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LIST OF CASES REPORTED

CASE DECIDED IN THE PRIVY COUNCIL.

ESHUGBAYI ELEKO ... ... *Appellant.*

v.

THE OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA AND ANOTHER ... ... *Respondents.*

A Privy Council Appeal—Deposed Chiefs Removal Ordinance—History of Writ of Habeas Corpus*—Application for writ may be made to successive Judges of the same Court.*

This was an appeal to the Judicial Committee of the Privy Council from a judgment of the Full Court (1) affirming the decision of Tew, J. (2) that he had no jurisdiction to entertain an application for a writ of *Habeas Corpus* which had been heard and refused by Webber, C.J. (Acting) (3).

Held, that the judgments of Tew, J. and the Full Court were wrong, and that on successive applications for the writ being made to different Judges of the same Court each Judge must consider the application on its merits.

The judgment of the Lords of the Judicial Committee of the Privy Council, consisting of The Lord Chancellor, Lord Buckmaster and Lord Warrington of Clyffe, was delivered in London on the 19th June, 1928 by

LORD HAILSHAM, L.C.

The facts which give rise to this appeal can be shortly stated; but the question of law involved is one of grave constitutional importance to His Majesty's subjects in this country as well as in the Overseas Dominions.

By the Deposed Chiefs' Removal Ordinance of 1917, as amended in 1925, it was provided that:—

> When a native chief or a native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the Governor . . . the Governor may: (*a*) if native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office . . . by an Order under his hand direct that such chief or native shall within such time as shall be specified in the Order leave the area over which he had exercised jurisdiction or influence, and such other part of Nigeria adjacent thereto as may be specified in the Order, and that he shall not return to such area or part without the consent

(1) 6 Nigeria Reports 81. (2) 6 Nigeria Reports 76.
(3) 6 Nigeria Reports 73.

of the Governor." "(2) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid as directed by the Governor . . . shall be liable to imprisonment for six months, and the Governor may by writing under his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the Governor may by such Order direct."

On the 6th August, 1925, the Acting Governor purported to make an order under the said Ordinance in the following terms:—

"Whereas Eshugbayi, a native chief holding the office of Eleko in the Colony, has with my sanction been deposed and removed from his office, and whereas native law and custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his office: Now therefore I do hereby direct that the said Eshugbayi shall leave the said Colony and the Province of Abeokuta Ijebu and Ondo within twenty-four hours of the service of this Order, and that he shall not return to any of the said areas without my consent."

On the 8th August, 1925, the Acting Governor made a further order reciting the order of the 6th August, reciting that the appellant had refused or neglected to comply with it, and ordering that the appellant should be deported forthwith to Oyo in the Province of Oyo.

Immediately upon service of the order of the 6th August, the appellant gave notice of motion for leave to set aside the order and to stay execution upon it. This motion was heard on the 7th and 8th August by the Acting Chief Justice of Nigeria, and on the 8th August the motion was dismissed. Upon the dismissal of the motion the appellant gave notice of motion on the 8th August for leave to issue a writ of *habeas corpus*, and on the 10th August leave was granted for a rule *nisi* for a writ of *habeas corpus* returnable on the 13th August. On the 13th August, cause was shown against the rule and the rule was discharged on technical grounds without going into the merits. Meanwhile the appellant on the same 8th August had issued a writ against the Acting Governor and the Chief Secretary of the Government of Nigeria, claiming a declaration that the order of the 6th August, 1925, was void, and asking for an injunction to restrain the defendants from taking any steps under the Order. On the 19th August the Attorney-General moved to stay or dismiss this action as being frivolous and vexatious and an abuse of the process of the Court. The motion was heard by the Acting Chief Justice and on the 7th September, 1925, he ordered that the action should be dismissed on these grounds.

On the 18th September, 1925, the appellant gave a fresh notice of motion for leave to issue a writ of *habeas corpus*, and on the 12th October, 1925, the Acting Chief Justice gave judgment refusing the motion. The learned Judge held that the orders of the 6th and 8th August had been validly made and that the detention of the appellant was therefore lawful. On the 4th December, 1925, the appellant gave a fresh notice of motion for a writ of *habeas corpus*. This motion was heard before Mr. Justice Tew on the 8th December, 1925, when the Attorney-General took a preliminary objection that a similar application based on the same material had been made by the appellant and had been dismissed by the Acting Chief Justice, and that in view of that refusal the application could not be entertained; and on the 14th December, 1925, the learned Judge gave judgment upholding the objection and dismissing the motion on that ground. The appellant appealed against this decision and, on the hearing of the appeal, took the point that there was no evidence that the previous application had been made or that it had been based on the same ground; and the Court directed that the case should be returned to the learned Judge in order that evidence might be filed upon these points. Accordingly, on the 9th March, 1926, an affidavit was filed by the Solicitor-General, and on the 15th March, 1926, Mr. Justice Tew reheard the motion and dismissed it on the same ground as before. From this decision the appellant again appealed, and on the 1st June, 1926, the Full Court in a considered judgment dismissed the appeal and upheld the view of Mr. Justice Tew that the preliminary objection prevailed and that he had no jurisdiction to entertain the application. It is from this decision that the present appeal is brought before the Board.

On the hearing before this Board the appellant contended in the first place that there never had been a decision on the merits of his application and that the dismissal of the second motion for a *habeas corpus* by the Acting Chief Justice had been merely on technical grounds. Even if this contention were relevant, it was not in fact made out. In their Lordships' view it is clear from a perusal of the judgment that the merits were most carefully considered by the Acting Chief Justice, and that the refusal was based expressly upon the learned Judge's view upon the merits of the application.

But it was further contended on behalf of the appellant that by the common law of this country, which applies in Nigeria, it is the right of any imprisoned person to apply successively to every tribunal competent to issue a writ of *habeas corpus*, and that each tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal of co-ordinate

jurisdiction, even if the grounds urged are exactly the same. On behalf of the respondent, Mr. Stafford Cripps admitted the existence of the right to make successive applications; but he urged that the applications must be to different Courts. He pointed out that in the present case each application had been made to the Supreme Court of Nigeria, and he contended that since that Court had determined the matter by dismissing the application on the 12th October, no fresh application based upon the same materials could be entertained by that Court. In support of this argument he cited the language of Lord Esher in *Ex parte Cox* (1): "It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the Courts in succession." He pointed out that, although the decision of the Court of Appeal had been overruled in the House of Lords, where the case is reported under the name *Cox* v. *Hakes* (2), none of the learned Lords had dissented from Lord Esher's statement of the law, and Lord Bramwell's language at p. 523 seemed to indicate that his view of the old practice was the same. He further called attention to the fact that no instance could be found in the books of applications being made to successive judges of the same Court, and he cited decisions in New Zealand in *Ex parte Bouvy* (3) and of the Court of Appeal of British Columbia in *Re Loo Len* No. 2 (4) to the same effect.

This constitutes a formidable body of judicial opinion, and their Lordships have thought it right, therefore, to examine with some care the earlier history of the writ. This will be found set out in Hale's Pleas of the Crown, Vol. II, p. 143; in Bacon's Abridgement under the title "Habeas Corpus, Section B"; in Sir William Blackstone's Commentaries, Vol. III, p. 131 *et seq.*, and in the Discussion of Blackstone's Opinion appearing in Lord Eldon's Judgment in *Crowley's* case (5). From these authorities it appears that the writ of *habeas corpus* was originally issuable out of the Court of King's Bench and out of the Court of Chancery; but that in very early days the Courts of Common Pleas and Exchequer had claimed the right to issue the writ in protection of their own officers and suitors, and that this practice had been gradually extended to other cases. In the seventeenth century the Habeas Corpus Act, 1640 (16 Chas. I, c. 10), expressly recognises the right and duty of the Court of Common Pleas to order the writ to issue; and the Habeas Corpus Act, 1679 (31 Chas. II, c. 2, sec. 10), enacts that it shall be lawful to move and obtain *habeas corpus* as well out of the High Court of Chancery or Court of Exchequer as out of the Courts of King's Bench or Common Pleas or either of them. This latter Act further provided that the Lord

(1) 20. Q.B.D. at p. 13.
(2) 15 A.C. 506. (3) 18 N.Z.L.R. 601.
(4) 1924, 1 Dom. R. 910. (5) 2 Sw. at p. 39 *et seq.*

Chancellor or any one of His Majesty's Justices might grant a *habeas corpus* in vacation and imposed heavy penalties upon any Judge who wrongfully refused to entertain the application. It was conceded for the respondent that under the terms of this statute application could be made in vacation to successive Judges of the same Court. This led to the curious result upon the respondent's argument that if application were made in vacation it could be renewed to each Judge of the Court, but that if it were made in term it could only be made once to the Court of Chancery and once to each of the three Courts of Common Law. But a far more serious consequence of the respondent's argument would be the effect upon the right to apply for this writ of the Judicature Act of 1873. That statute combined into one Court the old High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer, together with the Admiralty and Probate Courts and the Court for Divorce and Matrimonial Causes. If, therefore, the respondent is right in contending that an application for a writ of *habeas corpus* can only be entertained once by any one Court, it necessarily follows that the effect of the Judicature Act must have been to deprive the subject of the right which he had previously enjoyed of applying successively to the Court of Chancery and to each of the three Common Law Courts, and to limit him in future to one application to the Supreme Court of Judicature. Their Lordships would be reluctant to reach such a conclusion unless compelled to do so by clear words. The writ of *habeas corpus* is a high prerogative writ for the protection of the liberty of the subject, and it would be a startling result if a statute enacted primarily for simplification of procedure should have materially cut down that protection. But, in fact, their Lordships do not think that the Judicature Act has had this result, or that the contention of the respondent is well founded.

It is true that there is no reported case before the year 1873 of applications being made to successive Judges of the same Court; but it must be remembered that the Common Law Courts usually sat *in banco* so that an application to the Court was in effect an application to all the Judges of the Court sitting together; and there is a precedent for application being made to a Judge of the Court of Exchequer sitting in Chambers and a subsequent application being made to the Court of Exchequer in the case of *Ex parte Partington* (1), where Baron Parke says:—

> This case has already been before the Court of Queen's Bench on the return of a *habeas corpus* and before my Lord Chief Baron at Chambers on a subsequent application for a similar writ. In both instances the discharge was refused. The defendant, however, has a right to the opinion of every Court as to the

(1) 13 M. and W. 679.

> propriety of his imprisonment and therefore we have thought it proper to examine attentively the provisions of the Statute without considering ourselves as concluded by these decisions."

If it be conceded that any Judge has jurisdiction to order the writ to issue, then in the view of their Lordships each Judge is a tribunal to which application can be made within the meaning of the rule and every Judge must hear the application on the merits. It follows that, although by the Judicature Act the Courts have been combined in the one High Court of Justice, each Judge of that Court still has jurisdiction to entertain an application for a writ of *habeas corpus* in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other Judge has already refused a similar application. The same principle must apply in the case of the Judges of the Supreme Court of Nigeria.

It follows that, in the opinion of this Board, the learned Judge was wrong in refusing to hear the application in the present case on its merits, and the appeal must be allowed. In expressing that view, their Lordships must not be taken to be offering any opinion upon the merits of the application or upon the validity of the orders impugned. These matters will be investigated by the learned Judge who hears the application and will be decided by him on the evidence already filed and any further evidence which may be placed before him. The appellant must have the costs of his appeal here and below; the costs of the application before Mr. Justice Tew must abide the result of the re-hearing. Their Lordships will humbly advise His Majesty accordingly.

CASES DECIDED IN THE FULL COURT.

REX

v.

JACOB KEHINDE COKER.

CASE STATED FOR THE OPINION OF THE FULL COURT.

Publication of defamatory matter—Criminal Code, sections 373 et seq—Evidence of publication—Plea of qualified privilege—Procedure as to plea of justification—Section 6 of Lord Campbell's Act (6 & 7 Vic. c. 96) applies to Nigeria.

J. K. Coker was convicted on the 4th October, 1927, of publishing defamatory matter concerning the Alake of Abeokuta.

The defendant had filed a plea of qualified privilege, but had not filed a plea of justification. His plea was struck out and he was not allowed to give evidence of the truth of rumours referred to in the defamatory matter.

The Court stated a case on several points of law which sufficiently appear from the judgments. The Full Court affirmed the conviction.

Held (*inter alia*) that those provisions of section 6 of Lord Campbell's Act (6 and 7 Vict. c. 96) which prescribe the manner in which the defence of justification must be pleaded, are in force in Nigeria, though not incorporated in the Criminal Code or in the Criminal Procedure Ordinance, and that the Court below was right in refusing to admit evidence of the truth of the rumours.

O. Alakija and *Folarin* for the prosecutor.

Zizer and *Ayo Williams* for the defendant.

The following judgment was delivered at the Abeokuta Assizes on the 4th October, 1927, by

TEW, J.

The defendant is charged with publishing defamatory matter concerning the Alake of Abeokuta in a newspaper called *Eko Igbehin*. The article containing the defamatory matter, as set out in the information, reads as follows:—

> "For few months back rumour was afloat that several people are "marked out for destruction by the Alake of Abeokuta, pro- "minent amongst those mentioned are Messrs. J. K. Coker, "the Lisa of Iporo, W. A. Turner, the Intoji Oko, and A. K. "Ajisafe of 20 and 22 Jones Street, Ebute Metta. The "method arranged for carrying these out as reported was "by poison or assassination by robbers or employed agents.

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"The rumour reported that these chiefs are being watched day and
"night, on this account their friends and relatives advised
"them not to visit Abeokuta till the troubles are over; mis-
"chievous medicine men are several times caught at Ifako the
"residence of Mr. J. K. Coker and on being examined reported
"their errand which confirms the above rumour and connected
"the Alake with it. Several burglars from Abeokuta are found
"loitering around Ifako and being detected were driven away;
"several attempts were made on Messrs. A. K. Ajisafe and
"W. A. Turner but were frustrated."

It is rather difficult to determine whether the whole of this passage is repetition of rumour, or whether part of it is the writer's own statement: but in this particular case the point is not really material. It is hardly necessary to say that the whole passage is defamatory. The defendant had filed a plea, not of justification, but of qualified privilege. There is no precedent for such procedure, as the defence of qualified privilege can be raised on a general plea of Not Guilty, and the plea was therefore struck out. It was proved that the libel had been signed by the defendant and published in the issue of *Eko Igbehin* dated the 1st April, 1927, and that it had been handed to the printer by the editor of that paper. The editor had died before the preliminary investigation of this case.

On these facts it was submitted by the defence that publication by the defendant had not been proved; but it was ruled that, if a person writes a libel which is afterwards printed, this is *prima facie* at least a publication of the libel by the defendant. (*See* Odgers on Libel 4th Edition page 625).

The defendant in cross-examination was asked if he had published the libel. He at first refused to answer on the ground that his reply might tend to incriminate himself, and, on being pressed to do so, denied publication. He said that he had written the letter, which is addressed simply "To the Editor," and placed it on a shelf in his bedroom whence it had mysteriously disappeared. He admitted that nobody but his servants, who are illiterate, had access to this room. He further admitted that he had sent the same letter to the editor of *The Nigerian Spectator*, another newspaper published in Lagos, and that it had been returned to him. He declared that the letter had been sent to that paper not for publication, but for correction by the editor, and he admitted that he had been advised not to publish it. By the time he received this advice the letter had already been published in *Eko Igbehin*.

I have no hesitation in disbelieving the defendant's story, which bears the stamp of falsehood upon it throughout.

The defendant also applied for leave to file a plea of justification at this stage. The application was refused, and Counsel was warned that, in the absence of such a plea, no evidence of the truth of the rumours or statements constituting the defamatory matter could be allowed.

The defence was based on section 379 of the Code which sets out cases in which the publication of defamatory matter is conditionally privileged. The particular cases which Counsel sought to apply to this case are contained in paragraphs (7) and (12) which read respectively as follows:—

> "(7) if the publication is in good faith for the purpose of seeking remedy or redress for any private or public wrong or grievance from a person who has, or is reasonably believed by the person publishing to have, the right to remedy or redress such wrong or grievance;
>
> (12) if the defamatory matter constitutes information given to the person to whom the defamatory matter is published, with respect to some subject as to which he has, or is on reasonable grounds believed to have, such an interest in knowing the truth, as to make the conduct of the person giving the information reasonable under the circumstances."

There is a proviso to paragraph (12) that the defamatory matter must be relevant to the subject therein mentioned, and must be either true or be made without ill-will to the person defamed and in the honest belief, on reasonable grounds, that it is true. How the publication in a newspaper of rumours to the effect that some person is intending to murder other persons can be said to fulfil any of the conditions laid down in either of the paragraphs quoted above I am unable to understand. It would be perfectly absurd to hold that the occasion was privileged, and, that being the only defence, apart from the question of publication, it follows that the defendant must be convicted. He gave evidence, a good deal of which was really inadmissible. A person who repeats rumours does so at his peril and is in no better position than his informants, and evidence of the rumours is inadmissible. (Odgers on Libel 4th Edition pages 369-70.)

It is hardly necessary to repeat that, in the absence of a plea of justification, no evidence can be given that such rumours are true.

If the defendant had admitted frankly that he had published these libels and had stated that he had done so in good faith, I should have been inclined to treat him with greater leniency, especially as I am satisfied that he was at one time at least well disposed towards the prosecutor and was instrumental in securing

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his appointment to the office of Alake. The defendant will pay a fine of £100 within fourteen days and in default of payment will go to prison with hard labour for four months. He will also pay the costs of the prosecution up to an amount not exceeding £75.

These costs will be paid to the prosecutor within fourteen days.

TEW, J.

At the adjourned hearing of the appeal Howard, S.G., appeared by request of the Court as *amicus curiae* to argue the question whether those provisions of section 6 of Lord Campbell's Act (6 and 7 Vict. c. 96) which prescribed the procedure with regard to a plea of justification are in force in Nigeria.

The following judgments were delivered by the Full Court on the 13th January, 1928.

COMBE, C.J.

At the Assizes held at Abeokuta in August last the appellant was charged with publishing defamatory matter contrary to section 375 of the Criminal Code, the particulars of the offence as set out in the information being as follows:—

> JACOB KEHINDE COKER on the 1st day of April, 1927, at Lagos in the Colony published defamatory matter affecting Ademola, Alake of Abeokuta, in the form of a letter to the editor of a weekly newspaper called *Eko Igbehin* published in the issue of the 1st April, 1927, which contained the following defamatory matters concerning the said Ademola, Alake of Abeokuta:—
>
> "For few months back rumour was afloat that several people are "marked out for destruction by the Alake of Abeokuta, pro- "minent amongst those mentioned are Messrs. J. K. Coker, "the Lisa of Iporo, W. A. Turner, the Intoji Oko and A. K. "Ajisafe of 20 and 22 Jones Street, Ebute Metta. The method "arranged for carrying these out as reported was by poison or "assassination by robbers or employed agents.
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> "The rumour reported that these chiefs are being watched day and "night, on this account their friends and relatives advised "them not to visit Abeokuta till the troubles are over; mis- "chievous medicine men are several times caught at Ifako the "residence of Mr. J. K. Coker and on being examined reported "their errand which confirms the above rumour and connected "the Alake with it. Several burglars from Abeokuta are found "loitering around Ifako and being detected were driven away; "several attempts were made on Messrs. A. K. Ajisafe and "W. A. Turner but were frustrated."

