) *A.C.* 395.

Jamieson v. Jamieson (1952) 1 *A.E.R.* 875.

Odesanya for Petitioner.

Ogunsanya for Respondent.

Somolu for Co-respondent.

COKER, J:—This is a wife's petition for dissolution of her marriage with the respondent on the grounds of cruelty. The petitioner has also asked for the custody of the two children of the marriage and also for such secured provision or such sums of money by way of maintenance for the said children as may be just.

The respondent filed an answer in which he charged the wife with adultery with one Dr Emmanuel Ebosie and prayed for dissolution of the marriage on that ground and for the custody of the children of the marriage.

At the trial the petitioner LETITIA EFFUA LEWIS, a Nursing Sister attached to the General Hospital, Lagos testified to the effect that she was married to the respondent on the 18th day of November, 1950 at the Marriage Registry of the Metropolitan Borough of Hampstead in London and produced a certified true copy of the marriage certificate which was admitted as Ex. A. There are two issues of the marriage, namely OLAYINKA CONRAD LEWIS (born on 2nd April, 1951) and RICHARD OLABODE LEWIS (born on 1st December, 1954). The two children are now in the custody of the respondent since they were handed over to him by the Welfare Department. The petitioner further testified that they both returned back home to Lagos in April 1957. She was qualified as a midwife and as far as she knew the husband was not qualified and has since been jobless. Sometime during August 1957 the respondent packed away all his belongings and properties from the matrimonial home at No. 182A Clifford Street, Yaba and took with him the two children of the marriage and has since not returned back. The petitioner testified further that since the return of the parties to Lagos the respondent pestered her life by unnecessary and unjustified accusations, persistent naggings and habitual displays of infuriating temper resulting almost always in the administration of blows on her. She had been charged with carrying on an adultrous association with one Dr Ebosie but she testified that this was not correct or justified. She knew Dr Ebosie very well as both of them had worked together in Calabar when she was a student nurse posted to that station. Dr Ebosie was a medical officer in charge of the Calabar Hospital. She also testified that whilst they were living in England she could remember that during the Winter of 1954 after a row the respondent packed out all her things (at a time when she was 8 months pregnant with a child) and instructed the taxi-man to drive her wherever he liked. She took refuge with some relatives of the respondent.

Since the respondent left the house, the petitioner testified, he had always paid visits to her in the house, picked up rows and used the visits as opportunities to beat her up. Matters came to a head on the 24th October, 1957. She had returned back from duty between 9.30/10 p.m. of that night and she came back home in an ambulance. As she alighted from the ambulance, the respondent emerged from behind her, savagely assaulted her, tore off all her uniform and other dresses and she had nothing on her but the brassiere and knickers. She produced the torn uniform and this was admitted as Ex. B. This incident was witnessed by an inmate of the house who lived on the top floor by name MRS KEJI DAVIES-

WILLIAMS who also testified on her behalf. She went to the General Hospital for treatment as she had a black eye and her head was very heavy after the incident. She was examined and treated by Dr Akinsete. Since then she had had to consult a specialist with respect to her eyes and she has always worn glasses since and still has to report to the eye specialist every six months. She finally testified that she had seen the children of the marriage since the respondent left the matrimonial home and they looked very wretched and are not properly cared for.

Under cross-examination by Counsel for the respondent she testified that between 1950 and 1955 there had been many serious rows between her and the respondent and that indeed the rows started even before they got married. The parties were living together for a few months before they got married. She testified further under cross-examination that one night in November 1957 whilst she was at home cooking the respondent came into the house, slapped her and hit her on the head with one of the cooking pots. She denied carrying on any affairs with Dr Ebosie and testified further that every time she saw the children they tried to run away from her because the respondent had taught them to do so and also that whenever she gave them money the respondent would telephone her at the hospital, tell her off and return the money to her. She further testified that the respondent was in the habit of coming to her in the hospital and indeed in the wards where she worked to abuse her and humiliate her and even fight her.

DR AKINSETE, medical officer attached to the General Hospital Lagos, testified to the effect that on the night of the 24th October, 1957 the petitioner consulted him as an out-patient at the Emergency Clinic of the General Hospital. She had a black eye and also complained bitterly about pain on the frontal part of the left side of her head. He examined and treated her.

MRS KEJI DAVIES-WILLIAMS, testified to the effect that she lived at No. 182A Clifford Street, Yaba and that she remembered one night in October 1957 when she was standing at the window of the top floor of the house when the petitioner returned from work. As she alighted from the ambulance van the respondent emerged from the back and started to beat her up. She further testified that the respondent beat her up so mercilessly that she (witness) had to come down and plead with the respondent to desist from beating her. As the respondent would not yield she raised alarm and called out the inmates of the house and several neighbours to help her to overpower the respondent. She was definite that on

that occasion the petitioner's uniform was torn and indeed she saw blood coming out of her ear. She testified that she is about 68 years of age herself.

The respondent RICHMOND BABATUNDE LEWIS testified to the effect that he is at present unemployed and that there are two issues of his marriage with the petitioner, *i.e.*, Conrad and Richard and that the two children now live with him. He denied that he sent the petitioner out of the house in London in 1954 or at any time at all. With respect to the incident of the 24th October, 1957 he testified to the effect that he did not beat the petitioner at all and that it was she who tore up her uniform herself. He had gone to the house on that night in order to collect the ointment which he would apply to the nose of one of their children who had bleeding nose. The petitioner had not returned from the hospital and so he waited outside for her. She arrived at about 9.15 p.m. in a black chevrolet car driven by a man whom he knew by the name of THANNI. As he approached them the petitioner introduced him to Mr Thanni and Mr Thanni drove off. He then questioned the petitioner why Mr Thanni should be driving her home. He went on as follows :—

> She then got hold of my shirt, held me by the neck and started to scream. I did not touch her at all. When people started to collect she dipped her hand into a hole in the uniform and tore it up. She did this in order to get me into trouble. I would not say that she is very troublesome. I did not hit her on the head.

He further testified that since their marriage there was no trouble until the 12th June 1957 when one afternoon the petitioner was brought home by Dr Ebosie in his car. She was to close from duty at 2 p.m. but she never returned home until 5.27 p.m. She was carrying some parcels and had told him that she had gone ashopping. He was not satisfied with her explanation because she was in a dishevelled state. From that time the relationship between them became strained. On the 26th September, 1957 (he was not then living any more in the house) he went to a shop next door to settle his accounts with the shop-keeper and whilst he waited for a friend in front of the house he observed, through the front door which was left open, that Dr Ebosie was coming out of an unlighted room followed behind by his wife. He rushed into the house and fought with Dr Ebosie tearing his shirt and taking possession of his car key and various other documents. A part of the shirt which was torn was produced by him as Ex. D and the bundle of papers was also produced and admitted as Ex. E. He admitted that early in 1958 the petitioner reported him to the Yaba Magistrate Court and that as a result of the proceedings

that took place he was bound over to keep the peace. Under cross-examination by Counsel for Dr Ebosie he testified to the effect that he had met Mrs Ebosie at the Kingsway Stores, Lagos after the 26th September, 1957 and that she had come to his house on three occasions to speak to him. He produced a copy of the counter-affidavit to which he swore in the proceedings for binding over referred to above. This was admitted as Ex. F. He denied the suggestion put to him by Counsel that the documents Ex. E were all handed to him by Mrs Ebosie. Under further cross-examination by Counsel for the petitioner he testified that he did not get on well with his mother-in-law. He also testified that he was getting an amount of £20 every month from the purchaser of his house in London. With regards to the incident of the 26th September, 1957 he testified that this was witnessed by the inmates of the house, the neighbours and many passers-by but that he was not calling any of them as a witness as the only person he intended to call as a witness had left the house.

He called as his witness, his father STEPHEN JOACHIM LEWIS described as a pensioner. He testified to the effect that on the 7th August, 1957, he went to the General Hospital Lagos to speak to the petitioner, his daughter-in-law. Whilst he was coming out of the hospital premises he met his son, the respondent, coming into the hospital in a rather furious mood. He called his son and questioned him as to the purpose of his visit to the hospital. His son told him that he had come to look for a doctor. Just about that time Dr Ebosie was walking along on the corridor and the son pointed him out as the doctor for whom he was looking. They both talked to Dr Ebosie who thereafter invited them into the consulting room. In the consulting room his son told the doctor that he, the doctor, should not break up his home and the doctor then expressed surprise and asked him the reason for the statement. The respondent then told the doctor that he suspected his association with his wife. He further testified that there and then Dr Ebosie told him bluntly that he had nothing to do with his wife and that all he did on that occasion was to give her a lift to the house. The respondent then said that if all he did was to give her a lift he should have driven her right up to the house and not put her down about 20 yards to the house. The witness then interrupted and said that the doctor should have taken her right up to the house.

Under cross-examination by Counsel for the co-respondent he testified to the effect that his son was away in the United Kingdom for eight years and that Dr Ebosie did say at that meeting that it was customary to give lifts to hospital staff. He testified further

that he did not remember that his son told him at any time that his wife tore up her own uniform but he remembered that his son told him that he fought Dr Ebosie. This report, however, took place after Dr Ebosie had left Nigeria for the United Kingdom. He was not able to say whether the report took place before or after his son was bound over by the Magistrate at the Yaba court. He testified further that his son had come to the hospital on the 7th August, 1957 annoyed because of the incident of the 12th June, 1957 when Dr Ebosie gave his wife a lift in his car. He ended up by saying that his son told him that the fight of the 26th September took place some distance from the house and not inside the house.

In his address to me Counsel for the respondent submitted that the petitioner had not made out a case for cruelty and that I should order a decree on their own cross-petition. Counsel however agreed that the facts upon which the respondent relies can hardly justify an inference of adultery. Counsel for the co-respondent submitted that there is no averment in the answer and cross-prayer of the respondent about incidents to which he referred in his evidence. He submitted that adultery was not proved and that there was not a single suggestion to the petitioner about the incident of the 26th September, 1957 on which the respondent relied to charge his client.

Counsel for the petitioner submitted that whilst the charge of adultery by the respondent was not proved the petitioner has established a case of cruelty. He asked for dissolution of the marriage and for custody of the children of the marriage. He submitted that there was evidence of impairment of vision and that the petitioner has had to see the doctor every six months. He is not asking for any monetary allowances at present if his client should get the custody of the children.

The respondent has asked for the exercise of the discretion of the court but indeed the case on either side is a denial of the allegations by the other. Both parties have, however, asked for a decree and in the circumstances it is incumbent upon the court to examine the matters in issue very carefully in order to see whether or not there was sufficient evidence upon which a decree could be founded remembering at all times the advice of Viscount Simon in *Blunt v. Blunt* (1943) A.C. 517 at page 525 that it should be borne in mind that it is contrary to public policy to insist upon the maintenance of a union which has utterly broken down.

I consider first the allegations of the respondent. These allegations consist mainly of charges of adultery with one Dr Ebosie against his wife. The evidence is to the effect that he had often seen her in the company of Dr Ebosie who has been cited as a co-respondent to these proceedings. The most important incident in this connection is what happened according to the respondent on the night of the 26th September, 1957. It should be remembered however that the respondent had left the matrimonial home as far back as August 1957. On the night of the 26th September he had come to the shop next door in order to settle his account with the shopkeeper. The respondent has not called a single witness to support his testimony as to his purpose in going to that address at the time. What is most alarming is that not a single word about this incident by way of cross-examination was addressed to the wife whilst she was in the witness box ! It is true that this incident was pleaded in the respondent's answer and indeed the respondent tendered the bundle of documents admitted as Ex. E and stated that he recovered them from Dr Ebosie during the scuffle that took place between both of them. I am myself unable to accept without further proof the respondent's version of the incident of that night. I have come to this conclusion because of the sharp conflicts in the evidence of the respondent and that of his father (his only witness), because of the failure to put the matter to the petitioner in the witness box and because of the unfavourable view that I take of the respondent's demeanour and capacity to speak the truth during his testimony from the witness box. In my view the suggestion by Counsel to Dr Ebosie to the effect that the documents in Ex. E were handed over to the respondent by Dr Ebosie's wife appears to be a more probable account of the origin of the documents Ex. E. I have unhesitatingly come to this conclusion because of the unfavourable impression left in my mind by the visits of Mrs Ebosie to the house of the respondent (as clearly admitted by him) there being no evidence by which her visits may be justified or indeed understood.

The respondent had testified to the effect that he had seen his wife in Dr Ebosie's car on many occasions. Apart from the incidents of the 12th June, 1957 and the 26th September, 1957 (about which I had already expressed my views) there is no evidence of any other particular kind or any particular incident. It is very difficult in these matters to pin-point instances and far more so, to be able to discover any particular scenes on which specific instances of adultery can be founded. Opportunity coupled with familiarity must however be proved. *See England v. England* (1952) 2 All E.R. 784.

My own recollection of the law is that the court must be satisfied that there was something more than opportunity before it will affix guilt. *See Harris v. Harris* (1829) 2 Hagg. Ecc. 376. Whilst the evidence of the respondent may ground an inference of opportunity to the petitioner and the co-respondent (and I will not exclude that possibility) it seems to me that the evidence available is not a sufficiently safe one on which an inference of adultery may be predicated.

Besides, I am not satisfied that the evidence on behalf of the respondent deserves any high degree of credence and his own version is very difficult to accept. This position was carried to its logical conclusion by the father of the respondent when he testified to the effect that on the 7th day of August, 1957, when he saw his son and Dr Ebosie at the General Hospital, Lagos, the son was ventilating to Dr Ebosie his anger at what had happened since the 12th June, 1957 ! I have come to the conclusion that the evidence of the father is as unreliable as that of the son and that it would be unsafe to act upon such testimony without further independent evidence. Such further proof is not forthcoming and although the respondent was severely cross-examined as to the person or persons who witnessed the fight of the 26th September, 1957, it was not suggested and indeed not considered by the respondent to call any of them to testify in this case. I am rather inclined to take the view (and I will advert to this point later in the judgment) that the wife's testimony to the effect that the husband chased her all over the place and accused her of complicity with Dr Ebosie when he had no grounds to prove same is correct. There is no evidence whatsoever before me on which I could base an exercise of the discretion of the court and no Discretion Statement has been filed. That disposes of the counter charges by the respondent and I find it impossible on the evidence before me to pronounce a decree in his favour.

The petitioner's case is based on cruelty. Here again it is not possible to pin-point any particular occasion on which any aggravated form of violence by words or action has been proved. She did give evidence however, and this was supported by her witness Mrs Davies-Williams, to the effect that on the night of the 24th October, 1957, she was mercilessly and disgracefully assaulted by the petitioner. I am satisfied that Mrs Davies-Williams was speaking the truth and that the respondent on that night did commit the act with which he was charged. Dr Akinsete testified to the effect that he was consulted at the emergency clinic by the petitioner almost immediately after this assault. The petitioner's uniform Ex. B was produced in court. The respondent's answer to that is that on that

night the petitioner herself dipped her hand into a hole on her uniform and tore it up. I have examined Ex. B and I am satisfied that the respondent's story cannot be correct. The condition of Ex. B is more consistent with the uniform having been torn up during a fight than as suggested by the respondent. The evidence which I accept is to the effect that during the assault she had nothing on apart from her underwear and the attention of the neighbours and inmates was aroused to this incident when the old lady Mrs Davies-Williams could not get the respondent to leave off beating her. I cannot imagine a stronger case of humiliation !

In order to establish cruelty in a divorce proceedings it is not necessary to prove that there had been actual violence inflicted in such a way as to produce actual injury to life or limb. No spouse is bound by the obligations of marriage to wait until he or she is actually assaulted or injured before seeking redress in the Law Courts and a number of acts or omissions done with the intention to injure life or limb or to cause a reasonable apprehension of such injury may have the cumulative effect of legal cruelty even though each of the acts or omissions taken in isolation cannot ground a divorce petition. In *Russell v. Russell* (1897) A.C. 395 at page 438 Lord Nobhouse observed *inter alia* as follows dealing with the question of cruelty :—

> . . . I find ample authority for saying that . . . .cruelty has never been confined to cases of personal damages but has been judged by the wider and more reasonable criterion . . . .namely whether or no conjugal duties have become impossible between the litigant husband and wife.

In this case apart from the evidence of the petitioner, which I accept, to the effect that since the incident of the 24th October, 1957 she had had to wear glasses and indeed still has to see the doctor every six months, there is the further evidence that before and since the respondent left the matrimonial home he had pestered the wife with innumerable accusations of infidelity and particularly with Dr Ebosie which may not be justified and certainly cannot now be proved. Such a course of conduct operating on the mind of a person of the status of the petitioner (a Nursing Sister) is in my view calculated to injure her mentally, to upset her completely and to make it impossible for her to continue to maintain any respectable standard in the performance of her conjugal duties. The intention underlying the actions of the respondent is immaterial and he is presumed to intend the consequences of his action.

I will also refer to the letters Exs. C and C1. In Ex. C the petitioner was referred to by the respondent as a "nuisance and an apology to women. A woman without principle, without

morals, without character and a vile subtle serpent" and in Ex. C1 he threatened her that if she failed to return to him some of the curtains in the matrimonial home he would be "forced without any further request to sue you for recovery because I am convinced that by your attitude you have through spite converted this property of mine for your own use." I am satisfied that these letters were written with the tendencious intention of ruining her health mentally at least and the incident of the 24th October was designed to effect the physical damage to her health. I am satisfied that this is a case in which the dictum of Lord Reid in *Jamieson v. Jamieson* (1952) 1 All E.R. 875 at page 886 :—

> But there can hardly be a more grave matrimonial offence than to set out on a course of conduct with the deliberate intention of wounding and humiliating the other spouse and making his or her life a burden and then to continue in that course of conduct in the knowledge that it is seriously affecting his or her mental and physical health. Such conduct may consist of a number of acts each of which is serious in itself but it may well be even more effective if it consists of a long continued series of minor acts no one of which can be regarded as serious if taken in isolation.

should be applied.

I have come to the conclusion after reviewing the facts of this case that the petitioner has established by her evidence a course of conduct on the part of the respondent which produces the cumulative effect of legal cruelty sufficient to ground a decree of dissolution. I have already indicated my views about the evidence given by or on behalf of the respondent. I cannot and do not accept that evidence and I think that a good deal of such evidence consists of afterthoughts. I take the view that the time has come when these parties be no longer bound to live together as husband and wife and in such case it is the undoubted duty of the Court to intervene and grant relief to the suffering spouse. I hold therefore that this petition succeeds on the ground of cruelty.

With regards to the custody of the children the principle is well settled that the court considers in such cases primarily the welfare of the children. The respondent himself had indicated to the court that he was not contesting the issue of custody. I wish to place on record that even if he had contested I would be rather hesitant in granting him such custody as he is at present unemployed and I cannot see how he could have been in a proper position to look after the children.

I therefore order on this petition as follows :—

1. I order a *decree nisi* for the dissolution of the marriage between the petitioner and the respondent celebrated on the 18th day of November, 1950, such decree to be made absolute, if nothing else happens, after three months.

2. I order that the custody of the children of the marriage, Conrad Olayinka and Richard Olabode, the issue of the marriage between the petitioner and the respondent be given to the petitioner within 7 days hereof and that the children do remain in her custody until further order or orders of the court, but it is directed that such children be not removed out of the jurisdiction of the court without its sanction.

This order is with liberty to both sides to apply.

I also order that the respondent do have access to the children on the last Sunday in every month between the hours of 1 p.m. and 8 p.m.

3. I dismiss the counter-petition of the respondent and dismiss also the counter-charges against Dr Ebosie. I order the respondent to pay the costs of this proceedings fixed as follows :

(*a*) To the petitioner 30 guineas

(*b*) To the co-respondent 15 guineas.

HIGH COURT, LAGOS

RUFAI AKIYEMI OKOYA .. ..
SAMUEL AKIYEMI OKOYA ..
AJOMOH AKIYEMI OKOYA ..
MOTUNDE AKIYEMI OKOYA ..
(for themselves and on behalf of the Akiyemi Okoya Family) .. .. .. } PLAINTIFFS

v.