The accused was found guilty of the offence and was ordered to pay a fine of £100 and £75 costs, but the learned Judge has stated the following case for the opinion of the Court on four questions of law which arose on the trial:—

" The defendant was tried by me on the 28th September, 1927, on the charge of publishing defamatory matter concerning Ademola, Alake of Abeokuta, in a newspaper known as *Eko Igbehin*.

" A copy of the information is attached hereto.

" The defendant had not filed any plea of justification, but had filed a written plea of qualified privilege in which he attempted to incorporate allegations as to the truth of the defamatory statements.

" This plea I struck out, leaving the defendant to raise the defence of qualified privilege under the general plea of Not Guilty.

" I refused to allow a plea of justification to be filed at that stage or to admit evidence of the truth of the defamatory statements.

" I found that the words complained of were defamatory on the face of them, that they were published by the defendant, and that the occasion was not in any way privileged. I therefore convicted the defendant. A copy of my judgment is also attached hereto.

" The defendant has applied for a case to be stated on the following grounds:—

" 1. That there is no evidence that the accused published the alleged defamatory matter.

2. There is no evidence to prove or support the allegation contained in the particulars of offence that the accused published defamatory matter in the form of a letter to the editor of a weekly newspaper called *Eko Igbehin.*"

3. That the learned Judge below wrongly rejected evidence in favour of accused to support the plea of conditional privilege.

4. The matter complained of is not sufficient to constitute a defamatory matter so as to warrant the information laid.

5. That the learned Judge below was wrong in striking out the particulars of conditional privilege pleaded.

6. Misreception of evidence in favour of the prosecution.

7. Misdirection.

" At the hearing of the motion the defendant's counsel stated the grounds as follows:—

(i) No evidence of publication.

(ii) No evidence of publication to *Eko Igbehin*.

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(iii) Court wrongly rejected evidence as to truth of rumours.

(iv) Matter published not defamatory.

(v) Court was wrong in striking out plea of conditional privilege.

(vi) Evidence as to writing of letter not admissible.

COMBE
C.J

(vii) Court misdirected itself in holding that there was evidence of publication? "

" The first, second, sixth and seventh grounds can be taken together. It was proved that the letter addressed "To the Editor" containing the libel charged was signed by the defendant and he admitted that he had written it. I have set out fully in my judgment my reasons for holding that publication by the defendant to the editor of the paper in which the libel appeared had been proved.

" As to the third ground, it is laid down in Lord Campbell's Libel Act (6 and 7 Vict. c. 96 sec. 6) that on the trial of any indictment or information for a defamatory libel there can be no enquiry into the truth of the libel unless the defendant has pleaded justification and has further alleged that it was for the public benefit that the libel should have been published.

" As to the fourth ground, I held that a statement that A is attempting to murder B is clearly defamatory of A.

" As to the fifth ground, I have set out in my judgment my reasons for striking out the plea of qualified privilege. I have already alluded to an additional reason, *viz.*, that the defendant attempted to introduce into this plea suggestions that part at least of the defamatory matter was true.

" The questions for the decision of the Full Court are as follows:—

(i) Was I right in holding that there was evidence of publication by the defendant?

(ii) Was I right in holding that the matter published was defamatory?

(iii) Was I right in refusing to admit evidence of the truth of the rumours alluded to in the said matter?

(iv) Was I right in striking out the plea of qualified privilege, seeing that the defendant was not thereby debarred from raising that defence?

With regard to the first and second of the questions for the decision of this Court it is unnecessary to say anything except that there was ample evidence to justify the finding that the matter

was published by the appellant as alleged in the information, and that the matter published was clearly defamatory as that term is defined by section 373 of the Criminal Code.

The third question is one of considerable importance, as it raises the question as to whether section 6 of Lord Campbell's Libel Act, in so far as it prescribes the time at, and manner in which, justification shall be pleaded, applies in Nigeria. If it does not apply, then a person charged with the offence of publishing defamatory matter contrary to section 375 of the Criminal Code is entitled on pleading Not Guilty to prove that the publication was, at the time it was made, for the public benefit, and that the defamatory matter was true, as no provision has been made in any Ordinance requiring that the plea of justification must be specially pleaded. I am satisfied that Lord Campbell's Libel Act is a statute of general application which is in force in Nigeria by virtue of section 14 of the Supreme Court Ordinance, except in so far as the provisions of that Act have been incorporated in any Ordinance of Nigeria or are inconsistent with the provisions of any Ordinance. The provision of sections 3, 4 and 5 of Lord Campbell's Act which define offences and prescribe penalties have been incorporated, with or without alteration, in the Criminal Code, and no person can now be charged in Nigeria with having offended against those sections of the Act, since by section 2 (1) of the Criminal Code Ordinance it is enacted that " the provisions contained in the Code of Criminal Law set forth in the Schedule to the Ordinance, and hereafter called ' the Code ' shall be the law of Nigeria with respect to the several matters dealt with."

For the same reason that part of section 6 of Lord Campbell's Act which provides that it is a defence to a charge of publishing a defamatory libel if it is proved that the publication is for the public benefit and that the matter published is true, has ceased to apply to Nigeria, as that is a matter which has been dealt with by section 377 of the Criminal Code.

Section 6 of Lord Campbell's Act, in addition to allowing the defence of justification, makes very necessary provision with regard to the time at, and manner in which, the defence of justification shall be pleaded, the answer which may be made to that plea, and the consequences of a failure to establish that defence. The Criminal Code is entirely silent on the subject of those further important and necessary matters, and no provision has been made in any other Ordinance to be substituted for the provision of section 6 of Lord Campbell's Act which have not been dealt with in the Code.

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Unless therefore it must be assumed that the Legislature intended that these provisions of section 6 of Lord Campbell's Act which were not incorporated in the Code should cease to apply in Nigeria, those provisions are, in my opinion, still the law of Nigeria which governs the matters with which they deal.

COMBE,
C.J.

In my opinion such assumption would not be justified. It was essential that that part of section 6 of the Act which was incorporated in the Criminal Code should be dealt with by the Code if it was intended that the publication of defamatory matter could be justified, as after the enactment of the Code the Court would have to look to the Code and not to the Act to ascertain what the prosecution must prove to establish the offence of publishing defamatory matter, and whether the publication of defamatory matter could be justified. If the provision of section 377 of the Code which incorporates a portion of section 6 of Lord Campbell's Act had not been inserted in the Code, the publication of defamatory matter could not be justified in Nigeria, notwithstanding that the publication is for the public benefit and the matter published is true.

It is not necessary to insert in the Criminal Code those provisions of section 6 of Lord Campbell's Act which relate to procedure, as the Courts are not required to look to the Code alone to ascertain what is the law of Nigeria which governs the procedure on the trial of criminal cases. The primary purpose of the Criminal Code was to define offences and to prescribe penalties, and I do not consider that I should be justified in assuming that the Legislature intended that the very necessary and proper provisions regarding procedure in section 6 of Lord Campbell's Act should cease to apply in Nigeria because those provisions were not incorporated in the Code.

In my opinion the provisions of section 6 of Lord Campbell's Act which prescribe the time and the manner in which justification may be pleaded in answer to a charge of publishing defamatory matter was the law in Nigeria which governed those matters before the Criminal Code Ordinance was enacted, and, as those matters were not dealt with by that Ordinance, and have not since been dealt with by any other Ordinance, it is still the law of Nigeria to which the Courts must look to ascertain how and when justification can be pleaded as a defence to a charge of publishing defamatory matter.

As the appellant failed to comply with the provisions of section 6 of Lord Campbell's Act, the learned Judge was in my opinion right in refusing to admit evidence of the truth of the rumours alluded to in the defamatory matter published by the appellant.

Counsel for the appellant did not contend either in this Court or in the trial Court that those provisions of section 6 of Lord Campbell's Act did not apply in Nigeria; but, as the question was raised by the case stated and is one of considerable importance, the Court invited the Solicitor-General to argue the question as *amicus curiae* and was greatly assisted by his argument.

The contention of Counsel who appeared for the appellant on the third question was that evidence of the truth of the rumour was admissible in support of the defence which had been raised that the publication was conditionally privileged under paragraphs (7) and (12) of section 379 of the Code, as it was incumbent on the appellant, if he relied on that defence, to satisfy the Court that he honestly believed that the matter published was true.

As, however, the learned Judge had very rightly held that the publication was not privileged under either of those paragraphs, even if the appellant honestly believed that the matter published was true, the question as to whether the appellant believed that the matter published was true did not arise, and the learned Judge was right in excluding as irrelevant to the issues to be tried any evidence to prove the truth of the rumours.

The answer to the final question before the Court must in my opinion also be in the affirmative for the reasons given by the learned trial Judge in the case stated and his judgment. In my opinion therefore all the questions before the Court should be answered in the affirmative and the conviction should be confirmed, and the appellant should be ordered to pay ten guineas the costs of this appeal.

MAXWELL, J.

I concur.

PETRIDES, J.

I agree with the learned Chief Justice, whose judgment I have had the advantage of reading, that all four questions raised in the case stated should be answered in the affirmative and the conviction confirmed.

The answer to the first and second questions is so obviously in the affirmative that they call for no comment.

The fourth question of the trial Judge was in the following terms:—

> "Was I right in striking out the plea of qualified
> "privilege, seeing that the defendant was not thereby
> "debarred from raising that defence?"

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Our laws nowhere provide that a plea of qualified privilege may be pleaded, and it is therefore clear that the plea was redundant and was properly struck out. Although the plea was struck out the defendant's position was not in the least prejudiced, as he was not thereby debarred from raising the substance of that plea when he pleaded "not guilty," as is shown by the fact that his counsel did verbally raise the defence that the defamatory matter was conditionally privileged under section 379 (7) and (12). It is quite clear from the terms of the defamatory matter and the manner of publication that its publication was not conditionally privileged under either of the sub-sections relied on, even if the defendant were able to prove that he honestly believed the defamatory matter to be true. The defendant having failed to prove that the publication of the defamatory matter complained of was conditionally privileged, it follows that evidence could not be tendered under a plea of conditional privilege that the defendant honestly believed it to be true.

By section 377 of the Criminal Code the publication of defamatory matter is not an offence if the publication is, at the time it is made, for the public benefit, and if the defamatory matter is true.

Section 6 of Lord Campbell's Act, 1843, provides that on the trial of a person for defamatory libel the truth of the matters charged may not be inquired into unless truth and public benefit are pleaded, and the truth of the matters charged shall not amount to a defence unless it was for the public benefit that the said matters charged should be published.

If these provisions of section 6 of Lord Campbell's Act apply to Nigeria, it is clear that, if the defendant desired to urge truth and public benefit as a defence, he was bound to plead them as required by that section. The plea is a double-edged weapon, as when the plea has been raised it is competent for the Court, under the section referred to, in pronouncing sentence to consider whether the guilt of the defendant is aggravated or mitigated by the said plea and by the evidence given to prove or disprove the same.

The defendant has not pleaded truth and public benefit and his counsel has not urged either at the trial or before this Court that the provisions of section 6 of Lord Campbell's Act do not apply in Nigeria.

Although the defendant's counsel has not suggested that these provisions are not applicable, this Court has had to satisfy itself, that they do apply before it could answer the third question in the affirmative.

I do not think that it is open to doubt that Lord Campbell's Act, which was in force in England on the 1st January, 1900, was a statute of general application and therefore in force in Nigeria by virtue of section 14 of the Supreme Court Ordinance, subject to the terms of that or any other Ordinance in force in Nigeria.

Now the provisions of section 6 of Lord Campbell's Act referred to relate mainly to procedure when the defence of truth and public benefit are raised and to a certain extent to the admissibility of evidence. If the law of criminal procedure had been codified in this country, there is no doubt that if the code had been properly framed the code would have been the enactment which governed procedure in criminal cases. There is, however, no criminal procedure code in force in Nigeria. The nearest approximation to a code is the Criminal Procedure Ordinance which, as its full title indicates, is an Ordinance to make provision in relation to criminal law and procedure. Leaving aside the full title to that Ordinance, but examining its contents, it becomes quite clear, I think, that it was not the intention of the Legislature to make that Ordinance in effect a code of criminal procedure. For example, if one reads section 100 of that Ordinance, it will be seen that, although an accused person is required to plead to an information, the pleas he may make are not enumerated. It is obvious that pleas of *autrefois convict* or *autrefois acquit* are contemplated, as it is expressly stated what will suffice for those pleas. Nothing, however, is said about pleas to the jurisdiction or in abatement or demurrers or the plea of pardon.

I come to the conclusion that the Criminal Procedure Ordinance cannot be regarded as anything more than a guide to criminal procedure which requires to be supplemented by reference to the English law on the subject in force on the 1st January, 1900, which is not inconsistent with the provisions of the Criminal Procedure Ordinance.

Although I am quite satisfied that the provisions of section 6 of Lord Campbell's Act referred to above were not superseded by the Criminal Procedure Ordinance, I was much exercised in my mind as to whether those provisions were not superseded by the Criminal Code Ordinance. While the Criminal Code has superseded a good many of the provisions of Lord Campbell's Act, including a part of section 6, I am quite satisfied for the reasons given by the learned Chief Justice that it does not supersede the provisions relating to the plea of truth and public benefit.

I am quite satisfied that by the law in force in Nigeria truth and public benefit must be specially pleaded under section 6 of

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Lord Campbell's Act when it is sought to set up as a defence that the defamatory matter is true.

I have gone into the question at considerable length, as counsel for the defence suggested that the defendant had been prevented without justification from proving the truth of the defamatory matter. There are no grounds for such a suggestion, for if the defendant had desired to set up the truth of the defamatory matter he could have done so by pleading " truth and public benefit " as required by section 6 of Lord Campbell's Act. He has not chosen to do so and in consequence was quite properly prevented from giving evidence of the truth of the defamatory matter.

I am much indebted to the Solicitor-General for his able arguments as *amicus curiae* which have been of the greatest assistance.

CHIEF UWANI ... ... *Plaintiff-Respondent.*

v.

NWOSU AKOM AND OTHERS ... ... *Defendants-Appellants.*

Land occupied by strangers to the community—Ejectment of such strangers on account of dealings between themselves in the land—Relief against forfeiture.

The appellants were headmen of four compounds of Aros who had settled at Ukpom in the Bende District with the permission of the respondent as representing the community to whom the land belonged. One Aro having sold or mortgaged his portion of the land to another, the respondent took proceedings in the Provincial Court to eject the people of all four compounds. The Provincial Court ordered the appellants to quit the land within two weeks. On appeal to the Divisional Court the order of the Provincial Court was upheld with a slight variation. On appeal to the Full Court it was held that the Court could not give judgment on the facts so far appearing without further information, and the Provincial Court was directed to furnish replies to a number of questions.

On the replies being received it was held that the order of the Courts below was inequitable, and that the appellants should be allowed to remain on the land occupied by them on payment of an annual tribute to the respondent and his people.

Rhodes for the appellants.

Renner for the respondent.

The first judgment of the Full Court (Combe C.J., Tew and Petrides J.J.) in this matter was delivered on the 30th January, 1928 by

COMBE, C.J.

In this case the plaintiff suing in the Provincial Court of the Owerri Province on behalf of himself and the people of Ukpom claimed against the four defendants who are the headmen of four compounds of Aros an injunction to order the defendants to quit from the plaintiff's land.

On the case coming on for hearing before the District Officer Bende on April 2nd, 1925, the District Officer made the following entry in the Court record book:—

> " Plaintiffs state defendants trying to sell land belonging to Ukpom.
> " Defendants admit that they own no land at Ukpom. They
> " took action in Native Court *vide* Court Case No. 74/25 and
> " 83 of February, 1925 claiming land amongst themselves.
> " There is no objection to defendants settling in another part of
> " Bende. Finding. The injunction granted with 19s. costs."

On the following day the defendants asked the District Officer to review his judgment on the ground that they had crops growing on the land, and the District Officer then took evidence as to the alleged improper dealing by the Aros with the land which they had been permitted by the people of Ukpom to occupy.

The evidence is not very fully recorded and the District Officer has not recorded his findings or his reasons for his findings, but it appears that it is e tablished that some members of this Aro community sold or mortgaged the farming rights of one Inyama, a member of their community, to one Obona. Inyama, who appears to have been away at the time, was annoyed on his return to find Obona clearing his farm, and took action in the Court to prevent Obona from continuing farming operations on the land.

With this evidence before him the District Officer stated that he saw no reason to alter the injunction and he gave the defendants two weeks in which to move from the land. From this judgment the defendants appealed to the Divisional Court, where the learned Judge altered the judgment of the Provincial Court to read:

"The Court grants recovery of possession and orders defendants to quit from the land within two months from 1st March, 1927."

The defendants have appealed to this Court on the grounds set out in the grounds of appeal filed.

It has been stated by Counsel for the appellants that he is instructed by his clients that the effect of the judgment appealed against, if it is allowed to stand, will be that some 400 Aros will have to leave their homes on the land on which they have been permitted by the people of Ukpom to build their houses, and will have to sacrifice some hundreds of cocoa and cocoanut trees which they have been allowed to plant on Ukpom land. That the only offence, if any, against native law and custom which has been committed is that some members of the Aro community have, in order to obtain money which one member of their community had been ordered to pay, transferred or mortgaged the interests of that member in a farm to another member of their community.

If the facts are as stated by Counsel it appears to me that there may be two substantial questions arising on this appeal namely:—

(*a*) Whether the Aro community represented by the defendants had offended against native law and custom so as to render the community liable to forfeit all their rights on the land which they have been permitted to occupy; and

(*b*) If they have offended, whether relief against forfeiture should not be granted.

Counsel for the respondents is not in a position to challenge the facts as stated by Counsel for the appellants, and there is nothing on the record to assist the Court to ascertain the facts which should be before the Court when considering those questions.

Rule 26 of Order 53 in Schedule II of the Rules of Court empowers this Court to direct the Provincial Court to enquire into and certify its finding on any question which the Court may think fit to determine before giving judgment on the appeal. As the Court cannot give judgment on the facts appearing on the record, and in order to save the parties the expense of a retrial, the Provincial Court should in my opinion be required to enquire into and certify its findings on the following questions:—

1. The approximate area of the land which the Aro community represented by the defendants have been permitted by the people of Ukpom to occupy.

2. For how long has the Aro community been occupying this land.

3. The approximate number of the members of the Aro community living or farming on the land.

4. The number of houses on the land belonging to the members of the Aro community.

5. The approximate number of coconut trees and other fruit-bearing trees belonging to the Aro community on the land.

6. Whether Obona to whom Inyama's farming rights were sold or mortgaged is a member of the Aro community represented by the defendants or a stranger.

7. If Obona is a member of the said Aro community, whether the members of that community as occupiers of Ukpom land have offended against native law and custom in selling or mortgaging Inyama's farming rights to Obona.

8. If the members of the said Aro community have so offended, whether the offence would by native law and custom be punished by forfeiture of the rights of the said community in respect of the whole of the area occupied by them.

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The final judgment of the same Full Court was delivered on the 26th May, 1928, by

COMBE, C.J.

COMBE, C.J.