MOTAYO OKELEYE AKITAN ..
ABADATU AJILE ABINA .. .. } DEFENDANTS

[HIGH COURT : COKER, J.; 7th November, 1960]
(Suit No. LD/254/49)

Practice and Procedure—Refusal of Application to file amended writ—Discontinuance or withdrawal of suit—Provisions of order 44 *R.S.C. considered.*

The plaintiffs instituted proceedings in this case against the defendants for an order to set aside a deed of gift the particulars of which are set out on the writ. After pleadings were ordered and filed the plaintiffs applied to the court for leave to file an amended writ but the application was refused by the court and dismissed in January 1960. In August 1960 the case was mentioned and fixed for hearing on the 2nd and 3rd November 1960. On the 2nd November, 1960 the plaintiffs filed a notice of discontinuance asking for leave of the court to discontinue the action. Counsel for the defence opposed the application for leave to discontinue and asked for the plaintiffs action to be dismissed.

HELD : That on an application under order 44 for leave to discontinue or withdraw an action the provisions of rules 1 and 2 should be considered separately insofar as the application was made before or after a hearing date.

2. That where such application was made before hearing date the plaintiff is entitled to an order to discontinue or withdraw his action without terms except as stated in that rule but that if the application was made after the date fixed for hearing leave to withdraw is at the discretion of the court and terms as stated in rule 2 may be imposed by the court.

HELD ALSO : That on such application the court is not entitled to dismiss the plaintiffs case unless the plaintiff is unable to or refuses to proceed when leave to withdraw was refused.

Case referred to :

Nwachukwu and other v. Others (1955) 15 *W.A.C.A.* 36.

H. Lardner for Plaintiffs.

K.A. Kotun for 2nd Defendants.

COKER, J. :—In this case the plaintiff's claim against the defendants is for an order setting aside a Deed of Gift the particulars of which are set out on the writ. Pleadings were ordered and filed.

It appears that the first defendant was dead at the time the order for pleadings was made. Before the 2nd defendant filed her statement of defence Counsel on behalf of the Plaintiffs applied to the court for leave to file an amended writ of summons as set out on the exhibit carried by the affidavit to his motion paper dated 28th December, 1959. The application to file an amended writ was on the 18th January, 1960, dismissed with costs by Onyeama J. and the resultant position was, and still is, that the plaintiffs were left with the original writ filed by them on the 11th August, 1959. On the 29th August, 1960 the case was called for hearing and adjourned until the 2nd and 3rd November, 1960 for hearing. Late on the 2nd November 1960 however Counsel for the plaintiff filed a Notice of Discontinuance asking for leave to discontinue the action.

The application was argued at the resumed hearing of the 3rd November, 1960. Counsel for the plaintiffs relied on the provisions of order 44 rule 1 (1) and (2) of the Rules of the Supreme Court and Counsel's main contention was that under Rule 1 (2) the Court may allow such discontinuance or withdrawal on such terms as to costs or otherwise as to the Court may seem just. Counsel for the defendants, on the other hand, did not oppose the application to withdraw but submitted that the proper order was one of dismissal.

I have referred specifically to the argument of Counsel for the defence because I consider this a very important point of practice and also because I consider that a rather imperfect appreciation of the provisions of that rule may lead to confusion in the future with regards to the application of the rules.

Order 44 Rule 1 read as follows :—

(1) If before the date fixed for hearing, the plaintiff desires to discontinue any suit against all or any of the defendants, or to withdraw any part of his claim, he shall give notice in writing of discontinuance or withdrawal to the registrar, and to every defendant as to whom he desires to discontinue or withdraw. After the reciept of such notice such defendant shall not be entitled to any further costs with respect to the matter so discontinued or withdrawn than those incurred up to the receipt of such notice, unless the court shall otherwise order, and such defendant may apply *ex parte* for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the court to obtain the order. Such discontinuance or withdrawal shall not be a defence to any subsequent suit.

(2) If in any other case the plaintiff desires to discontinue a suit or to withdraw any part of his claim, or if a defendant desires to discontinue his counterclaim, or withdraw any part thereof, such discontinuance or withdrawal may be allowed on such terms as to costs, and as to any subsequent suit and otherwise as to the court may seem just.

The defference between sub-rule (1) and sub-rule (2) is obvious, one applies before a hearing date is fixed and the other after a hearing date is fixed. I am in this case concerned with sub-rule (2). It is manifest after reading that rule that the provisions are designed to give the court a discretion whenever applications are made to withdraw or discontinue a pending case after a hearing date has been fixed for that case. It is not in dispute in the present case that a hearing date had been fixed for the case before the Notice of Discontinuance was filed but the discretion given to the Court, in my comprehension, is either to grant leave to withdraw or to refuse such leave. It is not permissible for the Court at the hearing of an application for leave to withdraw to make an order dismissing the claim of the plaintiffs. If leave to withdraw was refused to the plaintiffs it is conceivable that in the event of the plaintiff failing or refusing to proceed with his case an order of dismissal might be the only order that could be made in the circumstances. In the case of *Nwobu Nwachukwu and Others v. David Nze and Others* (1955) 15 *W.A.C.A.* 36 the Court of Appeal in dismissing the appeal of the appellants observed *inter alia* as follows :—

> It follows that the learned Trial Judge had the power to refuse leave to discontinue as he did in this case and we are of the opinion that he was right in dismissing the claim when plaintiffs' Counsel declined to proceed with his case.

In my view that judgment presupposes that leave to discontinue was refused and plaintiffs' Counsel had declined to proceed with his case. It is therefore clear that I have no jurisdiction to make an order for dismissal on an application for leave to discontinue with the proceedings. As Counsel for the defendants did not oppose the application for leave to withdraw (his contention being directed to the dismissal of the action) I take the view that I would not refuse the application to withdraw this case.

In the circumstances I grant leave to the plaintiffs to discontinue the present proceedings. I observe that the discontinuance is necessitated by the refusal of the application of the plaintiffs to file an amended writ. The refusal occurred as far back as the 18th January, 1960 and the plaintiffs had taken no steps whatsoever before now to withdraw the proceedings, knowing then, as they ought to know, that they had no chance of success on the action as at present framed. I will therefore strike out this proceedings but in view of my observations above, will direct that the plaintiffs do pay the costs of and occasioned by the proceedings up till to-day to be assessed. I give no other conditions on which the plaintiffs are allowed to discontinue this case.

HIGH COURT, LAGOS

EDWARD OLUREMI ODEKUNLE
IBIRONKE OLUSEGUN ODEKUNLE
ATINUKE ADEJOKE ODEKUNLE .. APPLICANTS

v.

E. B. WILLIAMSON
THE PROBATE REGISTRAR
THE PUBLIC TRUSTEE .. .. RESPONDENTS

[HIGH COURT, COKER, J.; 22nd November, 1960]
(Suit No. M/174/60)

Public Trustee Ordinance—Retirement of Trustees appointed by Testator under a Will —Appointment by Court of Public Trustee to take over a Trust.

The present applicants who are Trustees appointed by the Will of one ALBERT OMOTESHO ODEKUNLE (DECEASED) have applied to the court for an order to appoint a Public Trustee as the Trustee of the Estate of the deceased in view of the fact that for reasons shown by them in the application they could no longer continue with the administration of the Trust. At the hearing the application was opposed by the Federal Public Trustee. It appears from the affidavit of the applicants that the present Trustees were either not interested in the property or are so pre-occupied with other matters or live so far away from Lagos that it was impossible for them to devote as much time as necessary to the affairs of the Trust. The accounts of the applicants were in order and this point was not contested by the Public Trustee whose main ground of opposition was that the transfer of the Estate to him "would involve greater overhead expenses not only to his office but also to the Estate".

HELD: That under the provisions of section 13 of the Public Trustee Ordinance any executor who has obtained Probate or representation may with the sanction of the court transfer such estate to the Public Trustee for administration and that although the Public Trustee may by virtue of the provisions of section 63 of the Ordinance decline the Trust yet such discretion cannot stultify the powers of the court as contained in section 13 (1) of the Ordinance to appoint the Public Trustee to take over a Trust where the applicant has established that "it is not only reasonable but also desirable that the management of the property be taken over by the Public Trustee.

Adeshina for Applicants.

M. N. Q. Sagoe, Public Trustee, for Respondents.

COKER, J. :—This an application for :—

(1) An order allowing the applicants to retire as Trustees of the Will of ALBERT OMOTESHO ODEKUNLE (DECEASED) and

(2) An order appointing the Public Trustee as the Trustee of the Will of the said Albert Omotesho Odekunle (deceased) and for such further and other order as this Hon. court may deem fit.

The application is supported by the affidavit of the present Executors and Trustees and both the Probate Registrar and Public Trustee were put on notice.

At the hearing the application was opposed by the Public Trustee on the grounds that no reasons whatsoever have been shown to justify the transfer of the administration of the Trust to the Public Trustee. On behalf of the applicants it was argued by Counsel that the present applicants are for one reason or the other unable to carry on with the execution of the Trust. Counsel argued that the first applicant is a railway official and his business frequently takes him out of town leaving him with no time to attend to the administration of this Trust; that the 2nd applicant is a minor and that the 3rd applicant is an illiterate widow of the deceased, who has since got married to another man. The first respondent now resident out of Lagos is also one of the Trustees but for a long time now has taken no interest in the affairs of the Estate.

On his part the Probate Registrar does not oppose the application and indeed pointed out that the Trust accounts in this case had been filed with him and have been duly passed.

As I understand the contention of the Public Trustee it is to the effect that the transfer of the Estate to him would involve greater overhead expenses not only to his office but also to the Estate. Most of the properties comprising the Trust are small properties and his own management would necessitate substantial repairs being effected on the properties. Besides it may be necessary to accede to urgent financial committments which for the reasons given above he would be unable to meet.

The application itself is founded upon the provisions of Section 13 of the Public Trustee Ordinance. Cap. 170 Section 13 (1) of that Ordinance reads as follows :—

> An executor who has obtained Probate or any administrator who has obtained Letters of Administration and notwithstanding he has acted in the administration of the deceased's Estate may with the sanction of the court and after such notice to the persons beneficially interested as the court directs transfer such estate to the Public Trustee for administration either solely or jointly with the continuing executors or administrators if any.

It is manifest from the phraseology employed in this section that an order for transfer may be made on the application of an existing executor or administrator even though such legal representative had

acted in the administration of the Estate. Counsel for the Public Trustee submitted that Section 13 (1) should be read subject to the provisions of Section 6 (3) of the Ordinance which provides as follows :—

> The Public Trustee may decline either absolutely or except on the prescribed conditions to accept any Trust but he shall not decline to accept any Trust on the ground only of the small value of the Trust prepared.

It seems to me equally manifest on reading Section 6 (3) of the Ordinance that that section simply prescribes and defines the powers and duties of the Public Trustee and does not in any way attempt to stultify any order pursuant to the provisions of Section 13 (1) that might be made by the court. I wish to point out that Counsel on behalf of the Public Trustee rightly pointed out that the Public Trustee would and should be consulted before an order is made for him to take over an Estate but certainly he can do no more than point out to the court the reason or reasons why such an order should not be made. I cannot myself imagine that the powers given to the court under Section 13 (1) could have been abbrogated by the provisions of Section 6 (3).

It is clear that in order to succeed on an application of this nature the applicant must prove that it is not only reasonable but also desirable that the management of the property to be taken over by the Public Trustee. It is not sufficient to establish that the Trustees or Executors appointed by the testator are unable from personal reasons to continue with the administration of the Estate.

In this case it is shown to my satisfaction not only that the present executors are incapable of carrying out their duties but also that they are not carrying on those duties. The 2nd applicant is a minor and I think it was wrong to have granted Probate to him in the first instance. I understand that the 1st respondent, another Executor, had been resident out of Lagos for many years and has taken no active part in the administration of the Estate. The 3rd applicant is illiterate. The position seems to me that only the 1st applicant is left to carry on the onerous duties prescribed in the Will carried as Ex. A. by the affidavit in support of this motion. It is elementary law that a Trust will not be allowed to fail because of lack of Trustees and it seems to me clear that the powers conferred on the court by Section 13 (1) are specifically designed to meet cases of the type now in contemplation.

I have come to the conclusion therefore that I will make the order on this motion as prayed. It is hereby ordered :

(1) That the present applicants and the 1st respondent be and are hereby granted leave to retire as Trustees of the Will of Albert Omotesho Odekunle (deceased).

(2) It is also ordered that the Federal Public Trustee be and is hereby appointed Trustee of the Estate of the aforesaid Albert Omotesho Odekunle (deceased) with all the powers prescribed by the Will of the afforesaid testator and also the powers and duties contained in the Public Trustee Ordinance.

(3) For the purpose of this order I direct that all the properties, documents, papers, etc., belonging or relating to the said Estate and now in the possession, custody or control of all or any of the retired executors be handed over to the Federal Public Trustees within 14 days hereof.

I make no order as to costs on this application.

HIGH COURT, LAGOS

DAVID DOSSAVI MAHINMI .. .. PLAINTIFF

v.

MADAM ADEOLA LADEJOBI .. .. DEFENDANT

[HIGH COURT: COKER, J.; 28th November, 1960]

(Suit No. LD/324/59)

Declaration of Title—Possession—Line of Title traced through original owners—practice and procedure—refusal of party to close his case when no more witnesses available.

In this case the plaintiff M. sued the defendant L. for declaration of title in fee simple to a piece or parcel of land situate at Suru-Lere, Yaba in Lagos and possession of the land ever since. He later learned that a Lagos chief was interested in the land and so obtained from that chief "a deed of ratification" for which he paid the Chief some money. He also obtained a conveyance from the legal personal representatives of his original vendors. The defendant on the other hand claims to have bought the land in 1959 from one A. who had purchased from the Oloto family admitted by both parties to be the original owners of the land. The defendant L. had in fact at the time of the action erected a building on the land in question and claims that she had at any rate since her purchase been in undisturbed and continuous possession of the land.

HELD : 1. That where a person in actual occupation of land traces his title to the original owners of land the onus which lies on a rival claimant to prove his title is a very heavy one indeed.

2. That where two parties claim to be in possession of land at the same time possession is ascribed to the person who can show a better title to the land.

3. That where a party has no more witnesses to call and refuses to close his case the court is entitled to proceed with the trial of the case in the normal way.

Cases referred to :

Nwachukwu and Others v. David Nze and Others (1955) 15 *W.A.C.A.* 63.

Canvey Island Commissioners v. Preedy (1922) 1 *Ch.* 179.

Mosalewa Thomas v. Preston Holder (1946) 12 *W.A.C.A.* 78.

Makeye for Plaintiff.

Sikuade for Defendant.

COKER, J.:—In this case "the plaintiff's claim against the defendant is for declaration of title in fee simple to a piece or parcel of land situate at Suru-Lere, Yaba in the mainland of Lagos and possession of the said land". Pleadings were ordered and filed and the only substantial issues raised by the pleadings are the identity of the lands purchased by the parties and the possession of such lands

Before I proceed with this judgment I should like to observe that an important point of practice arose during these proceedings. Counsel for the plaintiff sought unsuccessfully for an adjournment of this case. His applications failed because of the reasons given in my relative rulings. Counsel then refused to close the case for the plaintiff and would not go on with the case.

An application for adjournment is an interlocutary application and any party aggrieved by a ruling in respect thereof is at liberty to pursue the channels created by law for an appeal against such ruling. It seems to me a rather unjustifiable stand for counsel to refuse to close his clients' case when he has no more witnesses to call and an adjournment was refused. The conduct of counsel at the Bar, I apprehend, is a necessary part of the dignity of the legal profession and disrespect to the court may not be disguised by playing up to a litigant.

Be that as it may, that situation having arisen, there is no further duty on the court other than that of Proceeding with the case as it stands. In *Nwobu Nwachukwu and Others v. David Nze and Others* (1955) 15 *W.A.C.A.* 63 counsel would not proceed with his case after he has been refused leave to discontinue the proceedings. In such a case it is not necessary to close formally the plaintiff's case. I have therefore proceeded with the defendant's case as the plaintiff's counsel refused to close his case and would not proceed with same after having been called upon to do so.

According to the plaintiff he purchased his land from one ATIKU LAWAL in 1947 and he produced the receipt issued for the purchase price in his favour by his vendor. This was admitted as Ex. B. He also produced the conveyance executed in his favour by the legal personal representatives of his vendor and this was admitted as Ex. A. Since he bought he entered into possession of the land. He later heard about the history of the land and so he approached the Chief Olorogun Adodo of Lagos, paid £10 to him and secured what he described as a "deed of ratification" on this land. This was produced and admitted in evidence as Ex. C. He testified further that in view of discoveries made by him that other persons were trying to take possession of the land he caused the Notices Exs. D and D 1, to be posted on the land. The land claimed by him and described in his conveyance Ex. A is the same as the land the plan of which he had filed along with his Statement of Claim. This latter plan was produced and admitted in evidence as Ex. E.

The defendant's case according to her is that she bought the land in 1959 from one ATUNRASE and obtained a conveyance which she produced and was admitted as Ex. G. The land originally belonged to the Oloto Family who had previously sold and conveyed the land to her vendor by virtue of the conveyance Ex. H. Since she bought she entered into possession and has now erected a storey building on the land.

On behalf of the defendant ISAAC BODY-LAWSON, described as a Licensed Surveyor, testified to the effect that on her instructions he prepared the composite plan Ex. J. The conveyance which was produced and admitted as Ex. K carries a plan which according to the witness Lawson has been plotted on to the plan Ex. J. Mr Lawson further testified that the conveyance Ex. K is the same as the conveyance recited as the plaintiff's root of title in paragraph 5 of his Statement of Claim. The Surveyor testified that the land covered by the conveyances, Exs. A, E, G and H are the same as the land shown coloured yellow in the plan Ex. J. The land covered by the conveyance Ex. K is shown edged brown in Ex. J. The surveyor concluded by saying that the land coloured yellow in Ex. J is clearly outside the area edged brown in Ex. J. Chief Imam ASHAFA TIJANI the head of the Oloto Chieftaincy family testified to the effect that the land covered by the documents Exs. G and H was sold and conveyed by his family to one ATUNRASE and that before the sale the Oloto Chieftaincy family were in exclusive possession of the land by their tenants.

It seems to me that the matters for determination in this case are very simple indeed. It is well to point out that although the plaintiff testified to the effect that he bought this land first from one ATIKU LAWAL and then again from the Chief Olorogun Adodo of Lagos, yet at the trial neither of his vendors or their successors in title had been called to testify in proof of the conveyances Exs. A and C. I have nothing but the statement of the plaintiff to go by as to the issue of possession. The plaintiff when asked about the documents of title of his predecessor in title produced a bundle of receipts admitted as Exs. F, F 1/9. A receipt is not evidence of title and Exs. F, F 1/9 show no more than that during the period covered by them one Mr Lawal was paying by instalments for a piece of land at Suru-Lere. Not a single plan has been produced by him as emanating from his predecessor in title.

The conveyance Ex. A recites *inter alia* that ATIKU AKANBI LAWAL was during his lifetime entitled to the land "for an estate of inheritance in possession free from all encumberances." I

must confess that I do not understand under what tenure he held and the plaintiff's evidence goes no further. I have no evidence before me of and indeed the plaintiff himself admitted that he did not know, how his vendor became entitled to the land in question. With regards to the conveyance Ex. C I have already pointed out that the execution was not proved. SALIMOTU FADUNSI AMORE is recited in Ex. C as having owned this land since 1918. There is no recital or indeed evidence by the plaintiff of how she became entitled to this land. The conveyance Ex. K was quoted by the plaintiff and produced by the defendant but the evidence of the surveyor Mr Lawson which I accept and prefer, demonstrates quite clearly that the land covered by the defendant's conveyance is outside the land covered by the conveyance Ex. K which the plaintiff claimed in his Statement of Claim as his root of title.

This finding more or less disposes of the entire case but in view of the evidence about possession I desire to make a few comments. It is settled law that where two person claim to be in possession of a field the law ascribes possession to the one of them who can prove title to the land. *See Canvey Island Commissioners v. Preedy* (1922) 1 Ch. 179. In this case even if I accept, as I do not, the evidence of the plaintiff that he has always been in possession of this land I will still have to and I do consider the evidence of the defendant and her predecessors in title as to the possession of this land. It is not in dispute that the defendant has now erected a storey building on this land.

I accept and prefer the evidence of Chief Imam Ashafa Tijani to the effect that the Oloto Chieftaincy family has always been in possession of this land. It is therefore apparent that in order to establish possession the plaintiff must establish title to the land as well. I need not say in so many words that he has failed to do so. The conveyance Ex. G is not proved but I am satisfied that the conveyance Ex. H through which the defendant claims is executed by the Oloto Chieftaincy family who are admittedly the original owners of the land in question.