When this appeal in which the four defendants representing four compounds of Aros have appealed from the judgment of the Divisional Court which, on an appeal from a Provincial Court, granted the plaintiff recovery of possession of land at Ukpom-Bende, was before the Full Court in January of this year, the Court directed the Provincial Court in which the action was commenced to enquire into and certify its findings on certain questions in order that this Court could decide the following questions:—

(*a*) Whether the Aro community represented by the defendants had offended against native law and custom so as to render the community liable to forfeit all their rights on the land which they have been permitted to occupy; and

(*b*) If they have offended, whether relief against forfeiture should not be granted.

The findings of the Provincial Court on the questions referred establish the fact that some members of the Aro community have been concerned in selling or mortgaging the occupation rights of one member of their community to another member of the community, and have thereby offended against native law and custom. As to penalties which could be imposed for such offence the Provincial Court reports as follows:—

> "Native law and custom would appear to be somewhat flexible on this point, but it would seem to rest with the owner of the land to decide the extent of the punishment, and plaintiff is within his rights according to native law and custom in compelling the Aro community to quit the land. The Aro community in the event of such action would be entitled to remove all crops that they have planted."

It is further established that the effect of the order made by the Divisional Court would be that about 310 Aros would have to leave on area of about fifteen square miles which the Aros have occupied for about fifty years, and on which they have about 100 houses and many fruit-bearing trees planted by themselves, from which and from the other products of the land the community derive an annual income of over £1,000.

It may be that the trivial offence committed by some members of the Aro community would render the whole Aro community liable to be ejected from the land, although I cannot but think that, if the question of the native custom was further investigated, it might be found that it is the persons who were parties to the offence and not the whole community who would be so punished. However that may be, I consider, and Counsel who appeared for the respondent

has conceded, that it would be most inequitable to eject the whole community from their homes and from the lands on which they depend for their maintenance because some members have committed an offence of a trivial nature.

It appears that the owners of the land are a much smaller community than the Aro community occupying the land, and it is probable that the owners view with the gravest suspicion any act by their tenants which might suggest that they may in the future claim to be the owners of the land, and would be glad to be rid of them so that their anxiety may be removed.

It appears to me that as a punishment for the offence committed by some members of the Aro community that community should be ordered to pay an annual tribute in respect of the land occupied by them of £15 a year. The payment of such tribute would be a yearly recognition by the community that the community represented by the plaintiff are the owners of the land, and will remove any fear that the owners may have that the Aro community may in future claim and establish that they own the land occupied by them.

The order of the Divisional Court should, I consider, be set aside and the community represented by the defendants should be ordered to pay an annual tribute of £15 to the people of Ukpom-Bende in respect of the land now occupied by the defendant community. The first payment to be made within three months of the date of the order of this Court.

LUIGI AMBROSINI, LTD. ... ... *Plaintiffs-Appellants.*

v.

VICTOR ADE. ALLEN,

BAKARE TINKO,

TOGONU BICKERSTETH,

EMANUEL SHAW ... ... *Defendants-Respondents.*

Verbal plea admitting liability made in error of real facts—Amendment of plea by the Court—Order 26 of Rules of the Supreme Court—Amendment of plea may be made by the Full Court—Order 53 rule 27—Terms on which amendment should be made.

At the trial of the action the defendant Allen had admitted liability up to a certain amount. The two other defendants (the fourth not having been served), who were sureties under a bond, verbally admitted liability for such amount as the principal debtor should be found to owe.

The Divisional Court found that in fact Allen had contracted no liability to the plaintiffs after the date of the bond and, in spite of the plea, entered judgment for the defendant sureties.

Held, on appeal to the Full Court (Maxwell, J., dissenting) that the decision of the Divisional Court was right, but that the learned Judge could, and should, have amended the plea when he discovered the real facts, and that the necessary amendment must be made by the Full Court on the terms of payment by the respondents of the costs incurred through their negligence.

Knowles *v.* Roberts (1) considered and distinguished.

Irving and *Johnson* for the appellants.

Doherty for the respondents.

The following judgments of the Full Court were delivered on the 31st May, 1928

COMBE, C.J.

The plaintiffs appeal from the judgment of the Divisional Court in favour of the second and third defendants on the grounds that:—

(1) The judgment was wrong in law in that the learned Judge after reserving judgment, decided the case in the defendants' favour on an issue or plea that had not, throughout the proceedings, been raised or tried.

(2) The judgment was wrong in law in that the learned Judge having found for the plaintiffs on the only issue before the Court, judgment should have been entered for the plaintiffs with costs.

(1) 38 Ch. D. 263.

The plaintiffs by their summons claimed from the three defendants the sum of £759 5s. 9d. being (1) £739 15s. 5d. balance due on advance account per acknowledgment dated 1st October, 1925; (2) £7 10s. cost of one tarpaulin lent and not returned; (3) £11 15s. 4d. cost of 169 new bags lent and not returned; (4) 15s. value of one table lent and not returned.

The second and third defendants were sued as sureties. The first defendant counterclaimed from the plaintiffs the sum of £1,600 4s. 9d. and furnished particulars of his counterclaim. No pleadings were filed and the plaintiffs did not furnish particulars of the sum of £739 15s. 5d. claimed by them. On the case coming on for hearing before Mr. Justice Van der Meulen, in March, 1926, the plaintiffs and the three defendants were represented by Counsel.

The entry made in the record by the learned Judge as to the pleas was as follows:—

Plea to claim—no liability admitted.

Second and third defendants liable to extent of liability of first defendant.

Plea to counterclaim—No liability admitted.

The Lagos agent of the plaintiffs in giving evidence produced the account referred to in the summons, at the foot of which there was an acknowledgment by the first defendant dated October 1st, 1925, that the sum of £739 15s. 5d. was then due from him to the plaintiffs, if no allowance was made to him for shrinkage in the produce purchased by him. The first item on the debit side of that account was £3,463 15s. 4d. brought forward. All other items in the account related to money advanced to the first defendant and credits to him during the months of July, August and September, 1925. An examination of this account would not show on what dates prior to July, 1925, money had been advanced to the first defendant by the plaintiffs. The agent also produced a bond dated January 15th, 1924, executed by the second and third defendants as sureties for the first defendant in his employment with the plaintiffs as a produce buyer in the sum of £500.

During cross-examination the agent produced, for the purpose of showing that the first defendant had been credited in his account with all commission earned by him, an account of the transactions between the plaintiffs and the first defendant from April 4th, 1923. An examination of this account (which was marked Ex. " G ") by the second and third defendants or their Counsel would have disclosed the fact that on January 15th, 1924, when the second and third defendants became sureties for the first defendant, he was indebted to the plaintiffs in a sum of over £1,200, and that, so far

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from the first defendant having become further indebted to the plaintiffs, he had in fact reduced the debt by a considerable amount since the second and third defendants became his sureties in respect of further advances made to him by the plaintiffs.

No application was, however, made by Counsel for the sureties, either then or at any time, for the amendment of the plea recorded.

Whether Counsel neglected to examine the account, or examining the account failed to observe the all important facts disclosed, or failed to recognise that those facts provided a complete answer to the plaintiffs' claim as against the sureties, I do not know, I however agree with the learned Judge in the Court below that it is not possible to believe that the sureties intentionally waived a defence which was open to them, as they have throughout the proceedings strenuously resisted the plaintiffs' claim against themselves, even after the first defendant admitted his liability.

The hearing of the action proceeded for two days: but while the first defendant was under cross-examination a settlement was arrived at between the plaintiffs and the first defendant, the latter consenting to judgment being entered against himself for £550. The case was then adjourned for the sureties to consider their position.

On the case again coming on for hearing the learned Judge stated "that in view of the defendants' admission of liability for £550, and the plea of the second and third defendants that they are liable to the extent to which the first defendant is liable, such amount not exceeding the amount for which they have given security, there must also be judgment against second and third defendants for £500 the amount for which they had given security, and he entered judgment accordingly."

From this judgment the second and third defendants appealed to the Full Court on the grounds:

1. The learned Judge was wrong in holding that the acknowledgment signed by the first defendant created an estoppel which precluded him from having any other claims against the plaintiffs besides those stated on the face of the acknowledgment.

2. The learned Judge was wrong in holding that the second and third defendants are bound by the first defendant's submission to a judgment by consent to which they refused to assent.

On January 12th, 1927, the Full Court allowed the appeal on the second ground, and ordered that the case be sent back for retrial as between the plaintiffs and the second and third defendants.

On the case coming before Mr. Justice Petrides in October, 1927, for retrial, the plaintiffs and the second and third defendants were again represented by Counsel. It was agreed by Counsel that the evidence given at the first trial should be treated as evidence given at this trial, and the record in the first trial, including the pleas recorded, was before the learned Judge and became part of the proceedings in the retrial. Some of the witnesses were recalled and some additional witnesses were called. The evidence was entirely directed to the issue as to the extent of the first defendant's indebtedness to the plaintiffs, and Counsel for the second and third defendants addressed the Court solely on that question. The learned Judge reserved judgment, and when examining the bond and accounts put in evidence in the first trial discovered the defence which might have been raised by the sureties. It appeared to the learned Judge that on the facts disclosed the sureties were entitled to judgment: but as he considered that the plaintiffs should be given an opportunity of meeting a defence which had not been previously raised he called upon Counsel for the plaintiffs to show cause why judgment should not be entered for the sureties. Counsel for the plaintiffs protested against the Court taking into account a defence which had not been raised in the first trial or before the Full Court or on the retrial, and submitted that it was incompetent for the Court to investigate the question as to whether the sureties were liable under the bond for any sum found to be due to the plaintiffs from the first defendant. On February 1st, the learned Judge entered judgment for the second and third defendants on the ground that the plaintiffs had failed to prove that the second and third defendants were liable as sureties.

From this judgment the plaintiffs have appealed on the grounds I have already stated, and Counsel for the appellants, in addition to submitting that the learned Judge had decided in favour of the sureties an issue which did not arise in the action after the pleas had been recorded, cited numerous authorities on the question as to when a Judge should or should not exercise in favour of an applicant the discretion allowed to him to amend the pleadings before the Court. I can find nothing in the record suggesting that any application to amend a plea was made or that any amendment was in fact made by the learned Judge.

As I understand the judgment, the learned Judge held (*a*) that, even assuming that the second and third defendants did plead verbally as their sole defence that they were liable to the extent of the liability of the first defendant, the Court was entitled to give judgment in their favour on the ground that, although the liability of the first defendant had been established, the plaintiffs had failed

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to prove that the second and third defandants were liable as sureties, and (*b*) that in fact the second and third defendants had not made an unqualified admission that if the liability of the first defendant was established the plaintiffs were entitled to judgment against them as sureties.

As to (*a*) I regret that I am unable to agree with the learned Judge. I cannot think that, if the defendants at the commencement of the trial did in fact make an admission which relieved the plaintiffs of the onus of proving any fact other than one particular fact, which they did prove, the Court could be justified, whilst that admission stands on the record, in giving judgment in favour of the defendants because the plaintiffs have failed to prove that which they were not required to prove by reason of the admission. If the admission was in fact made by the second and third defendants, but was made in circumstances which would justify the Court in permitting the defendants to withdraw or qualify their admission at a later stage in the trial, the Court could, after such withdrawal or amendment, require the plaintiffs to prove the liability of the second and third defendants as sureties; but unless the admission is so withdrawn or amended it could not in my opinion be ignored by the Court.

On the question as to what was intended by the plea recorded in the first trial, the conduct of the case in the first trial, in the Full Court on the appeal from the judgment in the first trial, and in the retrial, indicates that Counsel for the sureties considered that the only issues to be determined by the Court were whether the liability of the first defendant was established, and if so in what amount?

It may be that the plea " no liability admitted," was the plea of both the first defendant and of the sureties, but it is clear that on the recorded plea the sureties qualified this plea of " no liability admitted " by an admission that, if the liability of the first defendant was established, they also were liable.

I cannot doubt that Mr. Justice Van der Meulen correctly understood and accurately recorded the plea in fact made, as, although the record of the proceedings in which the plea was recorded was before Counsel for the sureties both on the first appeal to the Full Court, and in the retrial, it was not suggested that the plea recorded was not the plea in fact made by the sureties. It is the fact that Mr. Justice Van der Meulen in giving judgment added words to the plea recorded to enable the Court to reduce the amount for which judgment was to be entered against the sureties so as not to exceed the sum for which the sureties had given their

bond. In adding these words the learned Judge was in effect amending the plea, and it has not been suggested that he was not justified in doing so.

I agree with Mr. Justice Petrides that, if Mr. Justice Van der Meulen had observed that on the facts disclosed by the evidence before him the plaintiffs were seeking to recover from the sureties a debt incurred by the first defendant which was not covered by the bond, he would have added such further words to the recorded plea as would be necessary, so that judgment should not be entered against the sureties for a sum which they were under no obligation to pay as sureties for the first defendant. In adding such further words the learned Judge would in effect have further amended the recorded pleas.

I am satisfied that the admission as recorded was in fact made by the sureties, and that the Court could not ignore that admission, although it might amend the admission or allow the admission to be withdrawn.

Although, as I have already stated, I can find nothing in the judgment of Mr. Justice Petrides to suggest that he intended to amend the plea recorded, it is impossible to read his judgment without being satisfied that he would have amended the plea so that he should not have to give judgment against the sureties when it was clearly established by the evidence that they were not liable under the bond given by them. The question therefore arises as to whether this Court can and should allow an amendment which I am satisfied would have been made by the Court below if the learned Judge had realised that an amendment of the plea was necessary if judgment was not to be entered against the sureties.

The question in controversy between the plaintiffs and the sureties was not the narrow question in issue before the Court after the sureties had inadvertently made the admission which was recorded, but was whether the sureties were liable as such in respect of all or any part of the sum claimed from the first defendant. I have no doubt that the learned Judge could have allowed an amendment of the plea so that this wider question could be decided, and that this Court can now make an amendment which could have been made by the Court below.

The more difficult question is whether this Court should at this stage amend the plea. In the conditions which prevail in Nigeria to-day it is, I consider necessary, if justice is to be done, that the Judges should exercise somewhat generously the very wide powers allowed to them by the rules of Court in the matter of amending pleas, more especially verbal pleas recorded in a case tried without

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pleading. It is probable that in this case Counsel for the sureties had not seen at the time the pleas were made the account which was later put in evidence as Exhibit G. It is also probable that Counsel for the sureties assumed, as indeed I understand that Counsel for the plaintiffs assumed, that, as the second and third defendants were sued as sureties, the plaintiffs were claiming in respect of advances made to the first defendant after the date of the bond given by the second and third defendants. Had pleadings been ordered in this case, and full and proper particulars been furnished, the fact that the plaintiffs were claiming in respect of advances made before the second and third defendants became sureties for the first defendant would have been apparent, and it is inconceivable that there would have been an admission of any liability by the sureties. It cannot I think be doubted that, if application had been made to amend the plea of the sureties when the account Exhibit G. had been produced, and Counsel for the sureties had had an opportunity of examining that account, the amendment would have been allowed.

Should the sureties be penalised by having to pay a debt of the first defendant for which they were not his sureties because their Counsel did not when the account was produced examine that account for the purpose of ascertaining that the plaintiffs were claiming only in respect of the advances made to the first defendant after the date of the bond? The sureties and their advisers have been guilty of great carelessness in the manner in which their case had been presented to the Court, and it is with considerable hesitation that I have arrived at the conclusion that this Court should now make the amendment which could have been made, and which, as I have stated, I am satisfied would have been made by Mr. Justice Petrides if he had considered that an amendment of the plea was required if judgment was to be entered for the sureties.

In allowing an amendment of the plea at this late stage the Court must impose upon the sureties " as the price of so great an indulgence " the terms that they pay all costs of the plaintiffs occasioned by their failure to apply for leave to amend their plea when the account Exhibit G. was produced. Such costs will be all the costs of the first trial after the production of Exhibit G., the costs of the appeal to the Full Court from the judgment in the first trial, and the costs of the retrial.

For these reasons I am of opinion that the judgment of the Court below in favour of the first and third defendants should stand, but that the order as to costs should be varied.

I have had an opportunity of reading the judgment of my learned brother Maxwell and I desire to add a few words to my judgment. I entirely agree that the rule " that the Court ought not to dictate to the parties how to frame their case " must be observed by the Courts in Nigeria. I do not, however, understand that rule to limit in any way the right of the Court to allow an amendment of a pleading which is desired by the party whose pleading is to be amended. In the case Knowles *v.* Roberts (1) which is referred to by my learned brother, and in which Bowen L.J. said at the commencement of his judgment (page 270) " It seems to me that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred ", the question before the Court was whether the plaintiff should be required—not permitted—to amend his statement of claim. If Mr. Justice Petrides had in fact given judgment in favour of the sureties, having himself raised a defence which the sureties had not raised and did not desire to raise, I should have agreed that the learned Judge had erred against the rule in question. It is, however, abundantly clear that the sureties desired that the defence that they were not liable to pay anything, as the debt proved was not covered by their bond, should be raised, as when the facts disclosed by examination of the account and bond by the Judge was brought to the notice of the Counsel, the Court was pressed by Counsel for the sureties to give judgment in their favour on that ground. Further I do not consider that Mr. Justice Petrides erred against the rule in bringing to the notice of Counsel facts which they should have observed themselves, but which they had failed to observe, if he had reason to believe that the plea of the sureties had been made inadvertently.

TEW, J.

The appellants took out a summons in January, 1926, claiming from the defendants the sum of £759 5s. 9d. alleged to be due from the first defendant on a trading account, the other defendants being sued as sureties. The fourth defendant, Shaw, was never served with the summons and was at no time a party to the action.

The cause was tried without pleadings before Van der Meulen, J., in March, 1926. The first defendant had put in a counterclaim and the learned Judge recorded the defences in the following terms:—

" Plea to claim—No liability admitted.
Second and third defendants liable to extent of liability of first defendant.

(1) 38 Ch. D. 263.

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"Plea to counterclaim—No liability admitted."

After evidence had been tendered on both sides, Counsel for the first defendant agreed to submit to judgment for £550 and the hearing was thereupon adjourned "to enable the two sureties to consider their position". At the further hearing the learned Judge held that, in view of the first defendant's admission of liability for £550, judgment must be entered against the sureties for £500, the amount for which they had entered into a bond dated the 15th January, 1924, which had been put in evidence at the trial.

The sureties appealed against the judgment, and the Full Court ordered a retrial as between the plaintiffs and the sureties on the ground that the sureties were not bound by the admission of the first defendant, but were entitled to have his liability proved.

TEW, J.

In February, 1928, the action came on for retrial before Petrides, J., and the learned Judge then made the following note:

"First defendant is no longer a party as judgment has been given against him. Fourth defendant is not a party not having been served.

"Counsel for plaintiffs and second and third defendants ask that the evidence given at the first trial be treated as evidence given at this trial.

"*Order.*—Evidence at first trial to be treated as though given at his retrial subject to this, that where a question of credibility arises, I must re-hear witnesses on the point of variance."

Judgment was reserved, and the learned Judge while considering his judgment, found that the plaintiffs' claim referred entirely to losses incurred by them through the acts or omissions of the first defendant at a time prior to the date of the bond by which the other defendants had bound themselves to make good such losses arising in the future. In fact, so far from incurring any further liability after that date, the first defendant had actually reduced his liability to the plaintiffs.