When a party to a proceedings for title claims and establishes a title through the original owners of the land, it is manifest that the burden of proof thrown upon the other side is a heavy one indeed and unless relief could be found in equity it is difficult and indeed almost impossible to assail such a title. *See* the observations of Verity C. J. in *Mosalewa Thomas v. Preston Holder* (1946) 12 W.A. C.A. 78 at page 80.

I come to the conclusion that the plaintiff has adduced no evidence by which I can come to the conclusion that he is claimed by his in his writ. Nor can I give him any declaration of title under any different tenure because in my view and particularly in view of the observations above he has not established any title through the vendors from whom he claimed to have bought. I will therefore not grant a declaration as such or at all. With regards to possession the position is that the defendant must show a better title to the possession of the land. I have already described the nature of the defendant's title. The plaintiff has shown no title whatsoever to this land and besides has not proved to my satisfaction that he was ever in possession of this land. I have already expressed my preference and I do repeat same for the evidence of the defendant and her witnesses. I have come to the conclusion that the plaintiff is also not entitled to possession of this land.

I therefore dismiss the plaintiff's case and the plaintiff is ordered to pay to the defendant the costs of this proceedings which I fix at 45 guineas.

HIGH COURT, LAGOS

T. A. EFUWAPE *v.* J. V. OLOGBOSERE AND JOHN OVIN OLOGBOSERE .. .. — PLAINTIFFS

v.

(1) DR OLADELE DA ROCHA AFODU (substituted by order of court dated 30-8-60)
(2) E. A. SOSANYA .. .. ..
(3) JOSHUA ALONGE .. ..
} DEFENDANTS

[HIGH COURT: COKER J.; 5th December, 1960]

(Suit No. LD/193/58 and LD/200/58)

Moneylenders Ordinance—Mortgage of Property without due Compliance with the Formalities of the Ordinance—Exercise by Mortgagee of right of Sale—Action against purchaser from Mortgagee.

These are two consolidated cases in which on the one part the plaintiff E has sued the defendant O for possession of the house and landed property in issue belonging to the defendant who was at that time in possession of same, and on the other part the defendant O had sued the mortgagees and purchasers from the mortgage for an order declaring the mortgage transaction covering the property in question null and void and setting aside the purported sale of the property. It appears from the evidence that the defendant O had mortgaged this property to the first defendants to his action who were Licensed Moneylenders carrying on business in Lagos and that as he had defaulted in the payment of the mortgage debt those defendants had in exercise of their power of sale sold the property through the 2nd defendant a licensed auctioneer to the 3rd defendant who was the vendor of the plaintiff in the first action. It also appears from the evidence that the mortgage deeds were not as required by the provisions of the Moneylenders Ordinance executed by the 1st defendants in the 2nd action, but that the 3rd defendants in that action was not aware of this and much less so the plaintiff in the 1st action in this proceedings.

HELD: The provisions of sections 12 and 19 of the Moneylenders Ordinance do not render the transaction concerned illegal or void but simply render those transactions unenforceable at the instance of the mortgagees.

HELD ALSO: That where a 3rd party *bona fide* acquires a mortgaged property from or through the mortgagees without notice of any defects in the mortgage arrangements, that 3rd party by virtue of the provisions of section 23 (1) of the Moneylenders Ordinance acquires an indefeasible title to the property.

Cases referred to :—

Kasumu v. Baba Egbe (1956) 3 *W.L.R.* 575

Sanusi v. Daniel 1 *F.S.C.R.* 93

Re Chetwynds Estate Dunn Trust Ltd. v. Brown (1957) 3 *A.E.R.* 530

Balogun v. Obisanya and Anor. (1956) 1 *F.S.C.R.* 22

Momodu Raji v. Williams and Ors. (1941) 7 *W.A.C.A.* 147

Bailey v. Barnes (1894) 1 *C.D.* 25

O. Somolu for Plaintiff

G. O. K. Ajayi for Defendant

COKER, J. :—These are two consolidated cases heard together on the application of one of the parties and pursuant to an order of court dated 30th day of August, 1960. In Suit No. LD/193/58 (which I will hereafter refer to as Suit A) the plaintiff "claims against the defendant possession of the house and landed property situate lying and being at 4 Bada Street, Idi-Oro, Lagos Township of which the plaintiff becomes the owner since 1st June, 1958 and which the defendant is holding over from him, despite repeated demands. The plaintiff also claims against the defendant the sum of £100 (One hundred pounds) as damages for the trespass by the said defendant on the said house and land and further seeks injunction against the said defendant, his servants and/or agents for their trespass on the said property or interfering with plaintiffs rights therein". In Suit No. 200/58 (which I will hereafter refer to as Suit B) the plaintiff "claims against the defendants :—

1. An order setting aside the purported sale of his property situate and known as No. 4 Bada Street, Idi-Oro on the mainland of the Federal territory of Lagos by the 2nd defendant at the instance of the first defendant to the third defendant on or about the 20th day of November, 1957.

2. A declaration that the Deed of Mortgage dated 15th August, 1949 and subsequent Deeds of further charges dated 23-12-49, 4-2-50, 16-5-50, 21-7-50, 26-9-51, 5-11-51, 8-8-52 and 20-9-52 executed by the plaintiff in favour of the 1st defendant is void in law and of no effect."

Pleadings were ordered and filed. In Suit A the Statement of Claim avers that the property the subject matter of the action was purchased during the month of May 1958 by the plaintiff from one JOSHUA ALONGE who was the then registered owner. The Statement of Claim further avers that since the purchase by the plaintiff, the defendant who was once the owner of the said property and who resides on the property has refused to give up possession of the premises to the plaintiff and has caused damages to parts of the premises. The Statement of Defence in Suit A avers that the

plaintiff came to the premises at the time he (plaintiff) was negotiating with Joshua Alonge for his purchase and that the defendant then duly warned the plaintiff against purchasing the property as litigation was contemplated on the alleged sale of the house.

In Suit B the Statement of Claim avers that the plaintiff did mortgage the property in question No. 4 Bada Street, Idi-Oro to secure the repayment of the various sums of money recited in the relative Deeds of Mortgage but that the mortgage transactions contravened the provisions of sections 13 (2), 12 (1) and 19 of the Moneylenders Ordinance, that no notice of foreclosure or any other notice was served upon the plaintiff before the purported sale and that the plaintiff prevented the sale being carried out on the date fixed and that the second defendant left without conducting any sale. The Statement of Defence of the first defendant in Suit B admits the Mortgage Deeds and the mortgage transaction and avers that the first defendant had instructed the second defendant to sell the property in dispute as the plaintiff had been in default and that the property was thereafter sold to the third defendant. The Statement of Defence of the second defendant in that suit avers that, that defendant received instructions from the first defendant to sell the property in dispute and avers that he did sell the property to the third defendant in accordance with the conditions of sale posted on the said premises. The Statement of Defence of the third defendant avers that that defendant purchased the property in dispute at an auction sale and that the plaintiff "conceded the right of the first defendant to sell the property in question and in fact accepted and acknowledged the third defendant's right of purchase of the property and made several attempts to buy the property back during April and May 1958 but failed. The Statement of Defence of this defendant further avers that he was a *bona fide* purchaser without notice of any defect in the right of the first defendant to sell the said property as mortgagee thereof and finally that the third defendant would rely on all equitable and legal defences and especially pleads estoppel.

At the trial TIMOTHY EFUWAPE, described as a pharmacist, and plaintiff in Suit A testified to the effect that he bought the property in dispute from one J. E. ALONGE at the price of £3,614 and he produced receipts of purchase which were admitted in evidence as Exs. A and A 1. He later obtained a conveyance which he produced and which was admitted as Ex. B. He produced a plan of the land in question and this was admitted as

Ex. C 1. After buying the property he inspected same, saw the defendant OLOGBOSERE on the premises and asked him for possession. The defendant still lives on the premises and would not give up possession. He produced a counter-signed copy of the plan of the property and this was admitted in evidence as Ex. C. He testified to the effect that Exs. C and C 1 are the same. He testified further that when he visited the house in May 1958 it was in good condition and the doors, windows and walls were all intact. When he visited the property again early in June 1958 however, he found that some of the windows were damaged and he spoke to the defendant about this. The defendant was very hostile and wanted to fight him. Under cross-examination by Counsel for the defendant he testified to the effect that he visited the house before he bought and he met the defendant in the house and told him why he was inspecting the property. At that time he said the defendant did not warn him not to buy the house. He testified that he gathered that the auctioneer Sosanya conducted the auction sale on or about the 20th November, 1957.

JOSHUA ALONGE, described as a Company Director, testified to the effect that he bought the property in dispute at an auction sale during November 1957 at the price of £3,200. He produced a copy of the auction notice (and this was admitted as Ex. E) and produced the auctioneer's receipt for the purchase price paid by him. This was admitted as Ex. F. He testified to the effect that Ex. D is the Deed of Conveyance which he obtained from the Mortgagee in respect of the property. He inspected the premises before he bought, saw the defendant on the premises and told him that he had bought the house. He went on as follows :—

> I told him that I had bought the house. He told me that he wanted to pay money to me in order to re-buy or buy back the property from me. I refused. The defendant then appealed to my townsmen in Lagos or clan people in Lagos. My people all spoke to me and I agreed to sell back the house to the defendant. He asked me to allow him two (2) months to pay for the house. I asked him for £3,614 representing my outlay with interest, solicitors charges, etc., on the property. He agreed to that price. I cannot remember the month of the year when he discussed this matter with me. The two months came and passed but he was not able to buy the property. He asked for another one month's extension of time to pay. I asked him to give me a written paper. He gave me such written paper.

The witness produced the written paper referred to as having been given to him by the defendant and this was admitted in evidence as Ex. G. As the defendant would not fulfil his promise to pay and buy back the house he sold the property to EFUWAPE.

When he went to see the auctioneer after the sale he saw a copy of the auction notice posted in front of the house of the auctioneer. He had seen the property advertised in the newspaper. After the purchase by him he collected rents on the premises for two months. He also produced, and these were admitted as Exs. H, H 1/8, all the documents of title and mortgage relating to the property which were handed over to him by the auctioneer after his purchase of the property. Under cross-examination by Counsel for the defence he testified that he had known the defendant for a long time before the sale and that he had known the property was to be sold long before it was in fact sold. He denied a suggestion put to him that he had bought the property for and on behalf of the defendant OLOGBOSERE and he stated that he was certain that the public auction of the property was held. He testified that the defendant even brought the Yorubaman who was the highest bidder (for £3,000) at the public auction sale to his (defendant's) house. He produced copies of the newspaper advertisements of the sale of the property and these were admitted in evidence as Exs. J and J 1.

JOHN OVIN OLOGBOSERE, described as a Contractor and the defendant in Suit A (and plaintiff in Suit B) testified to the effect that he borrowed monies as per Exs. H 1/8 from the late CANDIDO DA ROCHA who was a licensed moneylender. He testified further that he borrowed money from Da Rocha by virtue of the document which he produced and which was admitted in evidence as Ex. K. He testified that the late Da Rocha never gave him any copies of the documents Exs. H 1/8 and Ex. K. He paid back some of the monies to the late Da Rocha but was given no receipts for the payments made by him. To his knowledge the late Da Rocha kept no books of account. He first knew of the sale of his house on the afternoon of the 20th November, 1957. Previous to that date Da Rocha never warned him that he was selling the property and did not even demand any payments from him. He continued as follows :—

> At about 4 p.m. on the 20-11-57 I returned home at about 4.30 p.m. and met a boy ringing an auctioneer's bell in front of my house. I asked him why he was doing that and he told me he was selling my house ..... later the auctioneer SOSANYA arrived there. I went to Sosanya and asked him why a bell was being rung at my place. He said Da Rocha had given him instructions to sell my house. I then told Sosanya that there was no notice sent to me. There were about 5 people standing around then. I told all the people standing around not to bid for the house. I then saw Sosanya go back into his car and drive away. The house was not sold on that day.

He denied seeing any copy of Ex. E posted on his house but stated that on the day following this sale he went to the house of Da Rocha who told him that he had instructed the auctioneer to sell his property, the subject matter of this proceedings. He then asked the late Da Rocha for all the receipts for the payments he had made as well as an account so that he might know what he still had to pay. Da Rocha gave him neither. During the month of December 1957 Da Rocha had told him that his countryman Alonge had come to pay him (Da Rocha) for the house. He called a meeting of his townsmen and at the meeting Alonge told those present that he had only bought the house for him Ologbosere so that he might pay him back and get his house. He admitted signing the document Ex. G and stated that it was brought to him by one Mr EBEGBE who told him that he would like him (witness) to sign the paper so that he Ebegbe might take it to Da Rocha on the following morning. He testified further that he knew the plaintiff Efuwape and that when he came in company of another man to his house during the month of June 1958 he warned him not to buy the house. Under cross-examination by Counsel for the plaintiff he testified to the effect that when Efuwape came to him in June 1958 he told him the whole story about his business transactions with Da Rocha and that he was going to sue Da Rocha and Alonge. He testified further that he never handed over any monetary payments to Da Rocha himself and that apart from some Bank slips in his possession he had no records of the payments he had made to Da Rocha. He had paid a total of £727 to Da Rocha but all his payments were made through the Bank and his teller slips were all stamped by the Bank. He admitted that at the time the property was sold he was owing Da Rocha monies as principal and interest. He admitted, under further cross-examination that when he said, in giving evidence in another suit No. LD 358 of 1955, *Ashiru Openaike v. J. V. Ologbosere*, that he had some balance of money with Da Rocha he misled the court.

He called as a witness one PAUL OGBONNA, nurse at the General Hospital, Lagos, and a neighbour living opposite the house in dispute, who testified to the effect that on the 20th November, 1957, he stood at the window of his house and that although he saw a boy ringing a bell on that day there was no auction sale. Those who gathered left the place in view of the protests made by Ologbosere and the auctioneer also left.

In his address to me Counsel for the defendant Ologbosere submitted that the mortgage documents Exs. H 1/H 8 and Ex. K were not signed by the mortgagee and that no copies of them

were proved to have been delivered to his client after the mortgage transaction in accordance with the provisions of section 12 (1) of the Moneylenders Ordinance. Counsel further argued that the mortgage kept no books of account and did not issue receipts to his client for monies paid by his client in respect of the mortgage. These are in contravention of the provisions of section 19 (1) of the Moneylenders Ordinance. Counsel referred to the case of *Kasumu v. Baba Egbe* (1956) 3 *W.L.R.* 575 and submitted that the mortgagee was precluded in law from exercising his power of sale and could therefore have sold nothing to the predecessor in title of the plaintiff. Counsel for the plaintiff, on the other hand, submitted that the transaction referred to even if it contravened the provisions of section 12 (1) and 19 (1) of the Moneylenders Ordinance, was merely rendered unenforceable by the Ordinance, and that title of a *bona fide* purchaser for value without notice is expressly protected by the provisions of section 23 (1) of the Moneylenders Ordinance already referred to. Counsel also referred to the case of *Sanusi v. Daniel* 1 *F.S.C.R.* 93.

The material facts of this case are either admitted or established. The mortgage is admitted and the receipt of monies by that transaction is also not in dispute. The documents Exs. H 1/8 and Ex. K are clear to the effect that on the several dates shown thereon the defendant Ologbosere received on loan from the late Candido Da Rocha the various amounts shown on those accounts. That at the time when the late Da Rocha purported to exercise his power of sale Ologbosere was in arrears with respect to both principal and interest is also not in dispute and indeed the defendant admitted this in the course of his evidence. The controversy at present rages around the legal effect of the documents Exs. H 1/8 and Ex. K and the right of the mortgagee to exercise his power of sale.

I may mention in passing that Ologbosere did raise another point of fact, that is as to whether or not a sale was actually conducted on the material date on the spot. Apart from his own evidence he had called his neighbour Paul Ogbonna to testify as to what he saw on the 20th November, 1957. I wish to point out that I am not impressed by the evidence of this witness and less so with the evidence of Ologbosere on this point. There is evidence that a boy came there and was ringing a bell long before the appointed time. There is evidence that some people came to the sale and were present when the auctioneer arrived. There is evidence from Alonge which I accept and prefer, to the effect that a bid of £3,000 was obtained on that date, that the defendant brought the Yoruba-

man who was the highest bidder to his house and that he thereafter went to the auctioneer and added a sum of £200 in order to out-bid the highest bidder on the spot. I am satisfied that the sale did take place. I am also satisfied that the sale was duly and satisfactorily advertised before the sale and quite apart from the auction notice, Ex. E, there are the newspaper advertisements Exs. J and J 1 inserted on the 19th and 20th November, 1957. I take the view that the defendant Ologbosere was lying when he said that he had no notice of sale and that in fact no sale was effected on that date. His witness Ogbonna is as dishonest as himself.

It is not in dispute that the documents, Exs. H 1/8 and Ex. K are not signed by the mortgagee. The original first defendant in Suit B was the late Candido Da Rocha. He was described as carrying on the business of Moneylending under the name and style of DA ROCHA PROPERTIES COMPANY. He died since the institution of the proceedings and the present first defendant, an executor of his will, was substituted. The defendant Ologbosere did say that he did not receive any copies of the documents Exs. H 1/8 and Ex. K. Frankly speaking I do not believe him although there is no other evidence from or by the plaintiff to the effect that copies of those documents were at any time handed over to him. Section 12 (1) of the Moneylenders Ordinance Cap. 124 provides *inter alia* as follows :—

> No contract by a borrower or his agent for the repayment or securing of money lent to the borrower.....or for the payment by the borrower or by any agent on his behalf of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable unless a memorandum in writing of the contract be made and signed by the parties to the contract or their respective agents or in the case of a loan to a firm by a partner in or agents of the firm and unless a copy of such memorandum be delivered or sent by post to the borrower or his agent within seven days of its having been so signed and certified.. . . . .

It is obvious from a perusal of Exs. H1/8 and Ex. K that the mortgagee did not sign them. On the face of them they contain only the signature of the defendant Ologbosere.

It is also contended by the defendant Ologbosere that he was not given any receipts by the mortgagee for payments made by him on account of the transaction and that to the best of his knowledge the late Da Rocha kept no books of account. It is relevant to point out at this stage that all the documents comprising the mortgage transaction contained provisions to the effect that all payments on account of the transaction should be made through

a Bank specifically named in the relative document. In this case the defendant testified that he made most of the payments described by him to have been made to the Bank of account of the mortgagee but that he also made other payments direct to the mortagee. This of course conflicts with other statements made by him. He admitted that with respect to the payments to the Bank his teller slips were always stamped by the Bank when returned to him. I cannot accept his evidence to the effect that the late Da Rocha kept no books of account. Besides such evidence is based on his own view of the set-up in this case. There is, however, no evidence by or on behalf of the defendant Da Rocha to the effect that such books were kept or that receipts were issued to the defendant for payments made by him. It is a moot point whether or not an acknowledgment by a Bank into which payments were made on behalf or in favour of a mortgagee is a sufficient discharge of the duty placed upon the mortgagee by section 19 (1) of the Moneylenders Ordinance. If I were to venture an opinion I will say that it is a sufficient discharge, a receipt or acknowledgment having been obtained from the actual person to whom payment was made. Section 19 (1) requires the receipt to be issued *immediately* after the payment. That point, however, does not affect the merits of this case and in view of the conclusions to which I have arrived in this case, I do not consider it of any importance to this case. Section 19 of the Moneylenders Ordinance Cap. 124 provides *inter alia* as follows :—

1. Every moneylender shall give a receipt for every payment made to him on account of a loan or of interest thereon. Every such receipt shall be given immediately the payment is made.

2. Every moneylender shall keep a book . . . . in which he shall enter in connection with every loan made by him—

(*a*) the date on which the loan was made

(*b*) the amount of the principal

(*c*) the rate of interest

(*d*) all sums received in respect of the loan or the interest thereon with the dates of payments thereof and shall produce such book when required to do so by any court . . . . . .

4. Any moneylender who fails to comply with any of the requirements of this section shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made . . . .