The learned Judge thereupon raised this point at a further hearing and invited arguments upon it. No authorities were cited by either side, but Counsel for the plaintiffs protested that the defendants were bound by their own admission at the first trial, and that it was not competent for the Court to look into a defence that had not been raised at either trial or before the Full Court. The learned Judge, however, considered that he was bound to decide the issue on the evidence before him and gave judgment in favour of the defendants. Against that decision the plaintiffs have now appealed.

It is not clear to me from the judgment under review whether the learned Judge did or did not hold that the defendants had admitted liability provided that the first defendant was found to be liable He seems to have considered it doubtful, and to have thought that possibly the verbal plea of " no liability admitted " recorded at the first trial may have applied to all the defendants. But in any case he evidently held that, even if such an admission had been made, the Court was entitled to disregard or amend the plea if the evidence clearly showed that the admission must have been made under a mistake as to the facts. In one passage he says " Assuming that the second and third defendants did at the trial plead verbally as their sole defence that they were liable to the extent of the liability of the first defendant, does that bind this Court to enter judgment for the plaintiffs, although it is satisfied that the plaintiffs have not proved any cause of action against the second and third defendants "? This question he answers in the negative on the ground that there is no authority in the rules of the Supreme Court for such a proposition.

In a later passage of the judgment, Petrides, J., referring to the judgment of Van der Meulen, J., at the first trial says:—

" Although in his view the second and third defendants had admitted liability to the extent of the liability of the first defendant, he himself only gave judgment in order to comply with the terms of the bond against the second and third defendants for £500, although the first defendant had admitted liability for £550. Can it be doubted that the learned Judge if he had realised that the deficiencies sued on were anterior to the bond, would have given judgment for the second and third defendants, and would have been entitled, nay bound so to do? "

Now I am quite satisfied as to the meaning of the verbal plea as recorded at the first trial. It is in the form usual in this class of actions, where the sureties raise no separate defence and are prepared to stand or fall with the person for whom they have given security. I am convinced that the second and third defendants did admit liability. Their Counsel attempted to argue that at the retrial their plea in the first trial had not been adopted, and that they must be taken to have denied liability. I do not believe that this was so. It seems clear that the Court and both parties considered that the plea at the first trial stood. This was only natural, seeing that the cause had been remitted to the Divisional Court simply in order that the first defendant's liability should be strictly proved, and that the sureties should not be held liable on their admission solely because the first defendant had consented to judgment against himself.

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That being so, the learned Judge might of his own motion have amended the plea so as to record a finding which was clearly in accordance with the evidence; otherwise he would have been obliged to order the defendants to pay to the plaintiffs a sum of money which they did not in fact owe them. I doubt if there is any Judge of this Court who has not at some time or other, or indeed often, taken a point which had not been raised by some party, even when that party has been represented by Counsel.

This course the learned Judge did not adopt; he merely ignored the plea, and entered judgment for the defendants as if the plea had been amended. This Court, however, in the exercise of the very wide powers conferred upon it by rule 27 of Order 53 can make any order that ought to have been made in the Court below, and may make "such further or other order as the case may require." It is not necessary that any application should be made by any party before these powers can be exercised. In my opinion, if the necessary amendment could properly have been made in the Court below, the amendment should be made by this Court now.

A wide range of authorities has been cited to us with the object of showing that the Court should not raise a defence of which the party to whom it was open has not availed himself.

The rule as to amendments is contained in Order XXVI of the Rules of the Supreme Court of Nigeria (Schedule II) and reads thus:—

"The Court may at any stage of the proceedings, either of its own motion or on the application of either party, order any proceeding to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass, or delay the fair trial of the suit, and for the purpose of determining in the existing suit the real questions or question in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just".

This rule is in substance the same as Order 28, rule 1, of the English rules, though couched in rather wider terms, and its provisions are also substantially the same as those of section 222 of the Common Law Procedure Act, 1852 (15 and 16 Vict. c. 76).

In Wilkin *v.* Reed (1) it was held that a certain amendment sought to be made was not necessary to determine the real question "in controversy between the parties," that is, in the words of Jervis. C.J., "the question in agitation between them, which they went down to try". Maule, J., who had been the trial Judge,

(1) 15 C.B. 192: 139 E.R. 394.

referring to the new matter sought to be introduced by the plaintiff, said " The record did not raise those questions; nor was there any evidence of them upon which I as a judge could act . . . . I think it was intended by the Common Law Procedure Act to limit the power of amendment to the introduction of matters which the parties hoped and intended to try in the cause, and not to authorise amendments which might raise questions which never were contemplated before. There was nothing here to show that the matter sought to be introduced by the proposed amendment ever was a question in controversy between the parties; on the contrary, there was strong ground for presuming that no such controversy existed at all ".

In Eyre *v.* The Highway Board of the New Forest Union (1) the Court of Appeal held that a point taken by the plaintiff after the case on both sides had been closed was rightly rejected by the Court below on the ground that it was taken too late.

In Page *v.* Bowdler (2), where the defendant-appellant sought to raise a point of law that had not been argued at the trial, the Court held that he was not entitled to take the point on appeal, as it had never been raised at the trial.

Again in Graham & Sons *v.* Mayor and Corporation of Huddersfield (3), an objection in point of law raised by the defendants after verdict was held to have been taken too late. In that case the plaintiffs relied on a parol contract made with the Health Committee on behalf of the Corporation, and the jury found for them on that issue. The defendants then objected that the contract was not binding on them because (*a*) it was not under seal and (*b*) by virtue of section 200 of the Public Health Act, 1875, the Health Committee could not bind the Corporation by such a contract.

In Noad *v.* Murrow (4) the defendant, after verdict given for the plaintiff, asked for judgment on the ground that the issue on which the jury had decided in favour of the plaintiff, *viz.*: an alleged promise by the defendant, had never been raised on the statement of claim, and that an amendment should not be allowed at that stage in order to give effect to the verdict. The plaintiff admitted that it would be necessary to amend his pleading and asked for leave to do so. Denman, J., refused to allow the amendment. He said " I should certainly do so if I thought that I should thereby be doing justice between the parties, or if I thought that I should thereby be enabling them to settle the real question in dispute between them. The amendment proposed was that I should state the consideration of the alleged promise to have been that the

(1) 8 T.L.R. 648. (2) 10 T.L.R. 423. (3) 12 T.L.R. 36.
(4) 40 L.T. 100.

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defendant Murrow should receive the 2½ *per cent.* which he in fact charged upon the completion of the agreement to sell to Nolan. I should feel no difficulty, if I thought it right to do so, in so amending the statement of claim as to make it cover the undertaking suggested and the breach of it. But, in considering whether I ought to amend or not, I think that I ought not only to have regard to the finding of the jury upon a question left to them, *ex abundanti cautela*, but to the real truth and merits of the case, so far as I can gather them from the conduct of the parties upon the trial; and I certainly was not at all satisfied with the evidence upon this part of the case for the plaintiff."

TEW, J.

Plaintiff's Counsel also referred to a class of cases in which an appellant has sought to adduce new evidence which was, or should have been, available to him at the trial. It has been established by a long series of decisions that a Court of Appeal will refuse to admit evidence of that nature. An early case is that of Marriott *v.* Hampton (1), where Grose, J., said " It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence."

In Severino *v.* Witt and Busch (2) the Full Court refused to admit new evidence tendered on appeal and cited the following passage from the judgment of Lord Chelmsford in Shedden *v.* Patrick and the Attorney-General (3).

> " It is an invariable rule in all the Courts, and one founded upon " the clearest principles of reason and justice, that if evidence " which either was in the possession of parties at the time of a " trial, or by proper diligence, might have been obtained, is " either not produced, or has not been procured, and the case is " decided adversely to the side to which the evidence was avail- " able, no opportunity for producing that evidence ought to be " given by the granting of a new trial. If this were permitted, " it is obvious that parties might endeavour to obtain the " determination of their case upon the least amount of evidence, " reserving the right, if they failed, to have the case retried " upon additional evidence, which was all the time within their " powers."

The same principle was applied in G. Gottschalck & Co. *v.* Elder Dempster & Co., Ltd. (4), and in Ademola Awujale of Ijebu-Ode *v.* Oduntan, Bale of Ejinrin (an unreported case decided on the 2nd June, 1927) the Full Court refused an application for leave to produce documentary evidence which had been in existence at the time of the trial.

To deal first with the class of cases last mentioned, I do not think that the principle enunciated in them has any real bearing on the present case. To refuse leave to adduce additional evi-

(1) 7 T.R. 269: Smith's Leading Cases (8th ed.). Vol. 2 p. 421.
(2) 2 Nigeria Reports 75. (3) 1 Macq. H.L. at page 545.
(4) 3 Nigeria Reports 14.

dence, which may or may not support the case of the party seeking to adduce it, is one thing; to refuse to decide a case on the clearest possible evidence, which is actually before the Court, is quite another.

In all the cases cited on behalf of the appellants in which leave to amend was refused, it seems that there had been either a failure to take a point of law, which might or might not have been argued successfully, or a failure to prove facts which, if proved, might or might not have decided the issue in favour of the party who had failed to prove them.

The present case is very different. Here the documentary evidence before the Court shows beyond a doubt that the second and third defendants were indebted to the plaintiffs in no sum whatsoever under the bond into which they had entered. Mr. Irving for the appellants argued that, after the admission made by these defendants, the bond was not necessary to the plaintiffs' case. and that, if it had not been put in evidence, the point taken by the learned trial Judge could never have been raised. This contention is to a certain extent correct. It is certainly true that, if the learned Judge had never seen the bond, he would never have known that the defendants were not liable under it: it is equally true that, if the bond had not been put in evidence, the proper position of the parties, assuming for the moment that the losses against which they had secured the plaintiffs were incurred before the date of the bond, would not have been ascertained. The summons made no mention of the bond, or of the limitation of liability of the sureties to the sum of £500; this limitation was not pleaded by the second and third defendants, nor did it appear until the bond was produced by the plaintiffs.

I may say at this point that I quite agree with the learned Judge in the Court below when he expresses the opinion that it was by inadvertence that the defendants failed to take a point on which they must have succeeded.

That being so, was it not incumbent upon the Court, on discovery of the real facts of the case—facts clearly proved by the evidence—to give judgment in accordance with the evidence, even if it became necessary to amend the defence after the case on both sides had been closed? I think that it undoubtedly was.

Lastly, there is the argument, which was urged upon this Court at considerable length, that the question of the liability of the sureties was not " the real question in controversy between the parties ", and that consequently the Court had no power under Order XXVI to amend,

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In Wilkin *v.* Reed (*supra*) Maule, J., said " Whether or not the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties is matter of fact, to be decided by the Judge ". Later, in a passage which I have already cited. the same learned Judge said " The record did not raise those questions; nor was there any evidence of them upon which I as a Judge could act ". The last part of this sentence must surely mean that, if certain facts had been proved by the evidence, as in the present case, the Court would have had power to make the amendment asked for.

Again in Knowlman *v.* Bluett (1), the Court, finding that the plaintiff had claimed a sum smaller than that which was shown by the evidence to be due to her, amended the claim of its own motion. On appeal, where it was argued that the Court had no power to make such an amendment, Bramwell B. said: " As to the amendment. I think my Lord was right in making it. The 222nd section of the Common Law Procedure Act does not deal with questions of variance only, but enables a Judge to make any amendment necessary for determining the real question at issue between the parties. I am of opinion that a claim may be amended under this section which was purposely framed by the late Mr. Justice Willes and myself in the most comprehensive words that could be used ".

Another case to which reference may be made is Hollis *v.* Burton (2) in which the defendant was allowed to withdraw an admission which had been made by mistake and to amend his pleading. The Court of Appeal held that the order of the Court below giving the defendant leave to amend was right, though the order ought only to have been made on certain terms.

Now it is true that the only question that was actually discussed at the trial and retrial was the amount which the first defendant was liable to pay to the plaintiffs. But was this, in the language of Jervis, C.J., in Wilkin *v.* Reed (*supra*) already quoted " the question in agitation between them, which they came down to try "? I think that the language of Order XXVI is susceptible of, and should receive, a wider interpretation.

The plaintiffs sued the sureties to recover an amount—an amount wrongly stated on the summons so far as the sureties were concerned—for which they could only be liable under the bond into which they had entered. Surely the real question in controversy between the sureties and the plaintiffs—the question " which they came down to try "—was the liability of the sureties under the bond. The sureties made an admission under a mistake as to

(1) 9 Exch. 1. (2) 1892. 3 Ch. 226.

the facts This admission was clearly proved not to be in accordance with the facts, and the learned Judge found that it was made by mistake, a conclusion in which, as I have said, I entirely agree with him. I consider that the Judge should certainly have amended the defendants' plea in order to do justice between the parties and in the language already quoted of Denman, J., in Noad *v.* Murrow (*supra*) " to have regard to the truth and merits of the case ". In these circumstances I have no hesitation in saying that this Court should make the amendment which the trial Judge ought to have made by substituting for the plea of the second and third defendants as recorded a plea of " No liability admitted ".

But I am emphatically of opinion that this amendment should not be made unconditionally. The defence established by the evidence at the retrial would have been revealed to a careful observer at the time of the first trial, and it can only be due to almost incredible carelessness on the part of the respondents and their advisers that they overlooked it. If they had pleaded then that the first defendant had incurred no liability after the date of the bond, there would have been an end of the matter, and the appellants would have been saved the trouble and expense of the subsequent litigation. In my opinion the respondents should pay to the appellants the costs of all proceedings in this Court and in the Court below incurred subsequently to the time at which the account Exhibit " G " was put in evidence at the first trial, except the costs of the present appeal.

Subject to these variations, I am of opinion that the judgment of the Divisional Court should be affirmed and that this appeal should be dismissed without costs.

MAXWELL, J.

In this case the learned Judge entered judgment for the second and third defendants on a defence which had not been raised and which, in his opinion, was omitted solely by inadvertence. That may be so, but the fact remains that it was omitted.

The plea as entered at the initial hearing on 17th March, 1926, is perhaps unhappily worded, but to my mind it can mean but one thing, *viz.*, that the first defendant denied all liability and that the second and third defendants admitted theirs to the extent (up to £500) of that, if any, proved against the first defendant.

That is undoubtedly the most obvious meaning of the phrase used and that is clearly how the trial Judge understood it. On that understanding the case was tried and it was the sole issue before the Court.

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It is true that on the second trial on 28th October, 1927, no formal plea was entered, but the proceedings of the earlier trial formed part and parcel of the later and those proceedings include the pleas.

On the authority of *Knowles* v. *Roberts* (1) " the Court ought not to dictate to the parties how to frame their case ". That dictum is amply supported by the many cases (English and local) cited by the applicants' Counsel.

In this matter it seems to me that the trial Judge erred against it; both parties were represented by Counsel; and the possible defence accepted by him was never adumbrated by the respondents.

MAXWELL, J.

In these circumstances, I would allow this appeal. I do so with some hesitation, for it is obvious that in local conditions the strict application of the above principle of English procedure is likely (as in this case) to cause real hardship to litigants; but I can find no auhority in our laws for whittling it down in any way.

Ordered that the judgment of the Court below be varied by setting aside the order as to costs and substituting the order that the second and third defendants pay all costs of the first trial after the production of the account Exhibit " G," the costs of the appeal to the Full Court from the judgment in the first trial, and the costs of the retrial. No order as to the costs of this appeal.

(1) 38 Ch. D. at p. 270.

In the matter of An Order under the hand of T. S. Thomas, Governor's Deputy, dated 13th day of June, 1927, under the Deposed Chiefs Removal Ordinance, Chapter 78, concerning one Oshuntuyi Ogini, the Apetu of Ipetu and also in the matter of the Deportation of the said Oshuntuyi Ogini.

BETWEEN

OSHUNTUYI OGINI ... ... *Applicant-Appellant.*

AND

THOMAS SHENTON THOMAS, GOVERNOR'S DEPUTY

AND

AROWOLARAN OWA OF ILESHA IN THE PROVINCE OF OYO IN THE PROTECTORATE OF NIGERIA

AND

JANTA AT OYO ALSO IN THE PROVINCE OF OYO IN THE PROTECTORATE OF NIGERIA *Defendants-Respondents.*

Deposed Chiefs Removal Ordinance (Chapter 78)—Application for Writ of Habeas Corpus by person ordered under the Ordinance to leave a certain area—No jurisdiction in Supreme Court to issue writ directed to person not within the jurisdiction of the Court.

On June 13th, 1927, Oshuntuyi Ogini, a Chief with the title of Apetu of Ipetu Ijesha, was ordered by an order under the Deposed Chiefs Removal Ordinance to leave a certain area and not to return thereto without the Governor's consent.

This order was made by T. S. Thomas, who was Governor's Deputy at the time.

On July 27th Ogini through his Counsel applied for a writ of Habeas Corpus directed to T. S. Thomas, Governor's Deputy, and the other two defendants, it being alleged in an affidavit that the second defendant had removed Ogini to Oyo and that he was there detained under the custody of the third defendant. The Acting Chief Justice discharged the rule as against Mr. Thomas and held that he had no jurisdiction to make an order against the other two defendants.

The applicant appealed to the Full Court.

Held, that the first defendant having ceased to act as Governor's Deputy before the date of the application for the writ, he no longer had any control over the applicant, and no writ could be issued as against him.

Held also, that the Acting Chief Justice was right in refusing to issue a writ against the other two defendants on the ground of want of jurisdiction.

OSHUNTUYI OGINI *v.* T. S. W. THOMAS AND OTHERS. *IN re* AN ORDER MADE UNDER THE DEPOSED CHIEFS REMOVAL ORDINANCE.

Zizer for the applicant.

Howard, Acting Attorney-General and *Blackall*, Acting Solicitor-General, appeared to show cause.

The following judgment was delivered by

WEBBER, C.J. (Acting).

On the application of Counsel for Oshuntuyi Ogini the Court granted an Order nisi on the above defendants to show cause why a writ of habeas corpus should not issue against them by reason of the alleged illegal detention of the said Oshuntuyi Ogini.

The Acting Attorney-General with the Acting Solicitor-General on behalf of the defendants appeared to show cause.

WEBBER, Acting C.J.

After hearing Counsel on both sides as to whether a writ should issue against the first defendant T. S. Thomas, I discharged the rule nisi as against him. The Acting Attorney-General then claimed that, as the rule was discharged as against Mr. T. S. Thomas, this Court had no jurisdiction to entertain the application, the remaining defendants being, at the date of the Order outside of the Court's jurisdiction, and the alleged detention of the corpus taking place, according to the applicants affidavit, at Oyo, also outside of the Court's jurisdiction.

It is contended by Counsel for the applicant that this Court's writ, by its very nature, being a prerogative writ, runs throughout the whole of Nigeria.

I am unable to agree with this contention and must decline to make this rule absolute. The Supreme Court's jurisdiction is limited territorially, and writs of habeas corpus cannot be issued beyond the statutory limits, where both the defendants and the corpus are outside these limits.

Ilesha and Oyo are districts in the Oyo Province which is part of the Protectorate of Nigeria. Protectorates, which are Dependencies of the Crown, though governed by Great Britain, are strictly speaking Foreign Territories.