If it was true that the late Da Rocha did not keep any books, if it was true that the defendant Ologbosere received no receipts for payments made by him, then it is equally clear that the provisions of Section 19 of the Moneylenders Ordinance had been contravened. I had already pointed out my views about the testimony of the defendant Ologbosere on these points and it is well to point out that there has been no request throughout this proceedings for Da Rocha's books to be produced.

The provisions of Section 12 (1) and Section 19 of the Moneylenders Ordinance clearly make unenforceable all contracts of moneylending which are made in contravention of them. Learned Counsel for the defendant Ologbosere has referred me to the case of *Patience Kasumu and Ors. v. Gbadamosi Baba Egbe* (1956) 3 W.L.R. 575 decided by the Privy Council in July 1956. In that case the Privy Council held that the provisions of Section 19 (4) to the effect that a mortgagee shall not in respect of an offending mortgage transaction "be entitled to enforce any claim" were very widely drawn and Lord Radliffe delivering the judgment of the Privy Council observed :—

> When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforced it must be taken to mean what it says that no court of law is to recognise the lender as having a right at law of getting his money back.. There is no room to reform the terms of the loan since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made.

That case concerned a borrower who had claimed a redemption of the mortgage property and possession of same. No question was raised about the validity of the exercise of a power of sale by the mortgagee but the decision does contain *obiter dicta* to the effect that a lender who has taken security should not by that fact be placed in a better position despite his breach of the law.

The most important matter for consideration in this case is not just the validity of the exercise of the power of sale by the mortgagee but the legal effect upon a subsequent purchaser when such power of sale has been exercised. By the provisions of section 21 (1) of the Conveyancing Act 1881 a mortgagee exercising the power of sale conferred by the Act shall have power to convey the property sold for the estate and interest therein contained and by the provisions of Section 21 (2) where a conveyance is made in professed exercise of such power of sale the title of the purchaser shall not be impeachable on the ground that the sale was improper or the

power was irregularly exercised or that no case had arisen to authorise the sale. That section however provides that any person damnified by an improper exercise of the power of sale shall have his remedy in damages against the person exercising the power. In this case the property in dispute, plans of which Ex. C and C 1 have been put in evidence, has been employed as security for the loans covered by the documents Exs. H 1/8 and Ex. K. It is not in dispute that the mortgagee the late Candido Da Rocha executed the conveyance Ex. D to the defendant Alonge in purported exercise of his power of sale. I have already found that on the 20th November, 1957 there was in fact conducted on the spot an auction sale of the property in dispute pursuant to the exercise of the power of sale.

At this point it is apposite to consider the issues of fact surrounding the purported sale. I have found that the defendant Ologbosere was not speaking the truth when he said he was not aware of the sale until the afternoon of the 20th November, 1957. I have referred to the newspaper advertisement Exs. J and J 1 and the auction notice Ex. E. I do not accept the evidence of the witness Ogbonna and in this connection I accept and prefer the evidence of the witness Alonge to the effect that after the sale the defendant Ologbosere approached him, Alonge, and requested to buy back the property from him if he would give him some time to find the money. I also accept Alonge's evidence about the origin and delivery of the letter Ex. G. In that letter admittedly signed by Ologbosere he asked Alonge to bear with him up to the 9th May, 1958 so that he might find the money to buy the property. At the trial Ologbosere sought to explain this document away saying that a man by name Ebegbe had fraudulently got his signature on to that document. Needless to say I do not accept this testimony and I regard that part of his story as an unavailing afterthought designed to explain away the contents of a document which is clearly evidence of an admission by him of the sale of his house and an acknowledgment that the sale was really carried through. The defendant Ologbosere testified to the effect that he warned intending purchasers of the property that litigation was being contemplated. I do not accept this evidence and I may point out that even if I do that is not evidence to establish that those persons were apprised of any defects in the title of the mortgagee. I have already indicated that I do not accept that Ologbosere did anything of the sort and his subsequent conduct especially with regards to the defendant Alonge, and the document Ex. G, clearly admits that he took the view that the mortgagee was entitled at the time he did to sell his property.

I did point out that the provisions of section 12 (1) and 19 of the Moneylenders Ordinance certainly make the contracts contained in Exs. H 1/8 and Ex. K unenforceable. The provisions of section 12 (1) of the Moneylenders Ordinance Cap. 124 are similar to the provisions of section 6 of the Moneylenders Act 1927 and with respect to that section Sir Wilfrid Greene M.R in giving the judgment of the Court of Appeal in *Re Chetwynds Estate, dunn trust Ltd. v. Brown* (1937) 3 *A.E.R* 530 at page 531 observed as follows :—

> The section does not have the result that there is no contract. It merely makes the contract unenforceable.

I have referred to the decision of the Privy Council in the case of *Kasumu v. Baba Egbe* the effect of which is that the lender cannot as between himself and the borrower enforce the loan or exercise any incidental powers in respect of the security. The position however is different by virtue of the provisions of section 21 (2) of the Conveyancing Act 1881, to which I had referred, with respect to a *bona fide* purchaser without notice from a mortgagee.

My findings in this case are to the effect that the defendant Alonge was not aware (or rather had no notice) of any defects in the title of the mortgagee at the time he bought. I have already pointed out that I do not believe that the defendant Ologbosere warned him or indeed anybody else not to buy the property at the time he was buying. I take the view that the defendant Ologbosere had taken a completely different attitude to the whole matter after he had tried and failed to find the necessary money to buy back the property from the defendant Alonge. I am satisfied that the defendant Alonge was speaking the truth when he said that he kept the sale open for the defendant Ologbosere for some months and that as interest was accumulating on the amount of money paid for the property and he was being pressed by his townsmen not to dispossess the defendant Ologbosere (another townsman and indeed the President of the Clan Union in Lagos) of his property he decided to and indeed did sell the house to the plaintiff Efuwape by virtue of the conveyance Ex. B dated the 31st May, 1958. The letter Ex. G has stated that if by the 9th May, 1958 Ologbosere did not pay for and buy back the house Alonge was entitled to "take possession of the house and landed property"

In the case of *Asafa R. Balogun v. M. R. Obisanya and Anor.* (1956) 1 F.S.C.R. 22 the Court of Appeal held dismissing the appeal of a borrower against the judgment of the Lower Court that a sale to a *bona fide* purchaser for value without notice is unaffected by the defect in the title of the mortgagee and that "the effect of a failure to

comply with the provisions of the sections in both our law and the English law is to render a repayment contract for repayment of a loan to a moneylender or security given for the loan unenforceable". Jibowu F.J. delivering the judgment of the Federal Supreme Court observed at page 24 as follows :—

> It is quite clear, therefore, that the mortgage deed in question is not void or illegal but only unenforceable. The rights of transferees of securities taken by moneylenders are now protected by statute. . . . . and a proviso to section 23 (1) of the Moneylenders Ordinance which reproduces section 17 of the Moneylenders Act of 1937 reads :—
>
> Provided that notwithstanding anything in this Ordinance—
>
> (*a*) any agreement with or security taken by, a moneylender in respect of money lent by him after the commencement of this Ordinance shall be valid in favour of any *bona fide* assignee or holder for value without notice of any defect due to the operation of this Ordinance and of any person deriving title under him.

In this case my findings postulate that the defendant Alonge was not aware of any defects in the title of Candido Da Rocha. It is not in dispute that he paid a sum of £3,200 for the property in question. The receipt Ex. F and conveyance Ex. are conclusive on this point. It is also not in dispute that the plaintiff Efuwape later purchased this property from Alonge for an amount of £3,614. The receipts Exs. A and A 1 and the conveyance Ex. B are clear evidence of this as well. In my view, therefore, the titles of both the defendant Alonge and the plaintiff Efuwape are not affected by whatever defects there might have been in the title of Candido Da Rocha.

In the case of *Sanusi v. Daniel and another* (1956) F.S.C.R. 93 a similar point was raised and the Federal Supreme Court held that the court having found that the respondent was a *bona fide* purchaser for value without notice, he was specifically protected by the provisions of section 21 (1) (*a*) of the Moneylenders Ordinance. In this case the regularity of the sale was as in the present proceedings, put in issue. The Court of Appeal in this judgment came to the conclusion that the contention of the borrower could not be sustained. At page 95 of that judgment the Court observed as follows :—

> The appellants complaint is against an irregular exercise of the power of sale on the ground that there was a contravention of section 19 (1) of the Sales by Auction Ordinance. It seems to me that the title of the 2nd respondent cannot be impeached since the property was conveyed to him and that the appellant's remedy is in damages. . .

See also in this connection the case of *Momodu Raji v. Williams and Others* (1941) 7 W.A.C.A. 147 and also *Bailey v. Barner* (1894) 1 Ch. D. 25.

It seems to me therefore that the plaintiff's case in suit B. is bound to fail in any case because if his contention were upheld it amounts to this that the sale was void and of no effect. I am of the view that the court cannot set aside a void sale. The court cannot set aside a void sale. The court will of course intervene in the case of a voidable sale where sufficient grounds are shown to annul the sale but it is preposterous to ask the court to set aside a sale which is regarded by the claimant as void. This is so because *ex nihilo nihil fit.* The result therefore is that the claim in Suit A succeeds and the claim in Suit B fails.

I order that the defendant Ologbosere do give up possession of the property situate lying and being at No. 4 Bada Street, Idi-Oro and more particularly described in plans Exs. C and C 1 and in the Conveyances Exs. B, D and H to the plaintiff Efuwape within 7 days hereof, *i.e.*, on or before the 12th December, 1960. With respect to the claim for damages I am satisfied that no evidence has been adduced to establish that the plaintiff was at any time in possession of the land. It is correct that as the owner of a legal estate in *fee simple* by virtue of Ex. B he is entitled *ipso facto* to possession of the property but I am not satisfied that he has established a claim for damages in trespass. The claim for damages for trespass is therefore non-suited without costs.

With respect to Suit B the claim to set aside the purported sale of the property is hereby dismissed with costs. As to the 2nd claim that is the claim for a declaration that the deeds are void in law and of no effect I have come to the conclusion, the reasons for which I had amply set out above, that those deeds are not made illegal or void but are only rendered unenforceable. That being so I cannot grant the declaration sought and that claim as well is accordingly dismissed with costs.

I gather from the records that an order was made to the effect that the Registrar of the Court be appointed as Receiver of the rents so that such rents are now held by him in *custodia legis.* The plaintiff Efuwape having succeeded in this action I order that all monies so collected as rents and now held by the Receiver be paid over to him.

I order that the defendant Ologbosere shall pay the costs of this proceedings fixed as follows :—

(*a*) To the plaintiff Efuwape .. 90 guineas

(*b*) To the defendant Alonge .. 20 guineas

(*c*) To the defendant Dr Da Rocha Afodu .. .. .. 10 guineas

I make no order for costs in favour of the defendant Sosanya who although he filed a Statement of Defence has not appeared throughout the trial.

HIGH COURT, LAGOS

ADEBOUN OLUBUKOLA AIYEDE .. .. PLAINTIFF

v.

EARNEST O. NORMAN-WILLIAMS .. .. DEFENDANT

[HIGH COURT: COKER, J.; 6th December, 1960]
(Suit No. LD/340/59)

Breach of Promise of Marriage—Contract may be Discharged either by the Non Fulfilment of a Condition Precedent or by Acts or conduct of the Parties Amounting to a Mutual Discharge of each other from the Contract.

The plaintiff A instituted proceedings against the defendant N.W. for damages for breach of contract of promise of marriage alleging that as far back as June 1954 the defendant promised to marry her and thereafter confirmed his promise by several letters written to her between that time and 1956. The defendant disputed the claim and contended that the promise to marry her was subject to the consent of his parents which never was obtained and also that the plaintiff had by her conduct exonerated him from the obligations under the contract as she herself had treated the contract as determined. It appears from the evidence that the plaintiff was, during the year 1953, pregnant of a child for the defendant whilst both of them were students abroad and that before she delivered the child the defendant and the plaintiff had requested the parents of the defendant to grant their consent to their marriage. The defendant's father refused for reasons disclosed in evidence to grant his consent to the marriage. It also appears from the evidence that in the course of their dealings together the plaintiff had written several letters to the defendant, one of which at least indicated that the plaintiff considered the relationship to be at an end, and had left the defendant in the U.K. and returned home to Lagos. This was in the year, 1956. Between 1956 and the date of this action in 1959 neither of the parties resumed the relationship between them and no letters were exchanged between them but the defendant having got married to another woman in 1959 was sued by the plaintiff as described above.

HELD : That a contract of promise of marriage based upon a condition precedent cannot be enforced where it is not proved by the plaintiff that the condition precedent had been fulfilled.

HELD ALSO : That such a contract lapses where owing to effluxion of time and the conduct of the parties it is reasonable to draw the inference that both parties or at any rate the party seeking to enforce the contract had regarded the contract as determined.

Cases referred to :—

Northcote v. Doughty (1879) 4 *C.P.D.* 385
Coxhead v. Mulis 3 *CPD* 439
Aitcheson v. Baker (1719) 170 *E.R.* 219
Frost v. Knight (1872) *L.E. Ex.* 111
Coke v. Cottingham 173 *R.E.* 406
Jacobs v. Davies (1917) 2 *K.B.* 532

Cohen v. Sellar (1926) 1 *K.B.* 536
Martin v. Fenn (1783) 99 *E.R.* 618
Irving v. Glyn Wood (1824) 171 *E.R.* 1226
Davies v. Bomford (1860) 158 *R.E.* 101
King v. Gillett (1840) 151 *E.R.* 676
Lowe v. Peers (1768) 98 *E.R.* 160

S. O. Lambo for Plaintiff.

Chief O. Moore for Defendant.

COKER, J.—In this case the plaintiff's writ is endorsed as follows :—

Both by an oral promise made by the defendant to the plaintiff in June 1953, and by letters passing between them from 9th day of January, 1953 to 5th September, 1956, the plaintiff and the defendant agreed to marry one another within a reasonable time which elapsed before action.

Relying on the said promise the plaintiff on and about the 28th August, 1954 allowed the defendant to seduce her, whereby she became pregnant of a child of which she was delivered on the 29th day of April, 1954.

The defendant refused to marry the plaintiff within such reasonable time and still refuses to marry the plaintiff.

By reasons of the above promises the plaintiff has suffered damages and claims £5,000 (five thousand pounds) general and special damages.

Particulars of Special Damages

	£	s	d
Cost of Trousseau	50	0	0
General Damages			
General Damages	4,950	0	0
Total Damages	5,000	0	0

And the plaintiff claims £5,000 (five thousand pounds) damages.

Pleadings were ordered and filed. The Statement of Claim avers that the plaintiff is a spinster and the defendant is a medical practitioner in Government service. Paragraphs 3, 4, 5 and 6 of the Statement of Claim read as follows :

3. On or about the 20th of January, 1953 the plaintiff and the defendant orally agreed to marry each other on diverse dates.

4. On or about the 1st week of August, 1953 and in June 1954 the plaintiff and the defendant orally confirmed the agreement to marry each other.

5. By means of letters passing between the defendant and the plaintiff from 9th January, 1953 to 5th September, 1956 the plaintiff and the defendant agreed to marry each other within a reasonable time which elapsed before action.

6. Relying on the said agreement the plaintiff on or about the 28th day of August, 1953 allowed the defendant to seduce her whereby she became pregnant of a child of which she was delivered on the 29th day of April, 1954.

The statement of Claim finally avers that in breach of the agreement the defendant married another woman at Edinburgh in Scotland on the 12th November, 1959.

The Statement of Defence admits the substantial averments in the Statement of Claim and avers that the promise by the defendant to marry the plaintiff was conditional and that the condition imposed did not happen. Paragraph 4 of the Statement of Defence reads as follows :—

4. The aforementioned conditions to which the agreement was subject were :—

(*a*) That the parents of both parties should give their consent to the marriage.

(*b*) That the defendant before the marriage should be in a position to maintain the plaintiff and a matrimonial home or in the alternative that financial assistance be forthcoming from the plaintiff's and the defendant's parents to enable the parties to set up and maintain a home ; at such time the defendant and the plaintiff being students depending on allowances from their parents.

The Statement of Defence further avers that the parents of both parties refused their consent to the marriage and that thereafter both parties released each other from any obligation to marry one another.

At the trial the plaintiff, a sales girl attached to a commercial firm in Lagos, testified to the effect that on or about the 20th day of January, 1953 the parties agreed to marry each other and that the defendant never told her that his marriage depended upon the consent of his parents. She further testified as follows :—

I allowed the defendant to seduce me and I had a baby for him on the 29th April, 1954. I allowed him to do this because he said we should have a baby and afterwards get married—I agreed.

The plaintiff further testified that during and after the month of October 1959 the letters Exs. A, B and C were exchanged between her solicitor and the defendant's solicitors. In 1953, the plaintiff further testified she was a nursing student attached to St. Alfege's Hospital in London and she had to break off her studies because of her being pregnant with a child. On 27th January, 1955 she left London to return home to Lagos. She produced the letters Exs. D, E and F as emanating from the defendant to her and stated that she was to get married to the defendant at the completion of his course. The plaintiff testified that during the month of November 1959 she read in the local *Daily Service* (Ex. G) and the *Daily Times* (Ex. H) of the marriage of the defendant to another woman.

Under cross-examination by Counsel for the defendant, plaintiff testified that she associated with the defendant from 1945 to 1957 on the faith of their mutual promises to get married any time as from 1945. In 1945 she was 15 years old and the defendant could not be much older. Both of them were infants. In 1948 the defendant went over to the United Kingdom to study medicine and she later, that is on the 31st October, 1950, went over to the United Kingdom for further studies. In the summer of 1951 she met the defendant at the flat of his (defendant's) brother at an address in West London. She testified further that :—

> In August 1953 the defendant visited London. It was during this visit we decided to have a baby first and the marriage afterwards. That did not strike me as extraordinary . . . I did accept it. I now say that the agreement was that we should get married after the pregnancy and before the arrival of the baby. The defendant was passing through London to the continent. He stayed only one night in London.

The plaintiff denied a suggestion put to her that any discussion about marriage between the parties took place only after she became pregnant. She admitted that at a meeting to which her uncle, one Mr Savage was summoned at a flat in Maida Vale, London, the elder brother of the defendant made it clear that the defendant's parents objected to their marriage. She was not present at the meeting but her uncle told her what had happened. The defendant also told her that his father had objected to their marriage. She then wrote the letter which was produced and admitted in evidence as Ex. J to the parents of the defendant asking for their consent to the marriage and got a reply from the defendant's father refusing his consent to their marriage, until the defendant got qualified. She admitted that it was the defendant who paid for the wedding ring, Ex. M and also that that whilst on board the ship on her return to Nigeria she wrote the letter Ex. K to the defendant. During her re-examination she testified that she received Ex. D from the defendant during her pregnancy. She also received the letter Ex. L. She admitted that on the 24th September, 1960 she gave birth to another child of which the defendant is not the father.

The plaintiff's witness MRS TANIMOWO ONI testified to the effect that some time in 1953 whilst she was in London she was invited to a wedding ceremony between the parties. The marriage was to take place at the Marriage Registry in Kensington. She attended at the Registry on the appointed date but neither of the parties turned up and the marriage was not solemnised. She was later invited to her flat by the plaintiff who told her that the mar-

riage was postponed until the defendant got qualified. Under cross-examination she stated that she did not know that parental consent was necessary to any marriage at all.

In his defence the defendant, a registered Medical Practitioner employed by the Nigerian Government testified to the effect that he had known the plaintiff since 1945. They were both members of the same church that is St. Pauls Church, Breadfruit, Lagos and that they became friendly. He went to the United Kingdom in 1948 to study medicine and thereafter all communications between both parties ceased. In the summer of 1951 however, he met the plaintiff for the first time in London. He had come down to London from his station Dublin in Ireland. He testified as follows :—

> When I got to the United Kingdom in 1948 there was no communication between the plaintiff and me. . . . . Between the time she arrived in London and the summer of 1951 when I met her there was no communication between us.

The defendant further testified that on the occasion of their meeting a cousin of the plaintiff tried to bring the parties together again and they started writing letters to each other. In and during the year 1952 the plaintiff visited Dublin twice. During the visits of the plaintiff to him at Dublin misconduct took place but there was no talk of marriage between the parties. One day in the summer of 1953 he was passing through London to the continent and he saw and met the plaintiff. On that night there was sexual intercourse between the parties which resulted in the plaintiff being pregnant with a child of which he (the defendant) was apprised on his return from Denmark at the end of September 1953.

The defendant further testified that it was after he was told about this that both of them discussed about marriage for the first time and then it was agreed that both parties should write home to their parents and tell them what had happened. He had told the plaintiff that he would marry her on condition that his parents consented to the marriage. The defendant further testified that he wrote home not direct to his father, but to a *Mr* (*Magistrate*) *S. A. Thomas* asking him to tell his father the position of things and to ask for his consent to his marriage with the plaintiff. No reply was forthcoming for a very long time and as the plaintiff was worrying him to do something he decided to and did go with the plaintiff to the Marriage Registry in Kensington to file the necessary banns. He did this in the hope that before the date fixed for the marriage the letter signifying the

consent of his parents would have arrived. In the meantime he received the letter from the plaintiff which he replied by the letter Ex. N. In the plaintiff's letter she had told him that her grandmother had consented to her marriage. His own father however, did not write him but instead wrote to his elder brother, another Dr Norman Williams. He summoned a meeting in his flat in London at which he, defendant, was present. Present also were the plaintiff's uncle, Mr Savage, one Mr Euba and the defendant's brother. The meeting was informed that the father of the defendant had refused his consent to the marriage. The meeting dispersed but before he returned to Dublin he went to the plaintiff and explained the whole matter to her. He testified further as follows :—

I told her it was a pity that the whole matter had flopped but advised that we should both continue with our studies.

If the consent had been forthcoming the marriage would have been solemnised. There was no question of my being in love with the plaintiff. I loved her. The ring Ex. H was purchased by me before the meeting.

The defendant further testified that on the 29th April, 1954 the plaintiff gave birth to a baby girl and that she left the United Kingdom for home in January 1955. After the marriage was called off, that is some time in January 1954, before the plaintiff was delivered of the child she came to his lodgings in Dublin and said she came "to make trouble". He went on :—

She said she did not care whether I was expelled or not or whether it affected my studies or not. She said I must marry her at all costs. I left home and she came to the college campus and was making a big row with me. I had to write to my parents.

He returned back home on the 16th March, 1957 duly qualified but ever since his return he has not associated with the plaintiff and the plaintiff has not associated with him although he continued to maintain their child by the plaintiff.

Under cross-examination by Counsel for the plaintiff he denied that between 1945 and 1953 there was any discussion between him and the plaintiff about marriage. He testified that he got married in Scotland about the third day of his arrival in the United Kingdom and that the reports in the newspapers Exs. G and H, are not accurate. He testified further that :—

I informed the plaintiff that a condition of my marrying her is that I must get the consent of my parents. I did tell her.....I could not have done anything without my parents consent whilst in the United Kingdom, I was a student.

He testified further that he filed the notices at the Marriage Registry and wrote the letter Ex. D in order to allay the plaintiff's anxieties and in the hope that he would get his parents consent before the date fixed for the marriage. He stated further that the marriage bann were filed in November 1953 because up till November 1953 he was still expecting the reply to his letter from his parents. He testified that the letter Ex. D was written by him before the marriage was called off and indeed before the marriage notices were filed. He testified that in the same way the letter Ex. F, was written by him before the notices were filed. He was sure he did not come to London until the end of October after he had written Ex. F. and that he took an examination in October (as per Ex. F and that he could not have come to London in October 1953. With regards to Exs. A and B stating that he was supposed to marry the plaintiff in October 1953 he pointed out that the marriage was fixed for a date in November 1953 and that he was misled to regard it as a date in October by the letter from the plaintiff's solicitor Ex. A. He testified that he did not ask the parents of the plaintiff for financial assistance, nor did he ask his own parents for financial assistance in view of the refusal of his father to give his consent to their marriage.

He testified further that he was writing the plaintiff until January 1954 when she came over to Dublin to create a row. After she left the United Kingdom she wrote him the letter Ex. K and since then no letters have passed between them. He produced the letters, Exs. O, Q, R and S testifying to the effect that they were all letters written to the plaintiff by him. Under re-examination by his Counsel he testified to the effect that his own parents had at no time consented to the marriage between him and the plaintiff, that after the plaintiff came to Dublin to create a scene the tone of their letters changed and that after his return home there was no resumption of their relationship by both of them. On receipt of Exhibit K he thought that the whole matter had been called off by the plaintiff and that both parties were discharged.

The defendant called as his witness his uncle ALBERT ADENIYI WILLIAMS, described as a pensioner. He testified to the effect that some time in 1953 his late brother (the father of the defendant) visited the grandmother of the plaintiff in connection with the affairs of Ladipo (the defendant) and that in his presence on that day his late brother told the old lady that he would not give his consent to the marriage between the plaintiff and the defendant. He gave three reasons as follows :—

1. He understood the lady in question (in London) read only up to Primary 2 at Lagos and she went over to study nursing and as she could not do it she abandoned the course.

2. He was sceptical of the moral quality of the girl (in the United Kingdom) to take her into his family.

3. That Mr CADMUS a cousin of the lady was married to his own daughter.

He further testified that having told the old lady these she appeared to have accepted the position.

Learned Counsel for the plaintiff has submitted that a promise to marry need not be expressed in writing. I take the view myself that such a contract need not be proved *in totidem verbis* and I do not for a moment suppose that this point is at present open to controversy. As I understand the plaintiff's case, it is to the effect that the defendant promised to marry her and that he would not. On the other hand, the defendant admits the promise to marry the plaintiff but contends that such a promise was conditional and that the condition was never fulfilled. If my analysis of the facts of this case is correct then it is clear that the matter in controversy may not be all that difficult to decide.

The plaintiff contends that as far back as 1945 the parties had agreed, although they were then infants, to get married to each other. This statement by the Plaintiff was put in issue by the defendant and indeed controverted by evidence of the defendant. The facts of this case show that the parties were neighbours during their infant days and virtually saw each other every minute of every day. In those circumstances it is not difficult to see the point made by the plaintiff that even from their early days they grow very fond of each other.

By paragraph 3 of the Statement of Claim the plaintiff avers that on or about the 20th day of January, 1953 the defendant and herself agreed to marry each other. That paragraph is admitted by paragraph 3 of the Statement of Defence. The evidence in this case on behalf of the defendant does not refer to the 20th day of January, 1953 at all and apart from the statement of the plaintiff that on or about the 20th January, 1953 they agreed to marry each other I can find no other evidence of such promise. The first paragraph of the writ reads as follows :—

Both by an oral promise made by the defendant to the plaintiff in *June 1954* and by letters passing between them from the 9th day of January, 1953 to the 5th September, 1956, the plaintiff and the defendant agreed to marry one another within a reasonable time which elapsed before action.

I can find no evidence of any promise made in June 1954 in this proceedings and the evidence is to the effect that at that time the plaintiff was in London whilst the defendant was in Dublin. These conflicts demonstrate the importance of careful drafting of pleadings and processes and the difficulties likely to arise from an inadvertance to such duty.

Quite apart from the legal position of the promise made by an infant to get married (to which I shall advert shortly) there is the evidence of the plaintiff to the effect that as far back as 1945 when she was 15 and the defendant was about the same age, the parties had promised to marry each other. The plaintiff later stated however that the agreement was made on the 20th day of January, 1953. Such evidence is important as it is necessary that a new promise be proved, mere ratification of an existing promise made before the attainment of maturity not being enough.

A promise to marry another is an element in a contract and as such is equally subject to all the contingencies to which the several elements of a contract are legally subject. Thus it is that a promise to marry by an infant is unenforceable against him even at maturity and such a contract may not even be ratified by the infant after attaining maturity. Section 1 of the Infants Relief Act 1874 invalidates all contracts made by an infant except those in respect of necessaries. Section 2 of the same Act specifically provides as follows :—

> No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy or upon any ratification made after full age of any promise or contract made during infancy whether there shall or shall not be any new consideration for such promise or ratification after full age.

In *Northcote v. Doughty* (1879) 4 C.P.D. 385 it was held that repetition of the same promise from day to day was no more than ratification of the existing contract but that it is a matter for the jury to consider from the proceedings whether there could be evidence of a fresh promise. In *Coxhead v. Mulis* 3 C.P.D. 439 Lord Coleridge observed *inter alia* at page 441 as follows :—

> Evidence of ratification is one thing, evidence of a fresh promise is another and if there is positive proof that the promise was made before and the ratification after the defendant became of full age.....I am of opinion that the ratification would not be evidence of a fresh promise but must be referred to the promise made before the defendant was of age.

The position therefore here is that even if I accept the plaintiff's story that the promise to marry originated in 1945 when both parties were infants that promise would still be unenforceable at her instance against the defendant unless there was evidence of a fresh promise after attaining maturity by the defendant and not a more ratification of the contract made during infancy.

As I pointed out before, however, paragraph 3 of the Statement of Claim which avers that on or about the 20th January, 1953 the parties orally contracted to marry each other is admitted by paragraph 3 of the Statement of Defence. On the 20th January, 1953 the defendant was *sui juris* and it is important that I should at this stage resolve the question as to whether or not there was then at that agreed date a fresh promise to marry or a mere ratification of the contract made during minority. To start with I wish to observe that I do not accept the plaintiff's story to the effect that when in 1945 she was 15 years and the defendant 16 years the parties had agreed and promised to marry each other. No doubt the parties owing to the peculiar circumstances had developed considerable affection for each other but it seems to me to be extremely unlikely that at such early ages the question of marriage would have occurred and indeed appealed to them. I do not accept this part of the plaintiff's testimony and even if I did, such a contract is unenforceable against the defendant.

I am however prepared to take a construction of the facts and circumstances of this case which would be most favourable to the plaintiff. My rejection of her purported agreement during minority is in her interest as this clearly paves the way for an enforceable agreement at maturity. The agreement and promise of the 20th January, 1953 are admitted and I hold that on that day there was a fresh agreement by the parties to get married to each other.

It is now apposite to consider the exact nature of the promise and agreement to marry made on the 20th day of January, 1953. I observe that none of the letters produced in evidence contains unequivocally a promise to marry. It is however easy to infer from most of them that the defendant was exceedingly devoted to the plaintiff. I would like to know when the agreement to marry was to be fulfilled and indeed if it was an absolute or a conditional promise.

In the course of her evidence the plaintiff did state on several occasions that the defendant was to marry her after the baby, or after pregnancy but before the arrival of the baby, or indeed

after he qualified. In her writ of summons and in her Statement of Claim he was to marry her "within a reasonable time which elapsed before action". It is difficult, if possible at all, to get out of such a labyrinth of confusion and I do not desire to resolve this issue particularly in view of the defendant's admission of the agreement to marry and the very liberal construction in favour of the plaintiff that I have decided to place upon the facts of this case. It should however be remembered that on the 20th January, 1953, the plaintiff was not yet pregnant and it would be conspicuously out of place to consider on that date any suggestion about pregnancy or the arrival of a baby. If on the other hand the marriage was to take place after the defendant shall have qualified one wonders why the plaintiff wanted to get married to the defendant before then.

I have referred to the evidence of the plaintiff from the witness box about the time of fulfilment of the promise to marry. The averments in her writ and in paragraph 5 of her Statement of Claim are clearly inconsistent with the evidence of the plaintiff at the trial and although she mentioned various times for performing the contract she never said the contract was to be performed "within a reasonable time" of the promise. The point is important as a contract to marry generally is a contract to marry on request or immediately. If it is otherwise it is a conditional promise and must be so pleaded and litigated. *See Aitcheson v. Baker* (1719) 170 E.R. 209.

In the letter written by the plaintiff's solicitors to the defendant, Ex. A the following passage occurs :—

> A date in October 1954 was fixed for the celebration of the marriage and marriage forms were duly filled and signed but a day before the marriage was to take place it was postponed to a later date to enable you to complete your medical studies.

What that date was or is I am singularly not in a position to know there being no evidence of it. This is important as unless there be a request to marry within a reasonable time after a general promise to marry an action may not be maintainable after the lapse of a long time during which the parties or indeed one of them had regarded the contract as abandoned. The newspaper reports, Exs. G and H and indeed the evidence of the defendant demonstrate quite clearly that during the month of November 1959 the defendant got married to another woman.

My impression after reading the pleadings and letters in this case is that on both sides they are carelessly drafted and the court is now left to ascertain the actual facts which are in dispute or admitted.

The plaintiff's solicitors' letter Ex. A and the defendant's solicitors' letter Ex. B both put the date of the marriage called off as *October* 1954. In her evidence the plaintiff put that date in October 1953. In his evidence from the box the defendant stated that it was in November 1953 and explained that his own solicitor was misled in Ex. B to put the date as in October 1954 by the mistake in the plaintiff's solicitors' letter Ex. A which had referred to October 1954. Speaking for myself, I am satisfied that the banns were filed and the marriage was fixed for a date in November 1953. The letter Ex. E (dated 24th September, 1953) was written definitely before the filing of the banns. In it the defendant stated that he had not received any letter from home. He asked also "have you had any news-yet ? If so could I know". The letter Ex. F is dated 28th October, 1953. In it the defendant stated that he was then (on that date) taking an examination but would come to London on the 31st October, 1953. In his evidence, which I accept and prefer on this point the defendant did say that he could not have come to London before the end of his examinations that is at the end of October 1953. I am of the view that the evidence establishes that the defendant came down to London at the end of October 1953 as stated in Ex. F and that the banns were filed thereafter. The contents of Ex. F confirms my arrangement about the dates of the letters and Ex. F states *inter alia* as follows :—

> Now I would spare a few days and I hope everything will be settled before I return to Dublin.

My impression after reading Ex. F is that the defendant could thereafter "spare a few days" during which the arrangements about the marriage could be carried through. The plaintiff wrote the letter Ex. J (dated 7-11-53) after the marriage was called off.

In this connection the letter Ex. D must be considered. That letter is undated and Counsel for the plaintiff had submitted that it is by itself a promise to marry the plaintiff after the completion of his course by the defendant. I may say right away that even if that is so that is not the contract upon which the case of the plaintiff is founded and cannot therefore now be relied upon. In view of the observations which I propose shortly to make however I do not consider that the submission of Counsel is well founded. The letter reads in part as follows :—

> How are you getting on ? Please try and cheer up. Do not worry about the gossip as there is bound to be a lot of rubbish talk especially on an occasion like this.

My parents want us to attend to the child first and then get married after the completion of my course. I have written to them that we are both very anxious to get married. . . . everything will be perfect I guess before our Christmas vacation. I am coming down to London immediately we vacate.

As I said before, this letter is undated. The defendant testified that he wrote Ex. D before the marriage was called off in November 1953. The plaintiff said she got the letter from the defendant after that event. It is not easy to tell where the truth lies. The letter did state that "there is bound to be a lot of rubbish talk especially on an occasion like this." I think myself that the occasion referred to must be and was the cancellation of the marriage. What else could it be ? I am satisfied that the explanation of the defendant in this respect is unreliable but even then I cannot interpret this letter as a new and specific promise to marry the plaintiff. It does not contain a new promise, much less the time for fulfiling the promise to marry. He certainly then could not have completed his course "before our Christmas vacation" and yet he spoke of "everything" being "perfect" by that time. The letter Ex. D is certainly posterior in date to the letter Ex. Q dated 19th November, 1953. This is so because in Ex. Q the defendant was asking the plaintiff about the results of her examinations whereas in Ex. D he was already advised that the results had been released and the plaintiff had failed. Besides, and this is very important, the plaintiff did not accept the contents of Ex. D. After receiving the letter, she went to the college campus in January 1954 (before the arrival of the baby and before the defendant qualified) and insisted on the defendant marrying her. Her subsequent conduct also demonstrates that she never accepted the contents of the letter Ex. D.

My examination of the exhibits in this case and my careful study of the facts on both sides do not reveal a general promise to marry either immediately or on request and I have come to the conclusion that any contract established at all must be a conditional promise.

The law with respect to conditional promises to marry is well settled during the many centuries in which so many engagements to marry have been made in hope and broken in disillusion. Whether a promise to marry is conditional or not is a matter of fact. In *Halsbury Laws of England* (3rd Ed.) page 770 paragraph 1,227 the following passage occurs :—

Where the promise is to marry at or after a certain time or is conditional no action for breach thereof can be maintained until the time has elapsed or the condition been fulfilled unless the breach relied upon is a renunciation of the contract by the defendant.

The position is that where the promise is only to be carried into effect on or after the happening of a certain contingency that contingency must happen before the promise becomes actionable. The promisee is however entitled to sue as on the breach of an executory contract where the promisor does any act whereby he would be incapable of performing the contract if and when the agreed contingency arrives. *See Frost v. Knight* (1872) L.R. Ex. 111 where a promise by the defendant to marry the plaintiff after the death of his (defendant's) father was held actionable at the instance of the plaintiff where during his father's lifetime the defendant got married to another woman. In *Cole v. Cottingham* 175 E.R. page 406 it was held that a promise in the presence of a woman of an intention to marry her as soon as her business is settled must be considered as a conditional promise and that in order to make it actionable the conditions must be shown to have been performed or fulfilled.

In this case the admitted averments on the pleadings, and the letters Exs. A, B, C, D, E, F, L, N and Q show clearly that the parties carried on a relationship which is clearly referrable to a hope to marry each other. The ring Ex. N purchased by the defendant and produced by the plaintiff is also referrable to the same relationship. I have already stated that it is not necessary to prove the promise by express words to the effect and it has been stated that the conduct of the parties, such as the giving of an engagement ring or the fixing of a date for their marriage or their behaviour towards each other may justify an inference that they have mutually promised to marry ; and in the case of the woman, it is sufficient to show that she acted in such a way as to indicate her consent to and approval of the man's promise. *See* 19 *Halsbury's Law of England* (3rd Ed.) page 768 paragraph 1,220, also *Jacobs v. Davies* (1917) 2. K.B. 532 and *Cohen v. Sellar* (1926) 1 K.B. 536. There is the evidence of the plaintiff in this case which I accept to the effect that the defendant seduced her with a result that she became pregnant with a child in August 1953 and of which she delivered in April 1954.

The defendant has put in issue the evidence of the plaintiff to the effect that she allowed him to seduce her on the faith of the promise to get married to her. Fortunately it is not necessary for me to express any views upon this particular aspect of this case in isolation but it is well to point out that a promise of marriage made in consideration of the promises permitting the promisor to have carnal intercourse with her is void. In *Mortin v. Fenn* (1783) 99 E.R. 618

the principle was discussed but as there appeared as in this case other circumstances and indeed other promises to ground the action the court refused to consider the act of seduction a bar to the proceedings.

In her evidence the plaintiff said that the defendant never imposed any conditions on his promise. Under cross-examination, however, she stated as follows :—

I say that it was agreed that we should both write home to inform our parents of our proposals. I wrote home to my grandmother. She wrote a letter to me and she consented to my marriage ..... The defendant told me he wrote home to his parents. I asked him and he said he had not yet received any reply from his parents.

The defendant on the other hand is consistent to the effect that the promise to marry was conditional upon securing the consent of the defendant's father. I accept the evidence of Albert Adeniyi Williams the uncle of the defendant to the effect that the defendant's father and himself visited the grandmother of the plaintiff and that on that occasion the defendant's father made it clear to the grandmother that he was not consenting for the reasons stated by him to the marriage between the parties.

It is not easy to resolve the question as to which of the parties is (I mean the plaintiff and the defendant) speaking the truth but I will refer at this juncture to the letter Ex. J written by the plaintiff and dated 7th November, 1953. It is not clear whether this letter was written before or after the marriage at the Kensington Registry was called off. According to the plaintiff's testimony it must have been written after that ceremony was called off. If that is so it seems to me that the contents of that letter were clearly against the contention of the plaintiff. That letter reads *inter alia* as follows :—

Moreover we were in such a mood together before he went to the continent on holidays in August that I found that I'm expecting a baby now.

This is the fourth month that I had been pregnant by Ladipo and once he returned from the continent I told him that the most honourable thing to do is to write his parents, apologise and ask them for their consent to get married straight that I can start receiving treatments for my ante natal clinics.

Ladipo told me that he had written asking for his parents' consent for the marriage but they objected to it till he is qualified in 2 years time.

To this suggestion I do not blame his parents....So Dad and Mum I'm on my knees begging to please give your consents for our marriage as quickly as possible because going to the clinics at a later month will be querry of murder (sic). So kindly consider my position...