British Courts are established throughout the Protectorate of Nigeria, of which a very limited part is under the Supreme Court, the jurisdiction of the greater part being exercised by the Provincial Courts. These latter Courts have authority to grant and issue writs of habeas corpus and to ensure their due execution. Counsel for the applicant laid stress on the fact that only in very exceptional cases will the Courts permit applications to be made in person, and that the practice is that such applications, involving, as they do, complicated questions of law, are made by

Counsel. The rule is not an inflexible one, and the Courts have frequently permitted relations of the person whose liberty is affected to make these applications. Section 33 of the Provincial Courts Ordinance does not permit the employment of a legal practitioner, so that it is obvious that in applications for this prerogative writ before a Provincial Court no Counsel can make such an application. If this is a hardship, it can be remedied by legislation, but it must not be forgotten that in all proceedings initiated in the Provincial Courts the party affected may apply for a transfer to the Supreme Court.

I think that the case of *Rex.* v. *Pinckney* (1) quoted by the Acting Attorney-General aptly determines the point.

The Order of the Court is that the rule nisi as against Mr. T. S. Thomas is discharged.

Through want of jurisdiction, no Order can be made as against the other defendants. WEBBER, Acting C.J.

The judgment of the Full Court (Combe, C.J., Tew and Maxwell, JJ.), was delivered on the 26th May, 1928, by

COMBE, C.J.

This is an appeal from the decision of Acting Chief Justice Webber discharging a rule nisi for a writ of habeas corpus as against the first defendant Mr. T. S. Thomas, and holding that he had no jurisdiction to entertain the application for the writ as against the second and third defendants.

From the affidavits and exhibits before the Court it appears that Mr. T. S. Thomas was duly appointed Governor's Deputy during the absence from Lagos of the Officer Administering the Government of Nigeria from June 7th to July 7th, 1927. On June 13th Mr. Thomas in his capacity as Governor's Deputy made an order under section 2 (1) of the Deposed Chiefs Removal Ordinance which, after reciting that Ogini a native Chief holding the office of Apetu of Ipetu Ijesha had been deposed by him, and that he was satisfied that it was necessary for the maintenance of peace, order and good government in the Ife Division of the Oyo Province that the said Ogini should leave the said Ife Division and those parts of Nigeria adjacent thereto which were thereinafter mentioned, directed that the said Ogini should leave the area covered by the Divisions of Ife and Ibadan of the Oyo Province and the Ondo Province within two days of the service of the order upon him, and that he should not return to such area without his consent. The order issued by Mr. Thomas did not authorise the forcible removal of Ogini from the Ife Division or the detention of Ogini in any place.

(1) 1904 2 K.B. 84.

Zizer for the applicant.

Howard, Acting Attorney-General and *Blackall*, Acting Solicitor-General, appeared to show cause.

The following judgment was delivered by

WEBBER, C.J. (Acting).

On the application of Counsel for Oshuntuyi Ogini the Court granted an Order nisi on the above defendants to show cause why a writ of habeas corpus should not issue against them by reason of the alleged illegal detention of the said Oshuntuyi Ogini.

The Acting Attorney-General with the Acting Solicitor-General on behalf of the defendants appeared to show cause.

WEBBER, Acting C.J.

After hearing Counsel on both sides as to whether a writ should issue against the first defendant T. S. Thomas, I discharged the rule nisi as against him. The Acting Attorney-General then claimed that, as the rule was discharged as against Mr. T. S. Thomas, this Court had no jurisdiction to entertain the application, the remaining defendants being, at the date of the Order outside of the Court's jurisdiction, and the alleged detention of the corpus taking place, according to the applicants affidavit, at Oyo, also outside of the Court's jurisdiction.

It is contended by Counsel for the applicant that this Court's writ, by its very nature, being a prerogative writ, runs throughout the whole of Nigeria.

I am unable to agree with this contention and must decline to make this rule absolute. The Supreme Court's jurisdiction is limited territorially, and writs of habeas corpus cannot be issued beyond the statutory limits, where both the defendants and the corpus are outside these limits.

Ilesha and Oyo are districts in the Oyo Province which is part of the Protectorate of Nigeria. Protectorates, which are Dependencies of the Crown, though governed by Great Britain, are strictly speaking Foreign Territories.

British Courts are established throughout the Protectorate of Nigeria, of which a very limited part is under the Supreme Court, the jurisdiction of the greater part being exercised by the Provincial Courts. These latter Courts have authority to grant and issue writs of habeas corpus and to ensure their due execution. Counsel for the applicant laid stress on the fact that only in very exceptional cases will the Courts permit applications to be made in person, and that the practice is that such applications, involving, as they do, complicated questions of law, are made by

Counsel. The rule is not an inflexible one, and the Courts have frequently permitted relations of the person whose liberty is affected to make these applications. Section 33 of the Provincial Courts Ordinance does not permit the employment of a legal practitioner, so that it is obvious that in applications for this prerogative writ before a Provincial Court no Counsel can make such an application. If this is a hardship, it can be remedied by legislation, but it must not be forgotten that in all proceedings initiated in the Provincial Courts the party affected may apply for a transfer to the Supreme Court.

I think that the case of *Rex.* v. *Pinckney* (1) quoted by the Acting Attorney-General aptly determines the point.

The Order of the Court is that the rule nisi as against Mr. T. S. Thomas is discharged.

Through want of jurisdiction, no Order can be made as against the other defendants.

WEBBER, Acting C.J.

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COMBE, C.J.

This is an appeal from the decision of Acting Chief Justice Webber discharging a rule nisi for a writ of habeas corpus as against the first defendant Mr. T. S. Thomas, and holding that he had no jurisdiction to entertain the application for the writ as against the second and third defendants.

From the affidavits and exhibits before the Court it appears that Mr. T. S. Thomas was duly appointed Governor's Deputy during the absence from Lagos of the Officer Administering the Government of Nigeria from June 7th to July 7th, 1927. On June 13th Mr. Thomas in his capacity as Governor's Deputy made an order under section 2 (1) of the Deposed Chiefs Removal Ordinance which, after reciting that Ogini a native Chief holding the office of Apetu of Ipetu Ijesha had been deposed by him, and that he was satisfied that it was necessary for the maintenance of peace, order and good government in the Ife Division of the Oyo Province that the said Ogini should leave the said Ife Division and those parts of Nigeria adjacent thereto which were thereinafter mentioned, directed that the said Ogini should leave the area covered by the Divisions of Ife and Ibadan of the Oyo Province and the Ondo Province within two days of the service of the order upon him, and that he should not return to such area without his consent. The order issued by Mr. Thomas did not authorise the forcible removal of Ogini from the Ife Division or the detention of Ogini in any place.

(1) 1904 2 K.B. 84.

By subsection (2) of section 2 of the Ordinance the Governor is empowered to order that a deposed Chief or Native who has refused or neglected to comply with any order under subsection (1) or has returned to the area which he has been ordered to leave shall be deported to such part of Nigeria as the Governor by that order may direct. Not only is there no evidence before the Court of any order of deportation or detention of Ogini made by Mr. Thomas; but Mr. Thomas has stated in an affidavit filed in these proceedings that, apart from the order under subsection (1) of section 2 of the Ordinance to which I have referred, he issued no further direction either verbal or in writing, and had no knowledge of any deportation, detention or arrest of Ogini.

COMBE, C.J.

On July 27th Ogini through his Counsel applied to the Acting Chief Justice for leave to issue a writ of habeas corpus directed to T. S. Thomas, Governor's Deputy, to Aromolaran the Owa of Ilesha, and to Janta of Oyo to bring the applicant to the bar of the Court.

In the affidavit filed in support of the application it was alleged, *inter alia*, that on July 16th the Owa told Ogini that he was deported by the order of Mr. T. S. Thomas, Governor's Deputy, and at the same time handed him the order made by Mr. Thomas under section 2 (1) of the Deposed Chiefs Removal Ordinance; that immediately after handing to him that order the Owa forcibly removed him from Ilesha to Oyo under his police escort, and that at Oyo he was committed to the custody charge, care and keeping of the third defendant Janta, and had not since been allowed to leave the house in which he was then confined.

In the final paragraph of Ogini's affidavit he stated that he was then under the control of the said Mr. T. S. Thomas who had entirely misused his powers over him.

On July 29th the Acting Chief Justice ordered that the three defendants should appear on August 19th to show cause why a writ of habeas corpus should not issue.

From the affidavits filed and the exhibits attached thereto it was established that Mr. Thomas was not the Governor's Deputy at the date of the application for the writ or thereafter, and that he had in fact left Nigeria and the service of the Nigerian Government on August 5th, having been transferred to the Gold Coast.

On the return day the three defendants were represented by the law officers, and the Attorney-General first submitted that the rule as against M. T. S. Thomas must on the facts established by the affidavits and exhibits be discharged. The learned Acting

Chief Justice after hearing Counsel on behalf of the applicant discharged the rule as against Mr. Thomas. The Attorney-General then submitted that, as the rule had been discharged as against Mr. Thomas, the Supreme Court had no jurisdiction to entertain the application, the remaining defendants being at the date of the order outside of the Court's jurisdiction, and the alleged detention of the corpus taking place, according to the applicant's affidavit, at Oyo also outside of the Court's jurisdiction. The learned Acting Chief Justice after hearing Counsel reserved judgment, and on August 26th delivered a written judgment in which he held that no order could be made by him against the second and third defendants on the ground that the Court had no jurisdiction in the matter.

The applicant has appealed on the following grounds as set out in the grounds of appeal.

1. In view of the facts before the Court the learned Judge below was wrong in holding that for the purpose of issuing the writ the Court had no jurisdiction over first defendant.

2. The learned Judge was wrong in refusing to go into the merits of the case.

3. On the face of its own and the general procedure the learned Judge below was wrong in holding that the Court has no jurisdiction over the second and third defendants.

With regard to the first ground of appeal there is nothing in the record before the Court to show on what grounds the Attorney-General had submitted that the order as against Mr. Thomas must be discharged, except that he cited the case of *Rex* v. *The Earl of Crewe* (1) nor did the Acting Chief Justice set out in his judgment the grounds on which he discharged the rule as against Mr. Thomas. It is, however, abundantly clear that on the facts before the learned Chief Justice the writ as against Mr. Thomas could not issue.

Apart from the fact that Mr. Thomas had at the date of the hearing of the application left Nigeria, it is clear that Mr. Thomas had no control over the third defendant in whose custody the applicant was alleged to be. The only order made by Mr. Thomas in relation to the applicant was the order, made under subsection (1) of section 2 of the Deposed Chiefs Removal Ordinance, and that order was made by him in his then capacity as Governor's Deputy. On his ceasing to be Governor's Deputy Mr. Thomas had no power to rescind the order made by him or

(1) 1910 2 K.B. 605.

COMBE, C.J.

to make any other order or give any direction or sanction under the Ordinance. Even if the order made by Mr. Thomas had authorised the detention of the applicant, which it did not do, Mr. Thomas when he ceased to be Governor's Deputy could not give directions that the applicant be released from custody. Such direction could no doubt be given by the Officer at the time administering the Government. There can, I think, be no doubt that a writ of habeas corpus could be directed to the Officer Administering the Government if in fact the applicant was being wrongfully detained under the order of the Governor or a Governor's Deputy purporting to have been made under the Ordinance referred to. In *Rex* v. *The Earl of Crewe*, Vaughan Williams, L.J. expressed the view that the writ may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner. But there can be no authority for the proposition that the writ can be addressed to a person who may at one time have had such control, but who has ceased to have any control over the person or persons having the prisoner in custody.

It was suggested in the course of the hearing of this appeal that, as it was alleged that the applicant was being unlawfully detained, and as the learned Acting Chief Justice had jurisdiction to enquire into the truth of that allegation so long as Mr. Thomas remained a party to the proceedings, he should made such enquiry before discharging the rule as against Mr. Thomas. I consider however, that the learned Acting Chief Justice was bound on the application of the Attorney-General to discharge the rule forthwith as against Mr. Thomas on its being established that Mr. Thomas should not have been made a party to the proceedings.

With regard to the third ground of appeal, I was unable to follow the argument of Counsel for the appellant. Section 21 (1) of the Supreme Court Ordinance empowers the Governor in Council to declare the places or parts of the Protectorate to which the jurisdiction vested in the Supreme Court shall extend, and directs that the jurisdiction of the Court shall be exercised subject to the limitation contained in any such order.

Section 22 of the Ordinance directs that, subject to such orders as may be made under section 21, the exercise of jurisdiction by the Supreme Court in the Protectorate shall be limited to the areas defined in that section. The appellant has not been removed from, and is not being detained within, a place or part of the Protectorate to which the jurisdiction of the Supreme Court extends, and neither the second nor third defendant are within such place or part.

In explanation of the meaning of the third ground of appeal Counsel stated that on one occasion the Supreme Court has addressed an order to a European Political Officer serving in the Oyo Province calling upon him to show cause why a writ of *habeas corpus* should not issue. It may well be that such order has been made, as it is within the jurisdiction of the Court to make such order by virtue of section 24 of the Supreme Court Ordinance which confers upon the Supreme Court jurisdiction outside the local limits of the Supreme Court in all suits and matters to which a non-native is a party.

If the applicant is being detained in the compound of the third defendant as alleged, the Provincial Court of the Oyo Province has jurisdiction to deal with the matter, and if in any proceedings which may be taken in the Provincial Court he requires legal assistance he can apply for the transfer of the case from the Provincial Court to the Supreme Court. I gathered, however, from the argument of Counsel for the applicant that the real matter of which the applicant complains is not any detention by the third defendant, but the order made against him under the Deposed Chiefs Removal Ordinance, and that he desires to obtain a decision of the Court as to the validity of the order made by Mr. Thomas. Counsel contended that, as the order directed the applicant to leave certain areas and not to return thereto, the order imposed such restriction on the liberty of the applicant as to amount to imprisonment or detention from which he could be released on a writ of habeas corpus.

COMBE, C.J.

So far as the order made under the Ordinance is concerned, the applicant is free to move where he will within and without Nigeria, except that he must not return to the places specified in the order. Even if the learned Acting Chief Justice had jurisdiction with the parties then before him, I do not think that the question of the validity of the order could have been enquired into on an application for a writ of habeas corpus.

Re TRADE MARKS ORDINANCE.

In the matter of an application No. 3332 by Distilleerderij En Alcoholfabriek & Co. of Van Leeuwenheeksingel, Delft, Holland ... ... Applicants-Respondents.

AND

In the matter of an Opposition to the said Application by Netherlands Distilleries of No. 1, Wateringscheweg, Delft, Holland ... ... Opponents-Appellants.

Trade Marks Ordinance—Similarity of marks—Possibility of confusion is question of fact in each case.

The applicants sought to register the mark of a parrot in a class in which the opponents had already registered a toucan. The distinctive feature was the large beak of the toucan.

The Divisional Court (Petrides, J.) held that the applicants' mark was not calculated to deceive and that it ought to be registered.

The Full Court reversed this decision.

The following cases were considered:—
Eno v. *Dunn* (1).
The Houtman Case (2).
W. B. MacIver & Co., Ltd., v. *Compagnie Francaise de l'Afrique Occidentale* (3).
Payton & Co., Ltd., v. *Snelling, Lampard & Co., Ltd.* (4).

Johnson for the appellants.
Irving for the respondents.

The following judgments were delivered by the Full Court on the 26th January, 1928.

COMBE, C.J.

This appeal depends upon matters of fact as to which opinions may differ.

It is not suggested that any educated African would be misled by any similarity between the applicants' mark, which represents a parrot, and the opponents' mark, which purports to represent a toucan.

The question of fact is whether, if the applicants' mark is registered, some illiterate Africans who are capable of recognising that both the opponents' registered trade mark and the mark

(1) 15 A.C. 252. (2) Trade and Customs Laws (1924), p. 448.
(3) 3 Nigeria Reports, 16. (4) 1901 A.C. 308.

which the applicants desire to register depict birds may be misled by the similarity of the two marks into accepting a bottle of the applicants' gin when they think that they are purchasing a bottle of the opponents' gin.

If the answer to that question is in the affirmative, then the Registrar should not be directed to proceed with the registration of the applicants' mark, and it would seem that that direction should not be given even if the Court is in doubt as to what the answer to that question should be. See the judgment of *Lord Watson* in *Eno* v. *Dunn* (1).

I do not doubt that the ordinary illiterate African capable of recognising that birds are represented by both marks would, if given the two marks to examine and asked whether the birds are the same, recognise that one bird has a beak and the other a bill, and would state that the birds are different, though I think that some would hesitate for some time before answering the question. I am, however, by no means satisfied that some of these same Africans, if accustomed to purchase the opponents' gin and to recognise the bottle in which that gin is sold by the picture of a bird on the bottle, would not accept for the gin which they wish to purchase a bottle with the applicants' mark on it, being misled by the similarity of the two marks. If both birds were coloured the same, as they well might be, I have no doubt that many of the ultimate purchasers of the gin would be misled by the similariy of the two marks.

The conclusion at which I should have arrived on the question as to whether the similarity of the two marks is calculated to deceive the ultimate purchasers of gin in this country, if no witnesses had been called in the Court below, is not altered by the evidence of the witnesses called by the applicant, notwithstanding that I recognise that the third witness, who states in effect that his customers would not be misled by any similarity in the two marks, is in a better position to answer that question than I am, since he has been selling goods for years to illiterate Africans who recognise the goods they want by the trade mark on them.

The first witness called by the applicant is the African clerk to the Registrar of Trade Marks in Lagos. He, as one would expect of an educated African, had no difficulty in distinguishing between the two marks, but he stated that he could not say if a native who wants gin would be misled by the similarity of the birds.

The second witness is a trader of some forty years experience in selling cotton goods. On being shown the two marks he stated " Some people would have a doubt and some not if the two marks

(1) 15 A.C. at p. 257.

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are the same. I myself can tell the difference. If I had been selling one brand of gin with a parrot on it and I offered the customers the one with a toucan on it they would not accept ".

This witness it seems has had experience in trying to pass off on his customers goods which are not goods which the customers wish to buy, and he gives an example of a case in which he had difficulty in deceiving his customers. He states " I have an eagle on a cloth and vulture. I have tried to pass off the vulture as an eagle without success. Some will take it and some will not ".

This is exactly what I am satisfied would happen if the applicants' mark is registered. Some traders would try to pass off the applicants' " Parrot " brand for the opponents' " Toucan " brand of gin, and some customers would take it and some would not. It is, I conceive, the duty of the Court to protect those customers who would be deceived, and for this reason I consider that the appeal should be allowed and that the Registrar should be directed not to proceed with the registration of the applicants' mark.

COMBE, C.J.

TEW, J.

The respondents wish to register the mark of a parrot in Class 43—Fermented liquors and spirits. The appellants have already registered the mark of a toucan in that class and, in consequence of their opposition, the respondents have moved the Court for an order to the Registrar to proceed with the registration of the parrot mark.

The learned Judge in the Court held that the parrot mark was distinctive and made the order asked for.

In the case of each mark the bird is sitting on a branch in the same position and the size of each is about the same, but the toucan has a very large bill, whereas the parrot has a small beak. The appellants' Counsel stated that he would have no objection to the parrot mark if, for example, the parrot were sitting in a ring instead of on a branch; but in this he undoubtedly failed to appreciate one of the principles governing such cases, namely that it is the main feature or essential characteristic of each mark that has to be considered. I am entirely in accord with the learned Judge of the Court below when he said that the branch " is merely an incident in the pictorial representation ".