It seems to me curious that if to the knowledge of the plaintiff the promise to marry her was absolutely unconditional (and especially not conditional upon the consent of the defendant's parents) she would have taken upon herself to write such a letter to the defendant's parents. In her own evidence in court she testified to the effect that she got a reply to Ex. J and that in that reply the defendant's father told her that he would not consent to the marriage.

The letter Ex. L (dated 12th November, 1953) written clearly after the marriage was called off states some if not all of the grounds of objection to the marriage. Even in this letter the defendant was not prepared to dispense with the consent of his parents. After referring to the objection he stated as follows :—

> ...but under the present circumstances I feel there is no other choice. I am sure they have thought of this and will grant their approval. Besides either of us has not finished his or her course and so they want us to complete our respective courses. I have pointed out that we shall take up where we left up (sic) and that after you have given birth you will continue your training. By then I will be nearly finished. I am sure you will not let me down and will try your best,

and in the letter Ex. D written after the 19th November, 1953 (*see* Ex. C) he wrote that his parents wanted them to attend to the child first and then get married "after the completion of my course. I have written to them that we are both very anxious to get married". In my view therefore the evidence is abundant to the effect that the promise by the defendant to marry the plaintiff is subject to the consent of the defendant's parents. In this connection care must be taken to distinguish between consent which is the basis of a promise and consent which is merely ancillary to the contract. In the former case the securing of such consent is fundamental to the existence of the contract and its absence is fatal. It does not matter what the reasons are for the withholding of the consent. In the latter case where consent is merely ancillary it could only be given in evidence in order to mitigate damages. *See Irving v. Greenwood* (1824) 171 *E.E.* 1226. In the present case I take the view that the evidence and indeed Ex. J established that the consent of the parents is a fundamental necessity.

It is beyond question that such consent never came and the evidence of the defendant's uncle is to the effect that such consent would never come, for the reasons stated by him. That being so the promise of the defendant never took effect and is accordingly not actionable.

The defendant has raised a plea of being discharged from whatever contract there was between him and the plaintiff. By the plaintiff's letter Ex. A it was stated that since 1957 the defendant never associated with the plaintiff. The complaint by the plaintiff against the defendant, according to the letter Ex. A written by the plaintiff's solicitors is that the plaintiff "was persuaded by you under your said promise of marriage to associate with you from 1945 to 1957". The letter went on :—

...on your return to Nigeria in 1957 duly qualified as a doctor you showed your unwillingness to marry my client and up till now you are not prepared to fulfil your said promise to marry her.

That letter was replied by the defendant's solicitors and a portion of the reply from the defendant's solicitors, Ex. B reads as follows :—

Your client was well aware that it was conditional on both parties receiving the approval of their parents. This approval to your client's knowledge was not forthcoming from both parents and the reason given was communicated to your client.

Ever since then your client has accepted the position and we are informed that the reason why she has recently raked up the question of marriage is because she has come to know that our client is contemplating a marriage shortly.

In her evidence under cross-examination the plaintiff testified as follows : —

I received a reply to the letter Ex. J written by the late Mr Norman Williams (father of the defendant). The late Norman Williams in his reply did not give his consent to our marriage. He said we should wait until the defendant got qualified. I will not insist on marrying the defendant if his parents object to our match. They do object.

Evidence to the same or similar effect was given by the defendant.

In his evidence the defendant testified that after the visit of the plaintiff to the college premises in January 1954 to create a scene she wrote him only once or twice before her delivery and that the parties were certainly not on good terms when she left the United Kingdom in 1955. He testified further as follows :—

I came back home in 1957. The plaintiff was hostile and did not even discuss the question of marriage with me. We only talked about the maintenance of the child. Ex. K is the last letter I received from the plaintiff. She never wrote me a line about our marriage. Ex. K gave me the impression that she called off everything.

The plaintiff's evidence and the letter Ex. A establish beyond doubt that the parties did not associate with each other as from 1957 when the defendant returned to Nigeria duly qualified.

We know that the plaintiff left the United Kingdom for home in January 1955. The marriage which was later cancelled was fixed for a date in November 1953. During the month of January 1954 the plaintiff went to Dublin and created the row described by the defendant. The baby arrived in April 1954. The letters Exs. D, E, F, L, N and Q were all written by the defendant to the plaintiff during the year 1953. Only three letters were produced as having been written by him to the plaintiff during and since 1954, Exs. O, R and S. In the pre-1954 letters the plaintiff was addressed as "My dearest Ade" or "My darling Ade" and they were accordingly ended with a note of love from the defendant. On the other hand the letters Exs. O, R and S were started with "Dear Ade" or "Dear Deboun" and not a single word of affection appeared throughout them let alone at the end. The letter Ex. O dated 7th January, 1955 was written to congratulate the plaintiff on her birthday which fell on the 9th January, 1955. It said *inter alia* of the plaintiff that—

> You must be very busy packing for it was a long time since you last wrote.

The letter Ex. R dated 21st November, 1954 was similar. It started of :—

> I must apologise for the long delay in replying your last two letters.

and ended up—

> Please excuse the brevity of this letter as I am doing some packing. I shall write you soon, from Ladi.

The letter Ex. S dated 15th August, 1956 is the driest of all. It started off like this :—

> Undoubtedly you will be very much surprised to receive this letter. The cause of delay I presume you know already—pressure of work.

In it the plaintiff was addressed as "Dear Deboun" but the baby was referred to as "my sweet darling Enitan". The defendant had not forgotten those sweet words. He was certainly not employing them for the plaintiff. The tone of the letters had certainly changed and the defendant testified that after his return home the parties did not talk about the marriage at all. It is not easy here again to tell where the truth lies, but I think the plaintiff's letter Ex. K dated 4th February, 1955 written by the plaintiff on board the ship on her way home is extremely elucidating. That letter reads *inter alia* as follows :—

> I had fought the fight. I have kept the fate (sic) so it is all left to you now to plan your future for yourself. Nobody will because people just try to imagine but the weight of any punishment they never live to see. More grease to your elbows for your June examination.
>
> I should like to post you the false ring by registered post any time you want it.

The letter was addressed by the plaintiff to "Dear Ladi" and concluded thus :—

> Anyway keep fit, from Ade.

There is not a scintilla of affection expressed in or by that letter and the plaintiff was wanting and willing to return the false wedding ring (Ex. M) to the defendant. It appears to me clear not only from the letters Exs. A and B but also from the evidence of the parties, from a careful and comparative study of the letters put in evidence and from the express phraseology of the plaintiff's letter Ex. K that after the marriage was called off in November 1953 the parties attempted vigorously but certainly unsuccessfully to keep up their morale and to maintain the *status quo* until January 1954 (*see* letters Exs. D, E, F, L, N and Q and the letter Ex. P written to the plaintiff by the defendant's elder brother and also the plaintiff's letter to the defendant's parents Ex. J). It seems to me also that in the month of January 1954 the plaintiff made a most desparate but again an unsuccessful effort to get the defendant to marry her notwithstanding that the consent of his parents was not forthcoming and so she went to Dublin to create a scene. It seems to me further that thereafter a complete change of attitude overtook the entire set-up and the relationship deteriorated at a phenomenal speed (*see* letters Exs. R and O). It seems to me that thereafter the entire relationship went on the rocks and the letter Ex. K written by the plaintiff demonstrates quite clearly that the plaintiff had accepted that the relationship was in pieces.

In *Davies v. Bomford* (1860) 158 *E.R.* 101 it was held that the fact that the parties would not communicate with each other for a long period of about 2 years was evidence that the plaintiff has exonerated the defendant from his promise before breach. *See* also *King v. Gillett* (1840) 151 *E.R.* 676. In *Lowe v. Peers* (1768) 98 *E.R.* 160, at p. 163 Lord Mansfield stated the law thus :—

> When persons of different sexes attached to each other do not marry immediately there is always some reason or other against it; as disapprobation of friends and relations, inequality of circumstances, or the like. Both sides ought to continue free: otherwise such contracts may be greatly abused: as by putting women's virtue in danger by too much confidence in men or by young men living with women without being married.
>
> Therefore these contracts are not to be extended by implication.

In this proceedings the plaintiff's own case admits that there had been no association since 1957 when the defendant returned to Nigeria and the evidence in my view establishes that whatever

remained of the relationship was snapped by the plaintiff's letter Ex. K in February 1955. It is true that the defendant admitted having visited the plaintiff since he returned to Lagos and indeed wrote the letter Ex. S on the 15th August, 1956 but it should be remembered that the baby between the parties still exists and is with the plaintiff and is the duty of the court to examine the defendant's conduct and actions properly in order to ascertain whether they only related to the child or constitute a resumption of relationship between fiance and fiancee. I am satisfied that the visits in this case were in respect only of the child Enitan.

In my judgment therefore even if my views about the nature of this contract were wrong and it is held that the defendant's promise was unconditional the supervening facts and the conduct of the parties after January 1954 clearly discharged the contract and absolves the defendant from his obligations. I have come to the conclusion that much as the plaintiff's case excites commiseration and provokes to action the most sympathetic parts of the human soul she does not succeed in this case.

I wish to add that had I found in favour of the plaintiff I would have taken into consideration in assessing damages the fact that she was seduced by the defendant and she had lost the chance of being married to a qualified medical practitioner. I would also take into consideration the fact that her chances of getting married to another person are considerably reduced. I will not consider the defendant's conduct as having been responsible for her inability to qualify for the profession which she went to study. The defendant's uncle did state that one of the grounds of objection to her marriage was that she only read up to Primary II. Her evidence revealed that it was in 1953 she first took her Nursing exams. and that she failed even before she was pregnant. Her letters Exs. J and K portray a rather low standard of education and it is difficult after reading them to resist the conclusion that she would not have passed the examination in any case. She sat for the exams. over again and failed. She is at present a sales-girl.

In assessing damages I will also take into consideration the fact that in September 1960 she gave birth to another child of which the defendant is not the father. I will like to consider also the fact that the defendant now earns a salary of £1,200 per annum and the physical and mental agony and punishment resulting from the social ostracism which by his reckless conduct he has inflicted upon the plaintiff, another unmarried woman had had another baby for him.

I will hold however that the claim for special damages is not made out. It is established that it was the defendant who paid for the ring Ex. M and the other articles of property stated by the plaintiff to have been purchased by her, do not in my view come within the category of articles or properties collectively described as trousseau.

I will fix general damages at £500.

I have tried as best as I can to consider and deal with all the issues raised in this case and have come to the conclusion for the reasons amply set out by me in this judgment that whatever way the plaintiff's case is looked at and however liberal a construction is put on the facts in her favour she cannot succeed on this claim.

I therefore dismiss the plaintiff's case. In view of the facts and circumstances of this case and my opinions about both parties which I have expressed I make no order as to costs.

LAGOS EXECUTIVE DEVELOPMENT BOARD .. .. PLAINTIFF

v.

(1) FEDERAL ADMINISTRATOR-GENERAL
(2) OLOTO CHIEFTAINCY FAMILY
(3) BABALADE OKONU (for himself and on behalf of the EGBE CHIEFTAINCY FAMILY) } CLAIMANTS

[HIGH COURT: COKER J.; 9th December, 1960]
(Suit No. LD/275/58)

Lagos Town Planning Ordinance—Acquisition by Lagos Executive Development Board under Statutory Powers—Title of the Idejo White Cap Chiefs of Lagos.

The claimants who are referred to court by the L.E.D.B. for the determination of the question which of them should be paid compensation in respect of lands at Suru Lere Lagos acquired compulsorily under the Lagos Town Planning Ordinance have all laid claims to the land in question. The first claimants, *i.e.* the Federal Administrator-General is claiming on behalf of one O. M. whose estate was being administered by that officer and whose claim is to the effect that he owned a fee simple estate by inheritance from his father who had obtained an absolute grant of the land from the original owners, the Oloto Chieftaincy family. The 2nd claimants, the Oloto Chieftaincy Family (as Idejo Chieftaincy Families) claim as original owners of the reversion of the said land expectant upon the interest granted by them to one of the Kings of Lagos who had obtained permission from them to settle on the said lands his domestics the ancestors of the 3rd claimant. The 3rd claimant suing for himself and on behalf of the Egbe Chieftaincy family claims that the land belongs to his ancestors by right of occupation and contended that the original Chief Egbe settled on the land during the inter-tribal wars with the people of Lagos.

HELD: (1) That the title of the 1st claimants cannot be supported in as much as even if land was granted by the Oloto Chieftaincy Family to his ancestor that land becomes on his father's death family property belonging to all his children and could not have formed a portion of the private property of the person represented by the Federal Administrator-General.

(2) That the 3rd claimant having rejected the claims of the 2nd claimant and not having been able to support his claims to the effect that his ancestor the original Chief Egbe settled on the land, the claim by that claimant failed.

(3) The Oloto Chieftaincy Family is an Idejo Chieftaincy family and once it is established that the land in question falls within the land generally recognised as belonging to that Chieftaincy is entitled in the circumstances of the case to the payment of compensation for the lands acquired.

Cases referred to:

Ogunmefun v. Ogunmefun (1931) 10 N.L.R. 82.
Oshodi v. Aremu (1952) 14 W.A.C.A. 83.

Oduntan Onisiwo v. Attorney-General (1912) 2 N.L.R. 79.
Attorney-General v. John Holt and Co. Ltd. (1912) 2 N.L.R. 1.
Chief Eshugbayi v. Dawuda and others (1904) 1 N.L.R. 57.

K. A. Kotun for 2nd Claimants.
G. O. K. Ajayi for 3rd Claimants.

COKER, J. :—This is an originating summons taken out by the applicants the Lagos Executive Development Board, pursuant to the provisions of Section 48 of the Lagos Town Planning Ordinance Cap. 95 for the determination of the following question that is to say :—

> Who shall receive compensation in respect of a piece of land situate in the Housing Scheme area at Suru Lere, near Modele Village Road, which has been acquired by the L.E.D.B. under and by virtue of Section 42 (2) of the Lagos Planning Ordinance.

The three claimants filed their respective Statements of Interest in accordance with the order made in that respect.

The first claimant's Statement of Interest avers in effect that he is the Administrator of the Estate of one OSENI MODELE DECEASED who was, during his lifetime, the owner in *fee simple* of the land in question. This Statement of Interest also avers that the said Modele derived his title to the said property by inheritance from his father and that apart from being in possession of the land during his lifetime, in the year 1955 the said OSENI MODELE made a solemn Declaration of Title to the said property. The Statement of Interest of the Oloto Chieftaincy family avers that the land in question formed portion of the stool lands of the Oloto Chieftaincy family but that about 105 years ago the portion now in issue was granted by the family to Chief Egbe a War Chief to King Eshilokun the then Oba of Lagos "for the use and occupation of his domestic (arota) Modele as a customary tenant subject to good behaviour according to Yoruba Native Law and Custom." The Statement or Interest of this family further avers that the said Modele used and occupied the land and after his death his children succeeded him on the land but that on the acquisition of the land the said tenancy determined by operation of law and that compensation therefore should be paid to the family. The third claimant's Statement of Interest avers that the land in dispute belonged from time immemorial to the Egbe Chieftaincy family who have from time to time nominated individuals of merit to act as community heads on the land and that the Egbe family is therefore the person entitled to be paid compensation.

I wish to point out that at the trial the Counsel for the 3rd claimant sought and obtained leave of the court to amend his Statement of Interest by substituting for the original paragraphs 2, 3 and 5 the following :—

2. The land in dispute forms portion of the piece of land belonging to the Egbe family absolutely under Native Law and Custom.

3. Well over 2½ centuries ago the said land was settled upon by the then Chief Egbe, a Lagos War Chief and ancestor of the three claimants.

5. The Egbe Chieftaincy family thereupon remained in possession of and enjoyed the said land by settling their domestics (Arotas) thereupon.

On behalf of the 1st claimant JACOB SUMAILA MODELE testified to the effect that the land in dispute was given to his ancestor, Modele, absolutely by Chief Oloto Obalo many years ago. The gift was made in consideration for treatment given by Modele, a native doctor to the then Chief Oloto Obalo who was cured by Modele of epilepsy. Since then Modele and his people have settled on the land and they are still on that land. Under cross-examination by Counsel for the Oloto Chieftaincy family he testified to the effect that the land belonged to Obalo and not to the Oloto family ; that Modele left him surviving three children, SUMAILA, SEIDU and OSENI. The property had never been partitioned and both Seidu and Oseni had children and descendants who are still alive. He denied that Modele was a slave to Chief Egbe and stated that Chief Egbe came to Lagos only to look after himself. He had come for treatment to Modele as he could not produce a child. Chief Egbe never occupied the land in question and his people had never served under Chief Egbe. He admitted that when his relatives left the village, that is Modele Village, many domestics of Chief Egbe still lived on the land but he denied that Chief Oloto ever gave the land to Chief Egbe. Under further cross-examination by Counsel for the third claimants he testified that the present Bale of the village is one AMODU and also that Modele built a house in the village for his children although not a single one of them now lives in the village. He testified that Oseni Modele built a house on the family land of the Egbe Chieftaincy family in Lagos but did not know why the Egbe Chieftaincy family gave the land to him. His evidence was supported by the evidence of SUSANNAH ANJORIN and RABIATU AWELE both of whom testified to the effect that the land in question belonged to Modele to whom it was given absolutely by Chief Oloto Obalo who had been cured by Modele of the disease of epilepsy. They both denied that Modele was at any time a domestic of Chief Egbe and indeed the witness Susannah Anjorin denied that the relatives

of Chief Egbe ever lived on the land. RABIATU AWELE in cross-examination by Counsel for the 3rd claimant denied that Modele was ever a slave of Chief Egbe. EDMUND KOGBE, Executive Officer in the litigation section of the Federal Administrator-General's Office, Lagos, testified to the effect that the Federal Administrator-General is the administrator of the estate of one Oseni Modele who died in March 1957. He produced the Letters of Administration and this was admitted as Ex. A. He also produced the sworn Declaration of Title by Oseni Modele laying claims to this land and this was admitted as Ex. B.

On behalf of the 2nd claimant Chief Imam ASHAFA TIJANI, Arabic teacher and head of the Oloto family, testified to the effect that he is the Chairman of the family council and that the land in dispute formed portion of the stool lands of the Oloto Chieftaincy family. He testified further that King Eshilokun of Lagos asked for the land from the family in order to grant same to Chief Egbe to settle his domestics on the land. He continued as follows:—

> The grant by the Oloto to King Eshilokun was a grant under Native Law and Custom and the condition of a payment of yearly tribute to the Oloto family. The tenants were paying a box of cowries and a keg of palm oil yearly. After the abolition of cowries the Egbe family paid 5*s* and a keg of palm Oil.

He denied that the Chief Oloto Obalo ever granted the land absolutely to Modele and stated that the grant to Chief Egbe at the request of King Eshilokun was a grant under Native Law and Custom to him as a customary tenant. He testified further that the Oloto family also granted lands to Chiefs BAJULAIYE, BAJULU, ASHOGBON, AJOSIN and others and that none of the grants was an absolute grant. He testified further that when the question of compensation arose some members of the Modele family approached the Oloto family and suggested and indeed agreed that a portion of the compensation should be paid to the Oloto family and the balance paid to them. This agreement was confirmed in the letter written to the Oloto family which was produced and admitted in evidence as Ex. C. He denied a suggestion put to him that Chief Oloto Obalo ever had epilepsy or that he was cured thereof by Modele. Under cross-examination by Counsel for the 3rd claimant he testified that Chief Egbe himself was a slave of King Eshilokun and that the Egbe family had always paid tribute for the land to the Oloto family and that such tributes were brought to the Oloto family by the late Modele. He was definite that the Egbe family paid tribute in 1956 but could not tell who actually brought the tribute. The Chief Oloto he testified is an Idejo White Cap Chief and

testified that if land given by the Oloto family to a customary tenant is expropriated by the Government the Oloto family usually claim a third of the compensation paid in respect of the land.

In support of his evidence SANUSI OBA testified to the effect that the land in dispute was granted at the request of King Eshilokun of Lagos by the Oloto Chieftaincy family to Chief Egbe and that tributes were being paid by Chief Egbe until 1957 to the family council. He could not tell whether anybody paid tribute in 1958 and denied a suggestion put to him that the land was given absolutely by his family to the Egbe family. Under cross-examination by Counsel for the 1st claimant he testified that the payments of tribute to Chief ODUNTAN FAGBAYI, the Oloto of Otto between the years 1944 and 1956 were all in his presence and were brought down by Oseni Modele. He testified to the effect that the letter Ex. C was written to the Oloto family by members of the family of Modele. Under cross-examination by Counsel for the third claimants he testified to the effect that yearly tributes were not paid to the Treasurer to the family council but are paid to the Chief at the Palace.