Section 25 of the Trade Marks Ordinance (Chapter 142) provides that " 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*". and it is for the applicant to show affirmatively that the trade mark which he seeks to register is not calculated to deceive. (Eno *v.* Dunn; per Lord Watson) (1).

It has been laid down repeatedly by this Court that, in considering the possibility of deception, the Court must take into consideration the entirely different conditions prevailing in this country from those in a country where the great bulk of the population are literate and are used to seeing, and distinguishing details of, pictures. The principle has been well expressed by Osborne C.J. in the Houtman Case (2) in a passage which was quoted by the learned Judge of the Divisional Court and which need not be reproduced here.

I may also refer to a passage in the judgment of Ross, J., in W. B. MacIver & Co., Ltd., *v.* Compagnie Francaise de l'Afrique Occidentale (3), where that learned Judge said "In a highly intelligent and civilised community I should have no hesitation in saying that the likelihood of confusing the two marks is so very negligible that no one could reasonably say that the respondents' mark is calculated to deceive; however, I cannot but feel in coming to a decision in this case that attention must be paid to surrounding circumstances and local conditions. In this country the percentage of persons who can read and write, and especially of those to whom the class of goods concerned are sold, is extremely small. Very few natives can, even after a minute explanation, understand a picture or pick out the details in one which would differ from the details in another picture. Both the marks would be known to the natives by a description of the essential point in both marks, *i.e.*, by the cask—they would both be referred to as 'Agba' or 'Cask' without any reference to the firm by which the goods represented are sold or to the surrounding details in the marks. It is to be observed that two witnesses were called at the hearing in the Court below, but little importance can be attached to their evidence. These are experienced, intelligent and educated traders who are accustomed to trade marks and who can read and write well—these two witnesses having both the marks before them stated that they would not be confused, but I can hardly believe that the uneducated native unaccustomed to pictures and unable to read and write would be in the same position to see the difference especially when only one of the marks would be before him at a time; he would merely describe either of the two marks as 'Agba mark' or 'Cask brand' or some such form of words."

(1) 15 A.C. p. 257. (2) Trade and Customs Laws (1924), p. 448.
(3) 3 Nigeria Reports at pp. 19-20.

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The opponent to the registration of a trade mark which he alleges to be likely to deceive is in a stronger position if he can prove that his own registered mark has, in the language of Osborne, C.J., in the Houtman Case, " acquired an established reputation in any part of Nigeria ". In this case there is no evidence that the appellants' mark has acquired such a reputation *e.g.*, that it is commonly known by the ultimate consumers of the appellants' liquors as the " bird mark "—but Petrides, J., for the purpose of his judgment in this matter assumed that it had. No such assumption can be made by this Court, and the question as to likelihood of deception must be decided entirely on the comparison of one bird with the other, having regard to the standard of intelligence of the ultimate consumer.

TEW, J.

I agree entirely with the respondents' Counsel when he said that this must be a question of fact in each case, and that no amount of expert evidence, so to call it, as to the possibility of confusion between two marks can really affect it. This point is dealt with in Kerly on Trade Marks (4th edition) at pp. 284-5 and reference is there made to the judgment of Lord Halsbury, L.C. in North Cheshire and Manchester Brewery Co., *v.* Manchester Brewery Co. (1); and to the judgment of Lord Macnaghten in Payton & Co., Ltd., *v.* Snelling Lampard & Co., Ltd. (2). In that case Lord Macnaghten, referring to evidence of this kind that had been given in the Court below, said " But that is not a matter for the witness; it is for the Judge. The Judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness ".

Looking then at these two marks, and having considered the evidence, for what it is worth, and using my own experience, extending over a period of more than twenty years, of the mentality of the primitive African, I ask myself what would happen in the case of such a person who had bought and enjoyed a bottle of gin bearing the trade mark of the parrot. Would he, when anxious to buy more gin of the same brand, be satisfied with a bottle on which the mark of the toucan was displayed? I think that there is no doubt that he would. He would look for a bird of about the same size and would go no further than that; the fact that the second bird had a much larger bill would not affect his choice.

It was suggested, I think, in the course of the argument that there would be great danger and possibility of injustice if an appli-

(1) 1899 A.C. 83. (2) 1901 A.C. 308.

cant were forbidden to register any mark in which a bird was represented because a bird was the essential feature of a mark already on the register. I agree that the Court would not be justified in laying down such a proposition. To take extreme instances, there could be no possibility of confusion between a marabout and a canary or between a turkey and a weaver bird. I repeat that it is a question of fact in each case, and that in this case the applicants have not discharged the onus that was upon them of showing that there is no likelihood of confusion between their mark and that of the opponents.

In my opinion this appeal should be allowed, the order of the Divisional Court should be set aside with costs, and the Registrar should be restrained from proceeding further with the application numbered 3332.

TEW, J.

MAXWELL, J.

On the 16th April, 1924, the opponents registered as a trade mark for " fermented liquors and spirits " the picture of a bird which is described " toekan " and which is presumably meant to represent a toucan. It may be worth recording that the toucan is not indigenous to West Africa, that the creature depicted is not like a toucan, but is very like various not uncommon water-fowl of this country.

The applicants seek to register as a trade mark for " fermented liquors and spirits and particularly Schiedam gin " another picture representing a parrot.

Both parties are Dutch distillers.

In each case the birds as depicted are of a similar size, each is perched on a branch, each is facing left, and there are altogether some fourteen major or minor points of resemblance between them.

One is left to surmise why, with the whole realm of nature and of art before them from which to choose a trade mark, the applicants should have selected one so superficially (at least) similar to that of their rivals.

The sole point for the determination of this Court is a question of fact, as has been emphasised by the applicants' learned Counsel. Is their proposed trade mark likely to deceive and confuse the ultimate retail buyer of their and their opponents' goods, *viz.*, the unsophisticated bush native of the hinterland?

In coming to a decision one can only be guided by one's acquired knowledge of that individual, by the ordinary principles of commercial morality, and by the relevant judgments previously given by this Court.

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That written by the late Ross, J., in W. B. MacIver & Co., Ltd., *v* Campagnie Francaise de l'Afrique Occidentale (1) seems to me *mutatis mutandis* entirely applicable to the present case. "The average uneducated native unaccustomed to pictures and unable to read and write" would in my opinion, be unable to remember the difference between these two pictured birds, especially as only one of them would be before him at a time.

On these grounds I would allow this appeal

MAXWELL, J.

(1) 3 Nigeria Reports 16.

AKILOLU AKODU ... ... *Plaintiff-Appellant.*

v.

YESUFU OMIDIJI, IMAM KASUMU OLOKODANA, AKISANYA MOGAJI AND BAKARE OSHERU ... ... *Defendants-Respondents.*

Appointment of White-capped Chief—Distinction between "Selection" and "Election"—Action for trespass—No civil remedy for forcible entry.

The appellant had been selected by his family as prospective Chief Oloto, but had not performed the ceremonies necessary to his election as Chief. In consequence of his failure to do so he had been set aside and the respondent Yesufu Omidiji had been elected Chief Oloto.

The said respondent through his agents broke into the "Iga" or official residence of the Chief, where the appellant was living.

An action for trespass was brought by the appellant.

Held, by the Divisional Court (Petrides, J.) that the respondent Yesufu Omidiji had a right to enter the Iga and that no act of trespass had been committed by him.

Held also, that section 81 of the Criminal Code provides no civil remedy in respect of a forcible entry.

The Full Court affirmed the decision of the Divisional Court.

Zizer for the plaintiff.

Ajasa and *A. Alakija* for all the defendants.

The judgment of the Divisional Court was delivered on the 24th March, 1927, by

PETRIDES, J.

The plaintiff claims as per writ of summons "the sum of £550 as damages for trespass committed by the defendants on the plaintiff's dwelling-house situate at Oto on the 17th day of February, 1927".

The facts as I find them are briefly that after the death of the late White Cap Chief Ajayi the plaintiff was selected with the concurrence of a number of members of the Oloto family (stated by Mr. Isaac King, a witness for the plaintiff, to be eighty out of about 1,000 in the whole country) to succeed him.

Almost immediately after his selection he entered into an agreement dated 28th June, 1924, with four members of the Oloto Family, on behalf of that family, which witnessed, *inter alia*, that the whole of the family of the Chief Oloto Palace in Oto

AKILOLU AKODU v. YESUFU OMIDIJI, IMAM KASUMU OJOKODANA, AKISANYA MOGAJI AND BAKARE OSHERU.

PETRIDES, J.

willingly appointed the plaintiff to be Chief in place of the late Chief Ajayi Oloto and that the plaintiff was to follow always the Ilu Community and the " Nigerian National Democratic Party " in all their ways.

The keys of the Iga were handed to the plaintiff, and he remained there with the consent and knowledge and approval of the family of the plaintiff up to the 17th February last, although he had been asked previous to that date to give up possession to the first defendant.

The Chief of the Oloto family is a White Cap Chief, but owing to the fact that the then Eleko was under suspension it was at first impossible for the plaintiff to be capped. This difficulty was subsequently removed by the deposition of Eshugbayi and the election of Ibikunle Akitoye as Eleko in his place in about August, 1925.

Although the new Eleko was appointed as long ago as August, 1925, the plaintiff has not yet been capped, and I can only conjecture that the reason for this is that he refuses to recognise the present Eleko.

Be that as it may the fact that he has not been capped has created dissensions in the family.

The dissensions grew until at last the first defendant was selected at a meeting of a number of members of the Oloto family to be Chief. Among those who selected him were the third and fourth defendants, both of whom are admitted by the plaintiff to be important members of the family. There were other important members of the family present at this meeting, including Ayeni and Fadairo. Subsequently Mr. Ajasa, M.L.C., an important member of the family supported him, or, as he puts it, was one of those who elected him.

The first defendant was then presented to Chief Obanikoro by the third and fourth defendants and Ayeni and Fadairo, who took him to the Eleko, who accepted him.

Chief Ojora, who was entitled to do so, duly capped the first defendant, who subsequently performed all the ceremonies that are required by native law and custom and which were described at length by Chief Obanikoro in the witness box.

Prior to the capping of the first defendant the Eleko's staff-bearer went and saw the plaintiff and told him that the Eleko sent a message to him that he was bringing a Chief to the Iga at Oto and that he gave him three days within which to vacate that building. On the day that the first defendant was capped, which

was three days later, the staff-bearer returned to the Iga and brought a message to the plaintiff that the Eleko was bringing a new Chief that afternoon. On each occasion the plaintiff replied that he would see his family.

When the staff-bearer returned in the afternoon with the first defendant he found the doors of the Iga had been locked.

The doors of the Iga appear to have been locked for several days prior to the 17th February. On that day, while the plaintiff and all four defendants were at Ebute Metta Police Court, eight men entered the Iga by breaking a back outer door and forcing the locks of the inner doors of the Iga. When the defendants returned from the Ebute Metta Police Court they entered by the front door, which had been opened with force by one of the men who had broken and entered from the back, and took possession of the Iga.

I find that the Iga was broken open with the prior approval and sanction of the first defendant. I am not, however, satisfied that this was done with the prior approval and sanction of the other defendants. Since the 17th February the first defendant has been in possession of the Iga and the other defendants have been there from time to time and were there, having accompanied the first defendant, on the 17th February with his approval.

The first defendant claims title to the Iga, as being the duly capped White Cap Chief Oloto, and says he is legally entitled to possession of the Iga and may, if he chooses, oust the plaintiff, although he has not done so at present.

The onus is on the plaintiff to prove title, and after listening for many days to a mass of evidence on native law and custom I am satisfied beyond any doubt that the plaintiff was only selected as prospective chief, as the plaintiff himself admitted in the witness box, and that the family had no power to do more than that, and that the defence has proved that the first defendant was properly selected as a prospective chief by persons entitled so to do—that he was approved by the Eleko after being presented by four of the principal members of the family—was properly capped—has performed all the necessary ceremonies and is the duly appointed White Cap Chief of the Oloto family according to present native law and custom and is entitled to reside in and take possession of the Iga, and that the plaintiff has since the first defendant's appointment as White Cap Chief no right to possession of the Iga.

No useful purpose would be served by my reviewing all the evidence and detailing the points of the evidence on which I base my conclusion: that proceeding would be a very lengthy one. I must, however, state that I am satisfied that the word " elect "

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and " appoint " and their derivatives which appear in the evidence have no other meaning than " select " and its derivatives, except when applied to a person who has performed all the ceremonies required by native custom on such occasions after having been selected a prospective chief and then capped with the approval of the Eleko.

It has been argued by the plaintiff's Counsel that, even if the first defendant is entitled to possession of the Iga, his client is entitled to a verdict, as the defendants have committed an unlawful act by breaking into the Iga, which is a punishable offence under section 81 of the Criminal Code. I cannot accede to this contention, for although our law makes forcible entry on land which is in actual and peaceable possession of another an offence under section 81 of the Criminal Code that section does not give any civil remedy. I am of the opinion that the English law on the point is correctly stated by Fry, J., in Beddal *v.* Maitland (1) in the following words:—

" Damages cannot be recovered against the rightful owner " for a forcible entry on land . . . . The result of the cases appears " to me to be this, that, inasmuch as the possession of the defend- " ant was unlawful, he can recover no damages for the forcible " entry of the plaintiff. He can recover no damages for the entry " because the possession was not legally his, and he can recover " none for the force used, because, though the statute 5 Rich. II " creates a crime, it gives no civil remedy."

and that the principle enunciated applies to Nigeria *verbatim* with the exception of the words " statute 5 Richard II " for which the words " Criminal Code " should be substituted.

(The learned Judge here commented at length on the fact that some of the witnesses called on behalf of the plaintiff had committed deliberate perjury).

While I have no doubt that a few years ago the plaintiff would have had short shrift if he had acted as he had done since the Eleko's staff-bearer went to his house and demanded that it should be vacated, I must express my strong disapproval of the first defendant's action in breaking into the Iga by force as it might have led to a breach of the peace.

The first defendant having proved the defence of title there will be judgment for each of the defendants with taxed costs.

The judgment of the Full Court (Combe, C.J., Tew and Maxwell, J.J.), was delivered on the 11th January, 1928, by

(1) (1881) 17 Ch. D. at p. 188.

COMBE, C.J.

This is an appeal from the judgment of Petrides, J. delivered on the 24th March, 1927, in which he dismissed a claim by the plaintiff, the present appellant, for damages for trespass alleged to have been committed by the defendants on the plaintiff's dwelling at Oto Village.

The facts found by the learned Judge were, briefly stated, as follows. The house in question is the " Iga " or official residence of Chief Oloto, a White-Capped Chief. On the death of Chief Ajayi Oloto the plaintiff was selected to succeed him by the principal members of the Oloto family, and the plaintiff thereupon took up his residence at the Iga.

The plaintiff did not go through various ceremonies necessary to confirm his appointment as Chief Oloto, probably because he refused to recognise the then Eleko, who alone could accept him as a White-Capped Chief.

In view of this situation a number of members of the Oloto family selected the first defendant in the place of the plaintiff, and he was thereupon presented to and accepted by, the Eleko, and formally appointed as Chief Oloto. The plaintiff, however, refused to give up possession of the Iga to the first defendant.

On the 17th February, 1927, eight persons, among whom was none of the defendants, broke open the doors of the Iga, in the absence of the plaintiff and the first defendant, and subsequently took possession. The learned Judge also found that the Iga was broken open with the prior approval and sanction of the first defendant, but was not satisfied that the other defendants approved of or sanctioned the act.

On these facts he held that the first defendant, having been duly elected Chief Oloto, had a right to enter and take possession of the Iga, and that consequently no trespass had been committed by him. As to the argument that the plaintiff could recover damages for trespass on the ground that the forcible entry was unlawful, being an offence against section 81 of the Criminal Code, the learned Judge, on the authority of Fry, J., in Beddal *v.* Maitland (1) held that that section of the Code provides no civil remedy in respect of a forcible entry.

I am of opinion that the learned Judge was right in his findings of fact and in law, and that there was no misreception of evidence or misdirection of itself by the Court.

Counsel for the appellant pressed the argument that the appellant had been duly elected to be Chief Oloto, and that he could not be removed from that position except for misconduct and

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after a proper enquiry at which he had been given an opportunity to defend himself. Assuming that the appellant had been duly elected Chief, I quite agree that he could not have been deposed except for the reasons and in the manner suggested. I am perfectly satisfied, however, that the appellant had never gone through all the ceremonies prescribed by native law and custom which had to be performed before he could be *elected* Chief Oloto. He had merely been *selected* by the family as prospective Chief, and it was owing to his omission or refusal to perform the requisite ceremonies that he was never actually elected. This seems to me to be clearly established by the evidence, notably by that of Adamo Akeju, Chief Obanikoro, himself a White-Capped Chief of long standing. This Chief was quite definite upon this point. He said " When a man is elected by his family a man is not a chief at once ".

I have purposely used the term " selection " to denote the choice of the family, and the term " election " to denote the final consummation of the appointment whereby a man becomes a White-Capped Chief. I mention this because the word " election " was used by the witnesses in both senses.

I am of opinion that none of the defendants has committed any act of trespass and that the judgment of the Divisional Court was right and should be affirmed.

CASES DECIDED IN THE DIVISIONAL COURTS.

G. B. OLLIVANT & Co., LTD. ... ... *Plaintiffs*

v.

EUGENE COLE ... ... *Defendant.*

Liability of surety under fidelity bond—Variation of agreement.

The facts are sufficiently set out in the judgment.

Jibowu for the plaintiffs.
Alakija for the defendant.

The judgment of the Divisional Court was delivered on the 13th April, 1927, by

PETRIDES, J.

By an agreement dated the 7th day of November, 1923, between the plaintiffs and Z. T. Taylor of Zaria, the plaintiffs engaged Z. T. Taylor as " Commission Agent for the buying of produce at Funtua in the District of Katsina ".

On the same date Z. T. Taylor and the defendant executed a bond in favour of the plaintiffs in the sum of £250 which recited that the plaintiffs had agreed to take Z. T. Taylor into their employment as Commission Agent to buy produce at Funtua upon the defendant as his surety entering into a bond in the sum of £250 for his fidelity in the said employment, for which payment Z. T. Taylor and the defendant bound themselves and each of them and each of their heirs, executors and administrators and assigns.

The condition of the above bond was that if Z. T. Taylor who is referred to as the Principal Obligor " shall faithfully account for " pay over and deliver unto the said employers their successors or " assigns all sums of money, books, papers, matters and goods " belonging to the said employers which shall from time to time " be received by or come to the hands of the said Principal Obligor " and also shall act and conduct himself at all times with fidelity, " integrity and punctuality in and concerning the matters as such " Commission Agent in charge of the buying of produce at Funtua " in the district of Katsina and shall return and make good any " such moneys, books, papers or goods as he may misemploy within " the space of one calendar month after demand shall have been " made of him in default thereof if the said surety shall within one " month after he shall have had notice in writing from the em- " ployers of any such default make due and sufficient repayment " restitution or compensation for the loss or damage which the " said employers shall have thereby sustained " the bond should be void.

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PETRIDES, J.

It is not disputed that Z. T. Taylor has failed to account or pay over to the plaintiffs a sum of £493 12s. 3d. which he received from them in respect of his employment as a Commission Agent as a purchaser of produce at Funtua; but it has been argued that the defendant is not liable under the bond to make good the deficiency, on the ground that there has been a material variation of the contract under which Z. T. Taylor was originally employed, as he was given goods of the plaintiffs to sell subsequent to the bond being entered into, and that there is no evidence that the defendant was ever informed that goods were being supplied to Z. T. Taylor.

It is said that the transaction was one indivisible transaction and that this is borne out by Ex. " E ", which is a letter written by the plaintiffs' solicitors stating that the late Zerubabel Titus Taylor was indebted to them in the sum of £933 4s. 3d., which was made up of the amount due by Z. T. Taylor in respect of his employment as a Commission Agent to buy produce and that due in respect of the goods supplied to him by the plaintiffs to sell.

I am asked to decide that there has been a variation of the employment agreement and that in consequence the defendant is discharged as surety under the bond.

In the case of Bonar *v.* MacDonald and Others (1) the House of Lords laid down the following rule of law which bears directly on the point at issue:—

" The rule as extracted from the English authorities—Evans " *v.* Whyle (2), Eyre *v.* Bartrop (3), Archer *v.* Hale, (4) Whitcher " *v.* Hall, (5) is that any variance in the agreement to which the " surety has subscribed which is made without the surety's know- " ledge or consent which may prejudice him or which may amount " to a substitution of a new agreement for a former agreement even " though the original agreement may, notwithstanding such " variance be substantially performed, will discharge the surety."

In the case of Holme *v.* Brunskill (6) at p. 505 Cotton L.J., laid down the following as his view of the law on the point:—

> " The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident

(1) 8 R.R. 60: 3 H.L.C. 161.
(2) 5 Bing. 485: 130 E.R. 1148.
(3) 3 Madd. 221: 56 E.R. 491.
(4) 4 Bing. 464: 130 E.R. 491.
(5) 29 R.R. 244: 5 B. & C., 269: 108 E.R. 101. (6) 3 Q.B.D. 495.

that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett, L.J., in the case of Croydon Gas Company *v.* Dickson (1) ".

I do not think that it can be doubted that these two propositions crystallise the law on the point at issue.

It seems to me therefore that I have to decide whether there has been in this case " any variance in the agreement to which the surety has subscribed " or a " substitution of a new agreement for a former agreement " to quote the words in the first judgment or " any agreement between the principals with refrence to the contract guaranteed " to quote from the latter judgment.

While there can be no doubt that there was an agreement between the plaintiff and Z. T. Taylor whereby the latter was to sell the plaintiff's goods, can it be said that that fact constitutes (*a*) " any variance in the agreement to which the surety (defendant) has subscribed " or (*b*) " a substitution of a new agreement for a former agreement " or (*c*) " an agreement with reference to the contract guaranteed "?

Apart from the fact that there is no evidence before me to show there has been a variation of the contract guaranteed or the substitution therefor of a new contract or any agreement with reference to the contract guaranteed, it seems to me on such evidence as there is before me that the agreement to sell goods was not a variation of the contract of employment that was guaranteed, but that it was an independent and collateral agreement between the plaintiffs and Z. T. Taylor, which was not incompatible with and did not operate as a cesser of or in any way vary the contract of employment guaranteed.

The words of Lord Loughhorough, which are quoted by Lord Cotton in his judgment in Holme *v.* Brunskill (2) at the end of the first paragraph on page 505, appear to lend some colour to the

(1) 2 C.P.D. at p. 51. (2) 3 Q.B.D. 495.

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defendants' contention, as Lord Loughborough is quoted as saying that the principals must not carry on any transaction without the knowledge of the surety. If, however, the case of Rees *v.* Berrington (1) is perused it will be found that Lord Loughborough was giving judgment in a case where there had been a clear variation of the guaranteed agreement, and that he appears to have qualified his dictum by limiting them to a transaction contrary to the nature of the engagement of the surety, which means in other words a variation of the engagement. It is clear that the Appeal Court did not accept the words of Lord Loughborough as meaning that the principals must not carry on any transaction whatsoever without the knowledge of the surety, as they at once proceeded to lay down their view of the proper rule in the words I have previously quoted which clearly limits the agreement which principals may not carry on without the knowledge of the surety to a variation of the agreement to which the surety has subscribed or to a substitution of a new agreement for that one.

It appears to me that the case of Anderson *v.* Thornton (2) is a very clear authority for the proposition that the surety of an employee is not released by the fact that the person guaranteed enters into an agreement with the same employer to do work other than that guaranteed, when the new employment is not incompatible with and does not operate as a cesser of the employment guaranteed.

In that case it was decided that a surety for a clerk of a bank was not relieved of his liability although the clerk was promoted to be a manager of a branch of that bank, as it did not follow that he ceased to be a clerk when he was appointed manager, and it not appearing that the two offices were necessarily inconsistent.

The judgment in the case of Anderson *v.* Thornton is that of Lord Denman, C.J., Patteson, Williams and Whiteman, JJ., and I cannot find that it has been ever doubted, and I find it referred to without disapproval in a judgment of the present learned Chief Justice of Nigeria in the case of Miller Brothers, Ltd., *v.* Oyegunle and Others (3).

There was nothing in the bond to prevent the plaintiffs giving their goods to the defendant to sell, and it certainly seems to me that, if the surety thought it essential that the employment of Z. T. Taylor should be restricted to buying produce on commission, he should, as was suggested in the case of Frank *v.* Edwards (4) on a somewhat analogous point, have taken care to have it inserted.

(1) 3 R.R. 3: 2 Ves. Jun. 540: 30 E.R. 765.
(2) 1842. 3 Q.B. 271: 114 E.R. 510. (3) 5 Nigeria Reports, 97.
(4) 91 R.R. 448.

Without deciding the point it seems to me that, even if there had been a material variation in the terms of the agreement between the plaintiffs and Z. T. Taylor, of which I am satisfied there is no evidence, the onus was on the defendant to show that it was made without his assent: this he has not attempted to do.

I am satisfied that the plaintiff has proved his claim and there will be judgment for the plaintiffs for £250, the amount guaranteed, and taxed costs.

PETRIDES, J.

CLAUDIUS JAMES HAASTRUP ... ... *Plaintiff.*

v.

FELIX ADEBAYO COKER ... ... *Defendant.*

Effect on succession to property of Christian marriage followed by marriages in accordance with native custom—Unnecessary to consider whether parties to the Christian marriage were professing Christians.

Frederick Haastrup contracted a marriage according to Christian rites with one Christiana Fagumell. He died intestate in 1901, leaving Sally Thomas and Frederick Haastrup as the surviving children of the said marriage.

Frederick Haastrup the elder had, subsequently to his marriage with Christiana Fagumell, married a number of women according to native custom and was survived by nine children of these women.

In 1911 Sally Thomas took out Letters of Administration of the estate of her father, and in 1917 she conveyed to the defendant certain land which was owned by the intestate at the time of his death.

The plaintiff, purporting to sue on behalf of all the surviving children of Frederick Haastrup the elder, sought to set aside this sale and asked for a declaration that the land was the property of all the said children.

Held, following Cole *v.* Cole (1), that in view of the Christian marriage the native law of inheritance could not prevail.

Held also, that it was immaterial whether the parties to the Christian marriage did or did not actually profess the tenets of the Christian religion at the time of the marriage.

Asiata *v.* Cessario Goncallo (2) distinguished.

Zizer for the plaintiff.
Folarin and *Soetan* for the defendant.

The judgment of the Divisional Court was delivered on the 9th February, 1927, by

PETRIDES, J.

The late Frederick Haastrup, alias Kumoku, Ex-Owa of Ilesha (hereinafter referred to as the deceased) died on the 21st day of September, 1901.

It is admitted by the plaintiff's Counsel at the bar that the deceased went through a Christian form of marriage at Sierra Leone to one Christian Fagumell by whom he had a number of children of whom only two survived him, namely Sally Thomas, alias Princess Adenibi of Ilesha, and Frederick Haastrup, and that subsequently the deceased, on the death of his father, took unto himself some fifty wives whom he married by native custom by whom he had a number of children of whom nine survived him,

(1) Nigeria Reports 15. (2) 1 Nigeria Reports, 41.

and that the plaintiff seeks a declaration that the land in dispute is the property of these eleven surviving children.

In 1911 Sally Thomas as the eldest child of the deceased took out Letters of Administration of the estate of the deceased. The children of the marriages by native custom appear to have participated in the distribution of the estate of the deceased, other than that at Yaba.

Part of the land which belonged to the deceased at Yaba was by a deed of conveyance dated the 23rd day of September, 1917, and registered at page 170 volume 119 of the Register of Deeds conveyed by Sally Thomas, described in the deed as Princess Lekunye Adenibi, to the defendant, and it is in respect of the land so conveyed that the plaintiff claims to set aside the sale to the defendant, on the ground that Sally Thomas had no authority to convey the property, and asks for a declaration that the property in question be declared to be the property of the eleven children of the deceased.

The plaintiff purports to sue on behalf of the Haastrup family, but it is clear that he is not authorised to sue on behalf of Sally Thomas, and I am not satisfied that he is authorised to sue on behalf of Frederick Haastrup.

There is clear evidence that the deceased was a professing Christian during part of his life, but there is no actual evidence as to when he adopted Christianity, *i.e.*, whether before or subsequent to his marriage by Christian rites. This is not surprising, as he is alleged to have been married in 1848. The marriage certainly occurred a long time ago, and it would be virtually impossible to call witnesses now as to what religion the deceased professed so many years ago.

When the deceased came to Nigeria and succeeded his father long after his marriage by Christian rites, he took unto himself a large number of wives, some fifty in number. These appear to have lived in the same compound as the wife by the marriage by Christian rites and her two children, and after his death some Christian as well as native rites appear to have been performed over the body of the deceased.

I am of the opinion that, as it has been admitted that there was a Christian marriage between the deceased and Christiana Fagumell, the parents of Sally Thomas and Frederick, and that as such marriage was prior to the other marriages the principles laid down in the case of Cole *v.* Cole (1) apply, and that this is not a case in which the Court can observe the native law of inheritance.

(1) 1 Nigeria Reports 15.

CLAUDIUS JAMES HAASTRUP *v.* FELIX ADEBAYO COKER

It has been argued that, as it has not been proved that the deceased and his wife were professing Christians at the time of marriage by Christian rites, the case of Cole *v.* Cole is not applicable, and that in view of the deceased's subsequent record of polygamy he must be regarded as a pagan, and that native law should be applied on the principle laid down in the case of Asiata *v.* Cessario Goncallo (1).

PETRIDES, J.

I cannot agree with this contention. It appears to me that the facts on which I have to decide are similar to those in the case of Cole *v.* Cole. The *ratio decidendi* of the judgment in that case was that the Coles were married by Christian rites, and that a marriage according to such rites clothed the children of the marriage and their children with a status unknown to native law, and that in such circumstances the question of inheritance to the deceased person cannot be decided by native law and custom.

The Judges never paused to consider whether Cole was in fact a Christian and nowhere, either in the judgment or in the statement of facts, is it stated that Cole was a Christian native. That fact was in the circumstances of the Cole case immaterial, as the law would presume, until the presumption was rebutted, that where two parties went through a Christian form of marriage they intended to be bound by its consequences, for our law presumes that a person intends that which is the immediate or probable consequence of his act.

It is true that in the head-note to Cole *v.* Cole reference is made to Cole being a Christian native, but I have no doubt that this was inserted in the head-note subsequent to the decision of Asiata *v.* Cessario Goncallo. Such a distinction was in my opinion unnecessary, as the decision of Cole *v.* Cole was based, not on the fact that the parties to the marriage were Christian natives, but on the fact that they had gone through a marriage by Christian rites.

In the case of Asiata *v.* Goncallo it was proved that the parties to the Christian marriage were in fact two Mahommedans, who were married first in accordance with Mohammedan and then Christian rites in a Christian church, and Griffith, J., held that a contract which a Christian marriage would ordinarily imply was clearly not implied in that case.

Speed, J. (afterwards Sir Edwin Speed, C.J.), in his judgment in Asiata *v.* Goncallo specifically stated that he could not admit that the parties contracted a Christian marriage at all, as he

(1) 1 Nigeria Reports 41.

held the view that the parties were Mohammedans and merely for local reasons went through the marriage ceremony in Christian form.

The facts proved in the case of Asiata *v.* Goncallo were sufficient to rebut the presumption to which I have alluded above, that where two parties go through a marriage by Christian rites they intend to be bound by its consequences.

The marriage in this case is alleged to have taken place in 1848. It was admittedly according to Christian rites, and I have no hesitation in deciding that it is not in fact necessary to prove that the deceased was a professing Christian when he married, as the law will presume that the parties, by going through a marriage according to Christian rites, intended to be bound by its consequences, unless there was evidence to the contrary, of which there was none in this case.

On the facts proved before me the plaintiff has not established any *locus standi* to dispute the defendant's title and his claim must therefore be dismissed with costs.

In re APPLICATION OF EKONG ETA AKPO.

ADAM EPHRAIM DUKE AND
NTOI EKPO ETA OF BIG QUA ... ... *Plaintiffs.*

v.

ETA AKPO ABONG OF AKIM QUA ... ... *Defendant.*

Death of defendant—No steps taken by plaintiffs to substitute a fresh defendant—Application of representative of family of deceased defendant for order that the action be struck off the Cause List for want of prosecution.

This action was commenced in June, 1924.

The defendant died in March, 1926.

In May, 1927, the applicant, a member of the family of the deceased defendant, moved the Court for an order striking the action off the Cause List for want of prosecution.

Held, that in such a case a person interested in the action, though not a party, may make such application.

Renner and *Esin* for the plaintiffs.
Clinton for the mover.

The judgment of the Divisional Court was delivered at Calabar on the 23rd May, 1927, by

WEBBER, J.

This is an application by way of motion by one Ekong Eta Akpo, a chief and member of the Akim Qua family and deputed by the townspeople to represent them, for an order that the above action be struck off the cause list for want of prosecution and that the costs incurred by the defence up to date be paid by the plaintiffs.

The writ in this action was issued on 17th June, 1924, and in October, 1924, a plan and pleadings were ordered. At the end of the same year the pleadings were filed. But for the plan, the case was ripe for hearing at the beginning of 1925. From 1924 to the present time nothing further was done, and up to now no plan has been filed. On the 8th March, 1926, over fourteen months ago, the defendant died. This is sworn to by Jacob Duke of the Duke family, of whom the first plaintiff is the Etubom. No steps have been taken by the plaintiffs to substitute someone in place of the deceased defendant. The action is not a personal one, and so the maxim *actio personalis moritur cum persona* does not apply. The action continues to the representative of the deceased. The rules of Court enable a plaintiff to apply to the Court to have another person made defendant—Order 28, Rule 7.

The plaintiffs have been guilty of the grossest laches. For three years they have neglected to file a plan as ordered, and they have taken no steps to substitute another defendant.

In England the cause would have abated and been struck off the cause list without any party applying (R.S.C. O.17, r. 10).

Provision is made in our rules (Order 28, rule 1), enabling any interested person to apply for an order requisite to cure the defect or for enabling or compelling the proper parties to carry on the proceedings.

This is an enabling rule by which any interested person can move to compel the plaintiff to proceed with his action: and, if the Court ordered him to do so within two months and the order was not carried out, the action would be dismissed. A similar rule can be found in England—O.17, r. 8.

These rules are made to enable parties to continue the proceedings. There are no rules under which any interested party may apply to have a cause struck off for want of prosecution. Under our rules an action may be removed from the cause list on the non-attendance of both parties or of the plaintiff. The discretion is with the Court; there is no application by a party: the Court acts on the fact of the non-attendance. But I am of opinion that a party, and even a person interested in the action, where one of the parties has deceased, may move a Court to dismiss an action for want of prosecution.

The English rules make provision in certain cases for dismissing an action for want of prosecution—namely for default in pleading or in giving discovery of particulars—and Order 25, r. 4 enables a Court to dismiss an action where it is frivolous and vexatious.

Except in cases of non-attendance, our rules make no provision for dismissal or striking out for want of prosecution—but there are cases in which the Court deals with them by striking out or dismissal under its general or inherent jurisdiction, such as abuse of process, default in giving security, non-payment of costs (White *v.* Bromige (1)), and laches (Mohan *v.* Broughton (2)) and others. Such a dismissal does not bar a continuance of the proceedings, as the effect is only to remove the cause from the list, which cause can be restored again on terms as to costs (Winton *v.* Second St. James Building Society (3)). But, says Counsel for the first plaintiff, the mover is not a party to the action and it is not competent for him to move. He must first cure the defect and have another defendant substituted, and then the newly substituted defendant may move the Court. I am unable to agree with his

(1) [1878] 26 W.R., 312. (2) 82 L.T. 29: 1900 P.D. 56.
(3) [1904] 116 L.T. Jo. 267 (n)

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ADAM EPHRAIM DUKE AND NTOI EKPO ETA OF BIG QUA *v.* ETA AKPO ABONG OF AKIM QUA

WEBBER, J.

contention. The mover's affidavit shows that he is an interested person and is therefore competent to move the Court, nor do I think it necessary to have the new defendant first substituted. In Wright *v.* Swindon Marlborough & Andover Railway (1) the plaintiff failed to deliver a statement of claim within the time ordered and he became bankrupt. The defendant moved ex parte to dismiss for want of prosecution. The Court thought notice of motion should be given to the trustee in bankruptcy. It did not say " first substitute and then bring your motion ". Here there is no question of giving notice. But, says Counsel for the second plaintiff, the mover is not the head of Akim Qua family; Chief Eteta was installed as head in December, 1926, and he, and not the mover, should have brought this motion. I am satisfied from the mover's affidavit that he was deputed by the townspeople to represent them in this matter. This has not been denied. He is an interested person and competent to move. The plaintiffs' affidavits have not satisfactorily explained their laches in this matter, and I must therefore strike this action off the cause list and order each plaintiff to pay seven and a half guineas into Court to be uplifted by defendant's Counsel only when a new defendant has been substituted. The action is not to be restored to the list without special leave of the Court.

(1) 4 Ch. D. 164.

T. J. SOLOMON ... ... *Plaintiff.*

v.

J. D. PICKERING & COMPANY, LTD. ... *Defendants.*

Allegation that defendant is about to leave the jurisdiction of the Court—Order XII of Rules of Supreme Court (Schedule II)—Discretion of the Court.

The plaintiff had commenced an action against the defendant company, who were then carrying on business in Calabar, and now applied for an order requiring the defendants to give security for their appearance, alleging that the said business was about to be closed down.

The company admitted that their establishment at Calabar was shortly to be closed down, but denied that they intended to leave the jurisdiction of the Court, as they would still carry on business at Lagos and Kano.

Held, that in the circumstances disclosed by the defendants' affidavit the Court should not exercise the discretion conferred upon it by Order XII in Schedule II of the Rules of the Supreme Court, and that the order asked for must be refused.

McCormack for the plaintiff.

Graham Paul for the defendants.

The judgment of the Divisional Court sitting at Calabar was delivered on the 31st January, 1927, by

WEBBER, J.

This is a motion for an order that the defendants do give security for their appearance to answer any judgment that may be passed against them in the above suit.