BABALADE OKONU, the present head of the Egbe family and the 3rd claimant testified to the effect that the original Chief Egbe was a War Chief of Lagos and that the land in dispute belonged to him. He testified as follows :—

> I know the land in dispute. It is at Modele Village. The land belongs to Chief Egbe. Chief Egbe became owner of the land by occupation....it is not true that Chief Oloto Obalo gave the land to Chief Egbe at the instance of King Eshilokun. At the time Egbe (the first Egbe) occupied the land there was no King Eshilokun in existence. It is not correct that Chief Egbe was a slave of Eshilokun.

He testified further that the original occupiers of the village were the slaves or domestics of the Egbe family and that the Egbe family had always nominated and appointed Bales on the land in question and that Modele was one of the Bales appointed by the Egbe family on the land. The children of Modele, he further testified, are not the absolute owners of the village land. He denied sending Modele to pay any tributes to the Oloto family and testified further that deceased Chiefs were buried on lands which they possess and that a Chief cannot be buried within the land of another Chief. So it was, he testified, that the first Chief Egbe was buried at Modele village even though he died in Lagos. Under cross-examination by Counsel for the 1st claimant he testified to the effect that he did not know when Modele became

Bale of the land or when Modele died but that Oseni Modele lived at the Egbe Palace in Lagos for about 30 years. He testified also that before the time of Modele this village was known as Arowosegbe Village. Under cross-examination by Counsel for the 2nd claimant he testified to the effect that King Eshilokun reigned before Docemo. He testified further that Chief Egbe Oluwo took possession of the land and later informed the King of Lagos and that he did that because he had been brought out to Lagos by the King of Lagos. He admitted that the Oloto family is the owner of land at Otto and Ebute Metta and that indeed his own father bought a piece of land at No. 42 Ibadan Street, Ebute Metta from the Oloto family. He testified that his father never lived at Modele Village and that he never paid tribute for the land held by them at Modele Village. He admitted that the neighbours who had lands adjoining their own lands got their land from the Oloto Chieftaincy family. He testified that the entire village is no more than 400 feet square although it was originally about 12 acres. He testified further as follows :—

> The Oloto family had sold most of the land and are now confined to only about 400 feet square. We did not protest at all at these sales by the Oloto. . . . . Tejuosho's land was part of the village. I think the Olotos had sold to Tejuosho. We did not question Tejuosho.

He further testified that several parts of Modele village lands had been acquired by the L.E.D.B. and that in respect of those portions compensation had always been paid to the Oloto family. He denied ever instructing his lawyer to the effect that the land was granted to Chief Egbe by Chief Oloto. He testified to the effect that although all lands in Lagos, Ebute Metta, Yaba and Ikeja have owners no one owned the land at Modele Village when Chief Egbe settled there. He ended up as follows :—

> All Chiefs are land owning. The Idejo Chiefs are those who entertain the Oba of Lagos. They do not necessarily own lands.

His evidence was supported by AMODU TIJANI described as the present Bale of Modele Village. He testified to the effect that the land belonged to the Egbe family and not to the children of Modele. He did not know whether or not the Egbe family paid tribute to the Oloto family nor did he know how Chief Egbe got to be on the land. Apart from the land in dispute he could not tell whether the Egbe family owns any other land or not. The village land is about 400 feet square and that has always been the size from the time when their ancestors were first settled. It was not correct that the village was at one time about 12 acres.

He denied that Oloto Balo ever gave the land to Modele. Under cross-examination by Counsel for the 2nd claimant he admitted that all the lands in that locality except that of the Egbes belonged to the Oloto family. He also admitted that there is no access to the land in question except through lands which belong to the Oloto family.

Although there is a considerable amount of evidence given in this case yet it is quite clear that the facts of the case fall within a very narrow compass. To start with it is common ground between the 1st and 2nd claimants that the land in question originally belonged to the Oloto Chieftaincy family. The case of the 1st claimant is that the Chief Oloto Balo many years ago granted the land absolutely to Modele, an ancestor of Oseni Modele, the administrator of whose estate the 1st claimant is. As an administrator of an estate the 1st claimant is entitled to administer the personal estate of the deceased intestate and can only administer the real estate if he obtained an order to that effect from the High Court. In this case it is clear that the land in dispute had been acquired by the applicants the Lagos Executive Development Board and all claims at present can only be directed against the monetary compensation payable in respect of the land. In such circumstances the administrator of the estate is entitled to call in and take possession of such monetary compensation if due and payable to the estate administered by him.

The evidence preferred on behalf of the 1st claimant amounts to this—that the land granted by the Oloto family to Modele was occupied by Modele until the time of his death; that he left three children surviving him; that these children themselves do have children and that the property has at no time been partitioned among the children. That is the effect of the evidence of Susannah Anjorin and Rabiatu Awele. If this is correct it seems to me that Oseni Modele cannot by himself claim to be entitled to the entire compensation payable in respect of this land. In *Ogunmefun v. Ogunmefun* (1931) 10 N.L.R. 82 it was decided that when a person died intestate in this country his real property devolved upon all his children as family property according to Native Law and Custom. Even if I were to accept the evidence on behalf of the 1st claimant I cannot accede to his claim to be entitled absolutely to the entire compensation payable on this land. It has been argued on behalf of this claimant that his administrator is interested in his own share of the compensation. What that share is and indeed the proportions in which the money

should be shared out are matters of which no evidence has been given before me, and I am certainly not in a position to decide this matter. On behalf of this claimant a statutory declaration, Ex. B, has been produced in evidence by the Federal Administrator-General. That document states that Oseni Modele was at the time when the declaration was made the owner in *fee simple* of the land in question and that he derived title to the same by inheritance from his father Modele who died intestate in or about the year 1908. As this property was never at any time partitioned it is clear that the contents of the declaration Ex. B cannot be correct. I have come to the conclusion that Oseni Modele could not by himself alone inherit this land. There is no evidence of how he acquired the *fee simple* estate in the land and indeed the evidence of Sumaila Modele is to the effect that the land granted was not family land of the Olotos but the private property of Chief Oloto Balo. A grant in the token land would be void. *See Oshodi v. Aremu* (1952) 14 W.A.C.A. 83.

The story of the 1st claimant as to the grant of the land to Modele by Chief Oloto Balo was put in issue by both the 2nd and 3rd claimants and as it is not disputed by the 2nd claimant that this land was granted at one time or the other by the Oloto Chieftaincy family to strangers, one of the issues that arises is as to the nature of the grant that was made. The 1st claimant has contended that the grant was an absolute grant but in my view has not successfully done so. When it is proposed to establish that a grant from an accepted owner of land is an absolute one the onus of proof upon the party making that averment is a heavy one indeed, and he must show by evidence acts of possession and other incidents of ownership which are unequivocally referable to an absolute grant. In this case the evidence establishes that the descendants of Modele although they at one time lived in the village do not now live in the village and not a single tenant has been called by them to show that at one time or the other they exercised any acts of possession other than acts which are only consistent with those of a customary tenant. I cannot find sufficient evidence on which to base a finding of an absolute grant to Modele. Besides I do not accept the evidence to the effect that Modele was a native doctor and that he at one time cured Chief Oloto Balo of epilepsy. I take the view myself that that story is all trumped up for the purpose of this case and in this respect I accept and prefer the evidence for or by the Oloto Chieftaincy family that Chief Oloto Balo never had epilepsy and that Modele never cured him of such disease.

With regards to the claim of the 3rd claimant that is the Egbe Chieftaincy family, it is well to point out at the onset that the Oloto family admitted in their Statement of Interest that the family did grant the land in question to the original Chief Egbe Oluwo for the settlement of his domestics, one of whom was Modele. This averment is contained in paragraph 2 of the Statement of Interest of the 2nd claimant and indeed confirmed in the evidence given on behalf of the Oloto Chieftaincy family. On behalf of the 3rd claimant however, it was contended during the trial that the Egbe family did not hold of the Oloto family and that the original Chief Egbe became owner of the land by settlement. It is therefore necessary for me to examine in detail the origin of the title of the 3rd claimant.

I must point out that the only other witness called by the 3rd claimant, that is AMODU TIJANI the present Bale of the village testified to the effect that he did not know how the Egbes became owners of the land. He had described Modele as an Ifa priest and certainly not a native doctor. Indeed he thought that Modele was not the father of the 1st witness for the 1st claimant. The evidence about the origin of the title of the 3rd claimant therefore, rests upon the testimony of the 3rd claimant himself, Babalade Omonu. He had described the original Chief Egbe as a War Chief. He admitted that all the surrounding lands were owned by the Oloto Chieftaincy family and his only witness also admitted that it was impossible to pass into this land claimed by the Egbe family except one passes through Oloto land. He admitted that the land of the village originally about 12 acres was at the time of the acquisition no larger than 400 ft. square and that the Oloto family had sold all the lands which used to be parts of the village. He admitted also that his family did not protest against these sales. He also admitted that Chief Egbe Oluwo after having taken possession of the land later informed the King of Lagos and stated that he did this because he was brought out to Lagos by the King of Lagos and could not have taken possession of lands without the permission of the King.

It is contended on behalf of this claimant that Chief Egbe was buried in the village and that according to customary laws no chief could be buried in land belonging to another chief. I wish to point out that I have never come across any authoritative decision or statement of customary law to this effect and my own experience and knowledge of customary laws does not attach absolute ownership or title to grave sites. I am not satisfied that this is a proper exposition of customary law and I take the view that whether or not Chief Egbe was buried in the village that fact by itself would not

necessarily make him the absolute, as distinct from limited owner of the land. Lastly in this connection I wish to point out that Learned Counsel on behalf of the 3rd claimant has pointed out that King Eshilokun was not the King of Lagos at the time that Chief Egbe Oluwo came down. It is probable that the names and the reginal periods of the several Kings of Lagos might have been horribly mixed up in history as deposed to by the witnesses who gave evidence in this case. That, however, is not peculiar to the 2nd claimant and indeed the 3rd claimant himself was horribly mixed up with respect to that aspect of history in the course of his evidence. I cannot exclude the possibility of such confusion when evidence of history mainly unwritten and therefore shifty is being received from witnesses who are mainly illiterates. In my view it is not necessary to ascertain the relevant history with any high degree of precision, the facts in issue being what they are.

The Idejo Chiefs of Lagos are the titular owners according to native laws and customs of the lands in Lagos and the mainland. Modele Village is in the mainland of Lagos. This information was contained in the admirable "Report on Title to Land in Lagos" by *Sir Mervyn Tew* written in 1939 and the view that the Idejo Chiefs were such owners has received judicial sanction in many decisions of this court. *See Osborne C.J.* in *Oduntan Onisiwo v. Attorney-General* (1912) 2 N.L.R. 79 at page 80. The decision of Osborne C.J. in that case was upheld by the Privy Council. *See* also *Attorney-General v. John Holt and Company Limited* 2 N.L.R.1. In my view, that the 3rd claimant was not speaking the truth is clearly demonstrated by that part of his evidence where he stated that all Chiefs are land owning and that the Idejo Chiefs of Lagos are those who entertain the Oba of Lagos and that they do not necessarily own lands. It is common knowledge in Lagos that the Okarigbare and the Oba Alade classes of Chiefs in Lagos are not land owning and such lands only belong to the Abogbon class of Chiefs (*i.e.* the war chiefs) have been specifically granted by the Idejo Chiefs. I take the view that his evidence is not honest and I do not hesitate to reject his story to the effect that the original Chief Egbe came from Apa in Epe division and simply took possession of Land on the mainland of Lagos, which land as admitted by him was in the middle of lands which were owned by the Oloto family.

I now come to the claim of the 2nd claimant. My rejection of the story of the 3rd claimant is supported by the fact that in the original Statement of Interest filed on behalf of the 3rd claimant paragraphs 2 and 3 read as follows :—

2. The land in dispute forms a portion of land formerly belonging to the Oloto Chieftaincy family.

3. Well over a century ago the said land was granted by the then said Chief Oloto to the 3rd claimant's ancestor Chief Egbe a Lagos War Chief absolutely.

In his evidence before me the 3rd claimant stated that he never gave his Counsel intructions to the effect that the land was given to his ancestors by the Oloto family but it beats my imagination hollow that without any instructions to that effect, Counsel should have invented (or may be discovered) a gift from the Oloto family. I take the view that the 3rd claimant knew the truth about the origin of the title and that he had purposely attempted to mislead the court, firstly by amending his Statement of Interest by excising those paragraphs therefrom and secondly by giving from the witness box the evidence which was given at the trial. I simply say that I do not accept it. Ever before the 3rd claimant was joined in this connection the 2nd claimants filed their Statement of Interest on the 31st day of December, 1958 and paragraph 2 of their Statement of Interest averred that the land was granted to Chief Egbe as a customary tenant about 105 years ago on the intervention of King Eshilokun !

With respect to the 2nd claimant my findings are to the effect that neither the 1st nor the 3rd claimants have given evidence sufficient to divest the 2nd claimants of their title to the land in question. The 3rd claimants have certainly refused by their claim to acknowledge the titular ownership of the 2nd claimant. In the the case of *Chief Eshugbayi v. Dawuda and* (1904) 1 N.L.R. 57 it was pointed out at page 60—

That Chiefs Neno and Eshugbayi Egbe both say that they hold lands at Ebute Metta under Chief Oloto and pay for them. The evidence of the other Chiefs and an expert on native law given on behalf of the plaintiff is clear that lands were not in former times given away absolutely even to War Chiefs and it therefore must require very strong evidence to warrant the court to come to a conclusion con trary to this custom and such evidence is wanting in this case.

I take the view therefore that if there was any grant at all by the Oloto family it was not an absolute grant but the usual grant to customary tenants under Native Law and Customs and subject to the incidents of forfeiture and others in case of misbehaviour or denial of title.

It is manifest from the evidence that both the 1st and 3rd claimants have denied the title of the Oloto family and in a proper case have rightfully incurred the consequential penalties. I am satisfied that the evidence to the effect that tributes were paid by

or on behalf of the Egbe family until 1957 is correct. I do not believe the false testimony of the 3rd claimant that no such tributes were paid. Nor can I make a declaration in this case to the effect that as the Egbe family are customary tenants of the Olotos they should be entitled to a part of the compensation payable since that family by its own case has contended that they do not hold of the Oloto family. With respect to the 1st claimant I have pointed out that his own claim was that of an absolute gift. I do not accept the evidence that the land was at any time granted by the Chief Oloto to Modele absolutely who according to the evidence which I accept, was a domestic. I therefore reject the claim of the 1st claimant not only in respect of Oseni Modele as an individual but also even it was contended that the property was a family property of the descendants of the original Modele.

The result therefore is that neither the 1st claimant nor the 3rd claimant for the reasons I have set out above have established their rights to this land and that the 2nd claimant have proved to my satisfaction that they are the owners of this land. I therefore declare that compensation in respect of the land in issue in this case more particularly described in the plan Ex. D be paid by the Lagos Executive Development Board to the 2nd claimant in this case the Oloto Chieftaincy family.

I order that the costs of this proceedings be paid as follows :

(*a*) By the 1st claimants to :

1. The Lagos Executive Development Board ten guineas.
2. The Oloto Chieftaincy family twenty guineas.

(*b*) By the 3rd claimants to :—

1. The Lagos Executive Development Board ten guineas.
2. The Oloto Chieftaincy family twenty guineas.

HIGH COURT, LAGOS

FLORENCE OLAYINKA TAYLOR ..
OLUMIDE TAYLOR .. ..
TINU TAYLOR .. .. } PLAINTIFFS

v.

FRANCES OLUSOLA TAYLOR .. .. DEFENDANT

[HIGH COURT, COKER, J. ; 20th December, 1960]
(Suit No. LD/52/60)

Declaration of Legitimacy—Yoruba Native Law and Custom—Legitimacy and Right of Succession where Paternity Acknowledged.

The plaintiffs are children of one T. a Yoruba of Egba descent and the defendant was the widow of the said T. having been married to him at Christ Church Ijebu-Ode. It appears from the evidence that all the plaintiffs were children born to the deceased T. before his legal marriage with the defendant and that the deceased acknowledge the paternity of the children to the knowledge of the defendant during his lifetime. The defendant had an issue for the deceased but at and after her marriage with the deceased, the mother of the plaintiffs had ceased to live with the deceased. On the death of the deceased the defendant took over all his properties to the exclusion of the plaintiffs and claims to be entitled to same without taking the plaintiffs into consideration.

HELD : That the paternity of the plaintiffs having been acknowledged by their father they are by that fact legitimate under Yoruba Native Law and Custom and once it is established that they are legitimate they are entitled to share in the estate of their deceased father and the marriage of their mother was an irrelevant matter.

Cases referred to :

Subuola Alake v. Bisi Pratt and Another. 15 *W.A.C.A.* 20.

Savage v. Macfay (1909) *Renner's Gold Coast Reports* 504.

In re Sarah Adadavoh and Others and in the matter of the Estate of Herbert Samuel Heelas Macaulay deceased (1951) 13 *W.A.C.A.* 304.

Coker and Sikuade for Plaintiffs.

S. O. Sogbetun for Defendant.

COKER, J. :—In this case

The plaintiffs jointly and severally seek a declaration that they are legitimate children of Alfred Modupeola Taylor, deceased, according to Yoruba Native Law and Custom and that they are beneficiaries entitled to inherit on the intestacy of the said deceased.

The plaintiffs seek for a true and accurate account of all monies received and all payments made by the defendant.

The defendant is Administrator of the Estate of the deceased, Alfred Modupeola Taylor, deceased.

Pleadings were ordered and filed and the Statement of Claim avers that the plaintiffs were children of and born to one Alfred M. Taylor a Yoruba of Egba descent (now deceased) before he got married to the respondent sometime in 1930. The Statement of Claim further states that the said Alfred Taylor acknowledge the paternity of the plaintiffs and that at the time of his death he left the property No. 5 Lagos Street, Ebute Metta, the rents of which the defendant has been collecting and appropriating to her own exclusive use since the death of the said Alfred Taylor.

The Statement of Defence contends that the defendant was legally married to the said Alfred M. Taylor at Christ Church, Porogun, Ijebu-Ode and that there is an issue of the marriage namely Kehinde Taylor. The Statement of Defence admits that the late Alfred Taylor acknowledged the paternity of the plaintiffs, but states that the mother of the plaintiffs had long before the Marriage with the defendant left the said Alfred Taylor.

At the trial the defendant was not present and Counsel on her behalf called no evidence. The 2nd plaintiff Olumide Taylor testified to the effect that the three plaintiffs who are all brothers and sisters were born to and acknowledged by their father Alfred Modupeola Taylor who died on the 20th April, 1947 and that the youngest of them, that is the 3rd plaintiff Tinu Taylor, was born in November 1936. He admitted that his father was married to the respondent under the Marriage Ordinance in 1942 but he denied a suggestion put to him that at one time the Administrator-General was collecting the rents on the property No. 5 Lagos Street, Ebute Metta from 1947 to 1952.

The admission of the fact that the late Alfred Taylor acknowledged the paternity of the children simplifies to a considerable extent the matter in dispute in this case. In the case of *Subuola Alake v. Bisi Pratt and Another* 15 W.A.C.A. 20 the Court of Appeal held following the line of decisions originating from *Savage v. Macfoy* (1909) *Renner's G. C. Reports* 504, that the acknowledgment of paternity by the father *ipso facto* legitimises the children and that there could not for the purpose of succession be different degrees of legitimacy. It is not relevant for consideration on this point whether or not the marriage between the parents of the children is recognised or not. *See* per VERITY C.J. in *Re Sarah Adadavoh and Others* and in the matter of the Estate of *Herbert Samuel Heelas Macaulay* (*Dec'd*) (1951) 13 W.A.C.A. 304 at p. 309. In this case I am satisfied that the paternity of the

children, the plaintiffs, was acknowledged and for the purpose of succession I hold that they are legitimate children of the late Alfred Modupeola Taylor and that they are therefore entitled to share in the Estate of their deceased father. By the provisions of section 36 (1) of the Marriage Ordinance Cap. 115 which reads as follows :—

> Where any person who is subject to native law and custom contracts a marriage in accordance with the provisions of this Ordinance and such person dies intestate ...leaving a widow or husband or any issue of such marriage.....
>
> The personal property of such intestate and also any real property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary nothwithstanding...

it is provided that the distribution of the estate of a person of the category of Alfred Taylor (deceased) should proceed in accordance with the provisions of the Law of England appertaining to the distribution of the estate of intestates. The relevant law is to be found in the Statutes of Distribution and by the provisions of that enactment the wife takes a third of the estate and the children share equally the remaining estate *inter se*. I have not been asked for an order regarding the general distribution of the estate but I have already found that the plaintiffs are entitled as they claim to inherit on the intestacy of their father.

The plaintiffs have sought for a true and accurate account of all monies received by and all payments made to the defendant as the Administratrix of the estate of the deceased. It is not in dispute and indeed it is admitted that the defendant is the Administratrix of the Estate of the late Alfred Taylor. The evidence available which I accept is to the effect that she is collecting the rents of the premises No. 5 Lagos Street, Ebute Metta since the death of Alfred Taylor on the 20th April, 1947. Although the defendant has not expressly pleaded the statutes of Limitations I will not, for my part, order an account for any period longer than six years backwards. Learned Counsel for the plaintiffs in his final address has asked for an order for an account for the last six years.

The plaintiffs therefore succeed in this case and it is hereby decreed as follows :—

1. That the plaintiffs being legitimate children of the late Alfred Taylor are hereby declared entitled to share in the Estate of their late father Alfred M. Taylor.

2. The defendant shall on or before the 31st day of January 1961 file and deliver a true and accurate account in respect of her administration and management of the estate of the said Alfred M. Taylor (deceased) from 1-1-55 inclusive.

3. The plaintiffs are hereby granted leave within 30 days after the said accounts shall have been served upon them to surcharge and falsify the said accounts.

The defendant shall pay to plaintiffs the costs of this proceedings which I fix at 25 guineas.

HIGH COURT, LAGOS

THE FEDERAL ADMINISTRATOR-GENERAL suing as the ADMINISTRATOR of E. A. AJANA JOHNSON, Deceased — PLAINTIFF

v.

1. OLADIPO AJANA JOHNSON ..
2. OMOTOLA AJANA JOHNSON .. — DEFENDANTS

[HIGH COURT; COKER, J.; 19th December, 1960]
(Suit No. LD/20/60)

Will—Grant of Probate—Caveat entered on grounds of Insanity and undue Influence—Execution of Will by Testator under normal circumstances.

The plaintiff is the administrator named in the Will of one J. deceased and the defendants are two of his children who have opposed the Grant of Probate of the said Will to the plaintiff on the grounds (1) that the Will was not duly executed (2) that the Will was executed under the undue influence of one A and (3) that the deceased at the time of execution of the Will was not of sound mind, memory and understanding.

The evidence reveals that the deceased J had other children apart from the defendants and that although he made no provisions for the defendants in the Will which was being attached he made substantial provisions for his grandchildren including the children of the defendants. Although the testator also made provisions in the Will for the woman A there was no evidence that she was present at or influenced in any way the preparation and execution of the Will. The evidence also reveals that at the time of execution of the Will the testator had by himself invited the witnesses to his house to subscribe their signatures to the Will and was not shown to be suffering from any illness which could have affected or did affect his mental capacity.

HELD : That the due execution of a Will was a matter of fact to be resolved from the evidence available at the trial.

HELD ALSO : That in order to establish that a Will was procured by undue influence of another it must be proved that the person influencing the testator actually coerced the testator into doing what he would not otherwise have done.

HELD FURTHER : That in order to establish that a testator was not of sound mind, memory and understanding once the Executors or propounders of the Will had established that the testator was normal and acted normally the persons opposing the Will must show by evidence that the testator was in such a condition of health that it was absolutely impossible for him to appreciate the nature and the quality of his acts and the objects of his desires.

Cases referred to :

In the case of Redding (1850) 163 *E.R.* 1338.

In the case of Douce (1862) 164 *E.R.* 1127.

Baker v. Batt (1838) 12 *E.R.* 1026.

Barry v. Butlin (1838) 12 *E.R.* 1090.

Bafunke Johnson & Anor v. Akinola Maja & Co. (1951) 13 *W.A.C.A.* 290.

Boyse v. Ross-Borough (1856) 10 *E.R.* 1192.

Wingrove v. Wingrove (1885) 11 *P.D.* 81.

Craig v. La-Moureux (1920) *A.C.* 349.

Egbue for Plaintiff.

P. A. Atilade for Defendants.

COKER, J. :—In the case the plaintiff who claims to be the executor named in the last will dated 16th day of July, 1959, of EMMANUEL AKINLOLU AJANA JOHNSON (*Deceased*) claims to have the said will established. The writ has been issued against the defendants as the lawful children of, and as persons entitled in the event of an intestacy to share in the estate of the said deceased and also because the defendants have entered a caveat against the grant of Probate.

Pleadings were ordered and filed. The Statement of Claim avers that the late Emmanuel Akinlolu Ajana Johnson died on the 16th day of July, 1959 and asked for a decree for probate of the said Will in solemn form of law. The Statement of Defence attacks the Will in three directions, namely :—

1. That the said Will was not duly executed according to the provisions of the Wills Act 1837.

2. The said Will was procured by and under the undue influence of one MRS MARTHA AINA the mistress of the deceased whose influence over the deceased testator was so complete and dominating that he was not a free agent and the said Will was not the offspring of his own volition.

3. That the deceased at the time the Will was executed was not of sound mind, memory and understanding as he was suffering from senile decay, his memory was untrustworthy and he was unable to understand the nature of the act he was performing and its effects.

The Statement of Defence also counter-claims that the court will pronounce against the said Will propounded by the plaintiff and that the court will decree Probate of the Will dated 23rd September, 1955 executed by the deceased.

At the trial the plaintiff produced the original of the Will of the late Emmanuel Akinlolu Ajana Johnson and this was admitted in evidence as Ex. A. The Will was enclosed in a sealed envelope which in itself was enclosed in another sealed envelope. The envelopes were produced and admitted in evidence as Exs. A 1 and A 2. JOSEPH ADEFUWA ADENOWO, described as a schoolmaster and EFFIOM THOMPSON NTONG described as a clerk under the Rediffusion Services both testified to the effect that on the day of execution of the Will Ex. A they were requested by the testator to witness the execution of his Will and that in his presence and in each others presence the testator signed Ex. A in the column provided for the testator and that thereafter the attesting witnesses signed in turn. They both testified to the effect that at the time of execution of the Will the testator was quite normal, that he spoke to them as usual and that as far as they were aware there was nothing wrong with his mental condition. They were both certain that no other inmate of the home (nor indeed Martha Aina) was present in the room at the time when the Will Ex. A was executed by them. The witness Ntong admitted under cross-examination that a man who worked at the Administrator-General's office was present at the time they were signing Ex. A. The plaintiff produced a copy of the caveat lodged by the defendants and this was admitted as Ex. B. He also produced the affidavits of interest filed by the defendants and these were admitted in evidence as Exs. C and C 1.

On behalf of the defendants the Secretary of the General Hospital, Lagos, produced the medical record of the deceased from the 20th July, 1959 (when he was admitted to the General Hospital, Lagos) to the 15th August, 1959 (when he died). This was admitted in evidence as Ex. D. DR JAMES OLAITAN ATUNRASE, medical practitioner attached to the General Hospital, Lagos, testified to the effect that he examined a patient by the name of Akinlolu Ajana Johnson during July 1959. He was over 70 years old. He examined him and found that :—

1. He was an elderly man.

2. His tongue was clear and moist. His abdomen was soft and there was a suprapubric swelling from the pelvis to the bottom of the umbellicus which he thought was a distended bladder.

3. His chest was clean his pulse was 100 and regular but his prostrate was enlarged.

4. There was no abnormality found in the heart. His blood pressure was rather high.

5. There was a retention of urine with overflow due to the enlarged prostrate.

He thought he was rather senile for his age. He had attended the hospital before on the 16th July, 1959, but on that date he refused admission. He was later operated upon and he died 10 days after the operation. He could not say that he was not in a position to make a Will at the time he was said to have made one but his judgment may not be accurate. The patient spoke to him (witness) normally and made his complaints himself. The witness JEMINATU ASHABI and the defendant EMMANUEL OLADIPO AJANA JOHNSON testified as to the general condition of health of the deceased testator prior to his death and also as to the relationship between him and the members of his family. They also referred in their evidence to one Martha Aina who lived with him as his wife.

In his address to me Counsel for the defendants submitted that the deceased was about 70 years old and was very ill due to some chronic condition of retention of urine which poisoned his blood stream and that therefore his reasoning could have been impaired. Counsel further argued that this is demonstrated by the fact that although the testator had four children only one of them, a daughter, was given anything under and by virtue of the Will Ex. A. Counsel submitted that the propounders of a Will should be on their guard and must show that the Will is a free and voluntary expression of a capable testator. On the other hand Counsel for the plaintiff submitted that the plaintiff has established his case conclusively and that there is no evidence on record to support the contentions of the defendants.

That Emmanuel Akinlolu Ajana Johnson died on the 10th August, 1959, is not in dispute. This is borne out not only by the pleadings but also in the evidence of both parties and the hospital records Ex. D. That the defendants entered a caveat against the grant of Probate of his Will Ex. A is borne out by the documents admitted in evidence as Exs. B, C and C 1 and indeed the 1st defendant who gave evidence for the defendants testified to the same effect. By the law of Wills it is required that every Will Probate of which is granted should be the free and voluntary expression of a capable testator and that any such Will should be duly attested in accordance with the provisions of section 9 of the Wills Act 1837.

In this case I have already pointed out the three directions from which the defendants have attacked the Will of their late father, the testator. It is contended that the Will was not executed in accordance with the provisions of the Wills Act. Section 9 of that Act provides as follows :—

> No Will shall be valid unless it shall be in writing and executed in manner hereafter mentioned ; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction ; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary.

It is manifest from the above provisions that the requirements of attestation are to the effect that the testator should sign his Will in the presence of two witnesses, both of whom should be present at the same time and sign at his request in the presence of the testator and in the presence of each other. It is not always that both attesting witnesses must be called to give evidence as to the fact of execution it being always sufficient that one of them be so called.

In this case there is the evidence of the two attesting witnesses as to the circumstances surrounding the execution of the document Ex. A. The testator first spoke to the witness Ntong about the Will and later went out himself and called in the witness ADENOWO and in the presence of the three of them their respective signatures were subscribed to the document Ex. A. Both witnesses were subjected to severe cross-examination as to the parts they played respectively in the execution of the document Ex. A. In my view, however, their evidence is truthful and I accept such evidence. I find as a fact that the document Ex. A was duly executed as a Will in accordance with the provisions of the Wills Act 1837. Both witnesses identified the signature of the testator as well as each other's signature on the document and an examination of the document itself makes it abundantly clear that the person described as having subscribed their signatures therein duly did so. Indeed the 1st defendant himself admitted in the box that the signature ascribed to his late father is indeed his father's signature. He qualified this by saying he had signed in a different way. I must confess that I do not understand this and I come to the conclusion that this bit is no more than an after-thought invented for the purpose of this case. In any case, a signature in an erroneous name or an assumed name if intended as the

name of the testator is valid. And it has been held that where a testator puts his mark to a Will in which he is wrongly named, the execution is valid. See In *The Goods of Redding* (1850) 163 E.R. p. 1338 ; also in the *Goods of Douce* (1862) 164 E.R. 1127.

The defendants have also attacked the Will on the grounds that the Will was procured by the undue influence of one Mrs MARTHA AINA described severally as a mistress and a wife of the deceased. The woman Martha Aina was not called by either side as a witness in this case. The evidence available is to the effect that she was not present at the time when the Will was executed. There is no evidence as to whether or not she was present at the time the Will was typed or the instructions given. Counsel on behalf of the defendants has contended that the onus is upon the propounders of a Will to satisfy the court that a Will is the voluntary expression of a free and capable testator. Counsel relied upon that proposition as discussed in 2 Halsbury Volume 34 page 37 paragraphs 31/36. That statement has been called from dicta in *Baker v. Batt* (1838) 12 E.R. 1026 and *Barry v. Butlin* (1838) 12 E.R. 1090 where matters analogous to those in the the present case where discussed and dealt with.

With respect to the question of onus of proof I need not say that I am in entire agreement with the proposition of law as put forward by learned Counsel on behalf of the defendants. I would point out however that the burden of proof in a Probate action as indeed in all actions does not necessarily remain fixed and does shift. Hence it is that the position in practice is that once the propounders of a Will have established by *prima facie* evidence that the Will is perfect the onus shifts on to the other side to establish that the Will was imperfect. In the case of *Bafunke Johnson and another v. Akinola Maja and others* (1951) 13 W.A.C.A. 290 *Levey J. A.* delivering the judgment of the Court of Appeal observed *inter alia* at page 292 as follows :—

> The rule enunciated... that in every case the onus lies on the propounders of a Will to satisfy the court that the instrument is the 'last Will of a free and capable testator' must however be taken I think to refer only to the first stage so to speak of the onus for the onus does not necessarily remain fixed ; it shifts. Where there is a dispute as to a Will those who propound it must clearly show by evidence that prima facie all is in order that is to say that there has been due execution and that the testator had the necessary mental capacity and was a free agent. Once they have satisfied the court prima facie as to these matters it seems to me that the burden is then cast upon those who attack the Will and that they are required to substantiate by evidence the allegations they have made as to lack of capacity, undue influence and so forth. That it is clear to me must be their responsibility and nothing can relieve them of it.

In this case I have already indicated that the plaintiffs have proved not only the execution of the Will but also that at the time of execution the testator was free and normal, that he talked to them normally and that it was he himself who went out to call in the witness Adenowo.

The defendants have contended that the Will was procured by the undue influence of Martha Aina and the witness Jeminatu Ashabi and the first defendant had given evidence to the effect that on account of his association with the said Martha Aina the respondent was not in any close relationship with the other members of his family. The defendants want me to presume from these facts if accepted that the testator was not a free agent. In *Boyse v. Rossborough* (1856) 10 E.R. 1192 at page 1211 the Lord Chancellor delivering the judgment of the House of Lords observed *inter alia* as follows :—

> Undue influence cannot be presumed and looking to the evidence in the present case I am unable to discover evidence warranting the conclusion...of undue influence.

It seems to me that a great deal of misunderstanding surrounds the proper appreciation of the words "undue influence" as employed with regards to a Will. It is not any kind of persuasion that could be rightly described as undue influence sufficient to invalidate the Will of a testator. In *Wingrove v. Wingrove* (1885) 11 P.D. 81 *Sir James Hannen* at page 82 observed as follows:—

> We are all familiar with the use of the word 'influence'. We say that one person has unbounded influence over another...a man may be the companion of another and may encourage him in evil courses and so obtain what is called an undue influence over him and the consequence may be a Will made in his favour but that action shocking as it is perhaps even worse than the other Will not amount to undue influence.
>
> To put undue influence in the eye of the law there must be—to sum it up in a word—coercion... It is only when the Will of the person who becomes a testator is coerced into doing that which he does not desire to do that it is undue influence.

That statement of the law was applied by the Privy Council in the case of *Craig v. Lamoureux* (1920) A.C. 349 in a judgment delivered by VISCOUNT HALDANE at page 357.

In my view that facts of this case do not warrant an inference of undue influence. A man may decide or may even be persuaded to disinherit all the members of his family and choose as the object of his dispositions a mistress or anyone else who to him deserves to be so benefited. That by itself would not raise an inference of undue influence and the law will not presume that undue

influence has been proved when all on record is that a mistress was nearby and that the Will could have been procured as a result of her dictation. In order to amount to undue inference the testator must be coerced into doing something which otherwise he would not do, and the influence of the other party over him must be so dominating as to make him do what he does not wish if free, to do. I cannot find such evidence in this case and I hold therefore that the plea of undue influence fails.

I next deal with the attack by the defence upon the mental condition of the testator. Paragraph 6 of the Statement of Defence avers that at the time of the Will the testator was not of sound mind, memory and understanding. The evidence at the trial in support of this averment is to the effect that he was sullen and indeed unco-operative with his children and other members of his family. That is the evidence of the witnesses Jeminatu Ashabi and Emmanuel Oladipo Johnson. There is also in this respect the evidence of the doctor to the effect that at the time when he saw the deceased he was suffering from senile dementia and that the nature of the illness of which he suffered was such as could impair his judgment. The doctor is however not prepared to say that the testator was not of such mental capacity as to make a Will.

I am satisfied however from the evidence of Adenowo and Ntong that the deceased was normal at the time of the execution of the Will and that he spoke and acted towards them in the way described by them. Besides and this is more important, there is the evidence of the doctor that the deceased first came in to see him on the 16th July, 1959 but that he refused adminission to the hospital on that date. The Will Ex. A is dated 16th July, 1959. On the 20th July, 1959 he came back and took a bed at the hospital. On that date he signed a form consenting to an operation being carried out on him (*see* Ex. D). It is against this bit of evidence that I have to weigh the evidence given by the witnesses Jeminatu Ashabi and Emmanuel Johnson and some parts of the doctor's evidence. No doubt exists that his physical condition deteriorated considerably and that he was in some agony during the time that he lay at the hospital but the testamentary mental capacity required is that whereby the testator is able to understand the nature of the act he was performing and appreciate the effect of the exercise of such acts. The Will Ex. A on a close reading reflects that the testator did not make any bequests in favour of his sons but it is clear that adequate provisions were made in the Will for the education of his grandchildren and great grandchildren.

It is also clear that he made a request in the sum of £100 "to my wife Martha Aina who is now residing with me and also a room and parlour to stay for her lifetime" and there is contained also in the Will a request of a sum of £50 to his daughter Yeside. That daughter is not a party to the present proceedings and the other son is at present in a mental home. In my view the contents of the Will are consonant with the action of a testator who has transferred his affection from his children (except one) but is certainly still interested in their children and indeed grandchildren. On the same day that the Will was executed, he consulted a doctor at the General Hospital, but when offered admission he refused to be admitted. It occurs to me to be extremely unlikely that his condition was all that alarming on that date and it seems to me that he was more interested in getting his affairs at home organised on that day. The first defendant has refused to live with the testator in his declining years and he was the only son available the other being confined in a mental hospital. The second defendant another child (a daughter) did not give evidence. It must be remembered that the relationship between parents and children is a rather complex one and an infinite number of reasons can be ascribed to the behaviour ostensibly untoward and probably unexplained of parents to their children, especially in their advanced age.

Be that as it may, there is no evidence in this case establishing that the testator was mentally deficient at the time of execution of the Will, and his behaviour and conduct on that day clearly suggests that he was mentally capable. I cannot for myself consider this as the expression of a person who suffers from such senile decay of mind as to make it impossible for him to appreciate the nature of the act he was performing. The probative value of the evidence of the doctor is really next to nothing in this connection, when it is considered that from all the surrounding circumstances it could not be justifiably concluded that at the time of execution of the Will the testator was insane. I take the view that there is no evidence before me by which I can come to the conclusion that the testator was not in fit and proper mental condition to execute a lawful Will.

Although the defendants have counter-claimed for probate in solemn form of law of another Will of the deceased dated 23rd September, 1955 no evidence whatsoever was given at the trial about this Will and no such Will was produced in evidence. The counter-claim in so far as it relates to the grant of probate in respect of this Will is therefore dismissed with costs.

These findings dispose of all the contentions of the defence in this case and I am satisfied that the Will Ex. A is the free and voluntary expression of a capable testator Emmanuel Akinolu Ajana Johnson and that the defendants have not discharged the burden placed upon them by the averments by which they have opposed the Grant of Probate of the said Will.

I therefore give judgment in favour of the plaintiff in this case and I order as follows :—

1. It is hereby decreed that the Will Ex. A of the late Emmanuel Akinlolu Ajana Johnson dated 16th day of July, 1959 has been duly proved in solemn form of law.

2. That the caveat lodged against the Grant of Probate by the defendants be and it is hereby discharged.

3. That the Probate of the said Will be granted all other formalities being complied with to the plaintiff who has been named as Executor therein.

4. That the defendants do pay the costs of this proceedings which I fix at forty guineas.

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