The motion was ex parte and the Court directed that a copy of the motion and affidavit be served on the defendant company in order that the agent might file a counter-affidavit, if necessary, and appear and show cause why the order should not be made.

The plaintiff averred in his affidavit that the defendant company intended closing down their business in Calabar and were selling off their stock with the intention of leaving Calabar, and that their departure will precede the hearing of the suit Solomon *v.* Pickering & Co., which is a suit for an amount considerably over ten pounds.

The agent for Pickering & Co., in his affidavit admitted that his firm intended to close down their Calabar agency and that it was intended to realise their stocks. The defendant company claim to have a good defence to their action. The agent further stated that their company is established on a large scale at Lagos and Kano in Nigeria, and that these establishments are not being closed down.

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I am of opinion that the affidavit of the agent for Pickering & Co., shows good cause why no order should be made. The *causa procedendi* is the leaving of the jurisdiction of the Court, and, although there is every intention of the company's closing their agency in Calabar, there is no intention of their leaving the jurisdiction of the Supreme Court, nor do I think that, by reason of their departure from Calabar, execution of any decree which may be made against them is likely to be obstructed or delayed.

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The local rules dealing with the arrest of absconding defendants are similar in many respects to section 6 of the Debtors Act, 1869. The word "England" is used in this Act and we have the jurisdiction of the Court, but our local rules have a section which does not appear in the Debtors Act. Our rules contemplated the possibility of a defendant being in one Division of the Supreme Court and of the suit depending in another division and provided a procedure in such a contingency. *Vide* rule 6 of Order XII.

The exercise of the powers conferred by this Order is purely discretionary, and the Court, taking into consideration the law and all the circumstances, does not consider that this order should be granted and dismisses the motion with three guineas costs.

EFANA EFANA HENSHAW ... ... *Plaintiff.*

v.

ELIJAH HENSHAW, ANDEM EWA AND OTHERS, AND COMPAGNIE FRANCAISE DE L'AFRIQUE OCCIDENTALE ... ... *Defendants.*

Lease granted to European firm by chiefs of Henshaw Town—Native law and custom regarding "beach land."

The plaintiff claimed cancellation of a lease made between the chiefs of Henshaw Town and the Compagnie Francaise de l'Afrique Occidentale on the ground that the land, which was "beach land"—*i.e.*, land with a water frontage—was the property of the family of which he is the head.

The Court found that the plaintiff had never occupied the land in question, and further that by the local native law and custom "beach land" belongs to the town within the limits of which it lies and not to any particular family.

Renner for the plaintiff.

Graham Paul for the defendants.

The judgment of the Divisional Court was delivered at Calabar on the 19th April, 1927, by

WEBBER, J.

The plaintiff claims cancellation of a lease made between the defendants, the chiefs of Henshaw Town, on the one hand and the French Company on the other. The lease is in respect of certain beach land in Calabar, and the plaintiff claims that this land is the property of the Joseph Henshaw family, of which he is the representative. This land was leased to the French Company by the chiefs of Henshaw Town, and the plaintiff claims that, the land being the property of the late Joseph Henshaw, it could only be leased with the consent of all the principal chiefs of the family who should be parties to the deed.

For the defence the plaintiff's representative capacity is admitted, but it is denied that the land is the property of the Joseph Henshaw family. It is claimed that the land belongs to the whole Henshaw family and that the deed is in order. For the French Company it is pleaded that the plaintiff has no title to bring this action and that he is estopped from claiming to have this lease set aside.

The main question in this case is whether it has been proved that this beach land is the property of Joseph Henshaw, an ances-

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tor of the plaintiff and head of the Ekeng Iwatt branch of the Henshaw family.

There are four Henshaw families, namely Ewa Ekeng, which is the senior branch, Ekeng Iwatt, Andem Ankoi and Efana Offiong.

The plaintiff claims that his ancestor obtained the land, with the consent of the principal chiefs, in the year 1874 or 1875, that he cleared the site and filled in the swamps, settled there and built houses and sheds, and that his ancestor lived there with his wife and children and occupied the land till his death. The plaintiff states that Daniel, the successor to Joseph, used the land and planted there, and that no one interfered, and that on his death Ewa succeeded and planted one coconut tree.

WEBBER, J.

When the plaintiff refers to occupation by his family of this land, it is important to note that he does not, on his family's behalf, claim the whole land in respect of which the French Company obtained their lease. He says that the French Company are on four beaches owned by Ekeng Inyang, Hogan Henshaw, Okon Offiong and his ancestor.

As to evidence of occupation, there is the witness Ekpo Ekpo Efiom, who is a chief of Henshaw Town. He says that Joseph Henshaw had a beach on the portion of the land given to the French Company; but he states what is very important, that the beach land belongs to the whole of Henshaw Town " but individuals built upon it ". Further he says " the whole land is communial and the buildings belong to individuals ". Efana Daniel Henshaw supports the plaintiff's case as to occupation.

It is admitted by the plaintiff and his witnesses that at the time of the negotiations with the French Company there were no sheds standing which belonged to the Joseph Henshaw family. Ekpo Ekpo Efiom says that the land was overgrown with bush, but nevertheless it was occupied. As to recent occupation, *i.e.*, immediately before the French Company came, the only evidence is that of Efana Daniel Henshaw, who said he grew plantains. With this exception there is no evidence of actual and recent occupation.

If, as stated by the plaintiff, there were four beaches on the land in dispute, *i.e.*, three beaches of his own, one might have expected that the plaintiff would have called at least one of the occupants. Ekeng Inyang, one of these occupants, was called for the defence. He said that he had a shed on the beach and that Joseph Henshaw, whom he knew, had no shed on this land.

I am therefore compelled to come to the conclusion that the evidence of occupation produced is extremely weak: but when the evidence for the defence is taken into consideration and the whole of the evidence is read together, no Court could come to any conclusion other than that the plaintiff's family never occupied the site where the French Company premises now stand. That this is so is amply borne out by the evidence. In the first place the shed which the plaintiff's people pointed out as being the cause of action is outside of the land in dispute; then there is the evidence, which I have no hesitation in believing, that when the chiefs visited the land the plaintiff's predecessor, in the presence of his own people, pointed out the site of his father's shed, showing a coconut tree which was in front of it, and that his site was well outside of the boundaries of the land in dispute. The whole of the plaintiff's case rests on the question whether the land in dispute belonged to the family of Joseph Henshaw. Not only has he not proved it, but the evidence overwhelmingly shows that the occupation by his ancestor of a small shed on the beach was outside the limits of the land in dispute.

But, if I were disposed to believe that once upon a time Joseph Henshaw did occupy a shed on this land, and that Efana Daniel Henshaw in recent times planted plantains in the beach, this would not prevent the chiefs of Henshaw Town leasing the beach land to the French Company. It has always been native law and custom that beach land belongs to the town and never to a particular family. The beaches of Duke Town are owned by the descendants of Etim Efiom, and Ekpo Efiom and the principal chiefs of the present four branches of Henshaw family have the control and disposal of them.

The judgment delivered by Winkfield, J., in 1911 in the case of Prince Adam Duke IX *v.* Asuquo Ekpenyon Oku and Another in my opinion accurately states the native law and custom on the subject. This related to land adjoining the Calabar river which was once swamp. It was reclaimed by the plaintiff, who built a shed on it. The land was eventually leased to an European firm, and the plaintiff claimed to be the owner. In dealing with the giving of the land to the European, Winkfield, J. says:— " If the land was occupied the consent of the occupier was obtained. If the occupier objected, they would give the applicant a piece elsewhere, though they had the power, which under native law and custom amounted to a right, to ignore his objection ".

This is undoubtedly the law now. If the plaintiff did occupy this beach land, his consent would have been asked for, and, if he

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had consented, he would have shared in the rents. If he had refused, the chiefs of the town could have ignored his refusal, as there was no other adequate site. The plaintiff in such a case would have been entitled to reasonable compensation.

The plaintiff's claim is based on the alleged fact that this land belongs to the late Joseph Henshaw, and, this fact not having been established, the action must fail. The plaintiff was very ill-advised to bring this action. Even if the Court was able to hold that the ownership of the land was proved, the plaintiff still could not succeed. It is quite clear that the predecessor acquiesced in every procedure adopted by the chiefs of the town in the negotiation for a lease to the French Company. Elijah Henshaw was deputed by a power, the plaintiff's predecessor being one of the donors of the power, to negotiate for a lease, and there was no question of the revocation of the power. After the visit to the land, and after it was definitely ascertained that the plaintiff's family's objection proved to be unfounded, namely that the site included a portion of their family land, negotiations proceeded without any further trouble. Before the actual signing and execution of the deed, the plaintiff's predecessor died, and the plaintiff succeeded as head of the family. Not even up to the time of the actual signing was there any objection made by the plaintiff to the transfer of the land. The delay caused by the plaintiff was on the question of the amount of his share in the rents. That he was entitled to a share as the head of one of the four branches of the Henshaw family there was not the slightest doubt; but the plaintiff thought that he could be promised such a share as would be satisfactory to himself and family.

In this case there has been no deviation from the principle of native law and custom, and from the date of the signing of the power up to the execution of the lease there has been not only a general acquiescence, but a positive approval of the transfer of this beach land to the French Company. The plaintiff's claim for a cancellation of the deed and for other relief must accordingly be dismissed, and it is dismissed with thirty-five guineas costs to the defendants representing the Henshaw chiefs, namely Andem Ewa Ekeng and Elijah Henshaw, and twenty-five guineas costs to the French Company.

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v.

OKON EFANA

AND

JOHN NASSIF.

Offences against Customs Ordinance—Absence of mens rea no defence in case of acts absolutely prohibited in themselves.

The defendants were charged before the Police Magistrate, Calabar, with (*inter alia*) seven offences against the Customs Ordinance.

In respect of five of these charges, which were framed under sections 220 (*a*), 227, 224 (*d*), 224 (*f*) and 29 and 29 (*a*), it was argued for the prosecution that, the acts charged being proved, it was immaterial whether the defendants acted innocently and without intent to defraud, those acts being absolutely prohibited in themselves without regard to the intention of any person committing them.

The Magistrate discharged the defendants on the ground that there was no *mens rea*, but stated a case for the opinion of the Divisional Court.

Held, that the contention of the prosecution was right and that the defendants should have been convicted on the said five charges.

Fitzgerald, Crown Counsel, for the Crown.

The Magistrate was wrong in holding that failure on the part of the prosecution to prove a guilty intent entitled the accused to be discharged on charges 3, 4, 6, 7 and 8.

The maxim that in every criminal offence there must be a guilty mind is of great antiquity, and as regards the Common Law and earlier Statutes it may be said to have been of general application; but it has been greatly modified owing to the precision of modern statutes, and in many cases *mens rea* follows by necessary implication. (Regina *v.* Prince (1)).

The true meaning of the phrase must be found in the construction of the statute creating the offence. Where there is an absolute prohibition the absence of *mens rea* is no defence (Cundy *v.* Lecocq (2)).

The necessity to prove a guilty mind may be negatived by express words (Regina *v.* Tolson (3)).

Other sections of the Ordinance contain such words as "knowingly". In the sections with which we are dealing there is an absolute prohibition. It follows that the scope and object of the sections under consideration was to exclude such a defence as innocent intent.

(1) 2 C.C.R. 154.
(2) 13 Q.B.D., 207. (3) 23 Q.B.D., 168.

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If the accused are entitled to be discharged, it must be presumed that it was the intention of the legislature to include the word " knowingly " in the definition of the crime; but this would be altering the language of the statute and, it is submitted, departing from its intention.

WEBBER, J.

Regina *v.* Prince (*supra*), Emary v. Nolloth (1) and Brooks *v.* Mason (2) are direct and cogent authority for the principal that, where an offence is prohibited in itself, knowledge on the part of the accused is immaterial.

Clinton and *Inyang* appeared for the defendants.

The judgment of the Divisional Court sitting at Calabar was delivered on the 29th April, 1927, by

WEBBER, J.

This is a case stated by the Police Magistrate, Calabar. The two defendants were charged with committing nine offences. The first two offences, forging a customs entry and uttering the same, are against the Criminal Code, and the rest are against certain sections in the Customs Ordinance—namely sections 220, 227, 224 (*a*), 224 (*d*), 224 (*f*), 29, 29*a* and 221 (1)*a*.

I give the charges in detail:—

1. Forging Customs Entry No. 2528 dated 6/4/27 by writing figure 707/8 knowing it to be false and with intent that it may in any way be used or acted upon as genuine to the prejudice of the Collector of Customs Calabar on 6/4/27 contrary to Cap. 21, sec. 467, Vol. 1, Laws of Nigeria.
2. Uttering, etc., C.C. 468.
3. Removing two cases crockery marked 707 and 708 respectively from Customs Transit Shed, Calabar, without paying duty on 6/4/27 contrary to sec. 220 (*a*) Cap. 130 Vol. II Laws of Nigeria.
4. Did aid, abet counsel or procure or were by act or omission in any way directly or indirectly concerned in the removal of the said two cases marked 707 and 708 respectively from the Customs Transit Shed without paying the duty on 6/4/27 contrary to sec. 227 Cap. 130, Vol. II Laws of Nigeria.
5. Evading payment of duty on two cases crockery at same time and place. C.C. 224 (*a*).

(1) 1903 2 K.B., 264. (2) 1902 2 K.B., 743.

6. Making a false or incorrect entry in a Customs entry No. 2528 at same time and place contrary to sec. 224 (*d*) Cap. 130, Vol. II Laws of Nigeria.

7. Misleading one D. T. Johnson, Customs Officer, in the discharge of his duty at same time and place contrary to sec. 224 (*f*) Cap. 130, Vol. II, Laws of Nigeria.

8. Removing two cases crockery from the Customs Transit Shed No. 2 Calabar without the authority of the Collector of Customs at same time and place. Cap. 130, sec. 29 and 29 (*a*), Vol. II, Laws of Nigeria.

9. Smuggling the said two cases crockery at same time and place contrary to sec. 221 (1) (*a*) Cap. 130, Vol. II, Laws of Nigeria.

The facts of the case as found by the Magistrate appear to be as follows. A Mr. Paul Meyer of Hamburg sent three cases of goods to Calabar consigned to the Bank of British West Africa. According to the Bill of Lading two cases numbered 707 and 708 respectively were said to contain crockery and the third numbered 721 said to contain sundries. The case containing sundries was imported by Mrs. Nassif and she received the invoice at the same time that the Bank received the Bill of Lading. She sent her illiterate son John Nassif to the Bank with the invoice, and on payment for the goods the Bank handed to John Nassif the Bill of Lading and other papers. These other papers would presumably include the invoices in triplicate and the Bill of Exchange duly discharged. John Nassif then proceeded to the Customs and paid the duty on the case of sundries. The bill of entry was signed by Mr. Benjamin of the Customs. Before presenting this bill of entry to the officer on duty at No. 2 Transit Shed, Okon Efana, a clerk of Morin & Co., who was engaged on some matter connected with Customs, was asked by John Nassif to insert 707/708 in the bill of entry, which he did. These numbers represented the two cases described in the Bill of Lading as containing crockery, and the result was that John Nassif obtained three cases from the Transit Shed, two of which did not belong to his mother. Mrs. Nassif immediately returned the two cases which did not belong to her, and the prosecution of the defendants was the result. The Magistrate found that Okon Efana made the addition innocently, under the impression that John Nassif was entitled to the three cases, and that John Nassif thought that he was entitled to three cases. I think the Magistrate was correct in his finding that the defendants acted innocently and without any intention to defraud. The

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original mistake was made by the Bank in giving a delivery order of all three cases to John Nassif. Okon Efana, finding that according to the Bill of Lading John Nassif was entitled to three cases, entered in the bill of entry the numbers of the cases containing the crockery. This delivery order must have been confirmed by the local agent of the Steamship Company. There was ample evidence that the defendants acted under the mistaken belief that they were entitled to three cases.

A case is stated for the opinion of this Court as to whether on the finding of these facts the Magistrate was correct in discharging the accused. The Magistrate held that there was no *mens rea* and therefore the accused were entitled to a discharge.

I think the Magistrate acted rightly in discharging the two accused on the charges of forgery, uttering, smuggling and evading payment of duty.

In the first two charges the intention to defraud must be proved, and as to smuggling there is no evidence that the defendants smuggled the goods, nor can it be said they " evaded " payment if they acted innocently.

I confine myself to the other sections of the Customs Ordinance in which I am asked to say whether *mens rea* is a necessary element in the commission of offence under the sections.

The Crown Counsel (Mr. W. J. Fitzgerald), at whose request the case was stated, argued at considerable length. His main argument was that, where a thing is prohibited by Ordinance, the prosecution need not in all cases prove *mens rea*. He said it was mainly a question of the construction of a particular Ordinance. He dealt with the doctrine of *mens rea* from its earliest times, showing how it has gradually been superseded by modern legislation. He quoted several authorities which go to show that there are cases where the absence of *mens rea* is no longer a defence.

I agree with the Crown Counsel that the question whether *mens rea* is necessary or not is mainly a question of the construction of a particular Ordinance. This is clearly laid down in Regina *v.* Prince (1) and Regina *v.* Tolson (2), showing how in the one case the honest though mistaken belief of the age of a girl, namely that she was of the age of eighteen, was no defence in a charge of abduction of a girl under sixteen years, and in the other the belief in good faith and on reasonable grounds in the death of a husband or wife was a good defence to an indictment for bigamy. Stephen J. in the case of Cundy *v.* Le Cocq (3) arrived at his conclusion by comparing the different sections under the head " offences against

(1) 2 C.C.R., 175. (2) 23 Q.B.D., 168. (3) 13 Q.B.D., 207.

the public order" in the Act, and he held that the offence of a licensed person "selling any intoxicating liquor to any drunken person" under section 13 of the Licensing Act, 1872, was committed by a sale to a person who is drunk, although he showed no indication of insobriety and neither the licence-holder nor his servants noticed that he was drunk.

"There is, in my opinion," says Stephen, J., "an absolute prohibition against selling intoxicating liquors to a drunken person;" and so in Regina *v.* Prince (*supra*), where the judges held that the statute absolutely prohibited abduction of a girl under sixteen years of age.

This principle of absolute prohibition is further exemplified in Rex *v.* Wheat and Stooks (1), where a *bona fide* belief on the part of the defendant that he was divorced was not a defence to a charge of bigamy if in fact he was not divorced.

And so in particular enactments which by their form might appear to constitute the prohibited acts into crimes, and yet by virtue of which enactments the defendants charged with the commission of the prohibited acts have been convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*. Such are cases of trespass in pursuit of game, or of piracy of literary or dramatic works, or of statutes passed to protect the revenue; but the decisions in these cases, says Brett, J., in Regina *v.* Prince (*supra*) "have been based upon the judicial declaration that the enactments do not really constitute the prohibited acts into a crime or offences against the Crown, but only prohibit them for the purpose of protecting the individual interests of individual persons or of the revenue."

But in all enactments, the question whether the absence of *mens rea* or the positive proof of *bona fides* is an excuse of or defence to the acts prohibited is a question of the construction of each particular enactment.

And now I come to the Customs Ordinance, which, at a glance, contains many sections enacted for the purpose of protecting the revenue. Therein are laid down—and I particularly refer to section 224—certain definite prohibited acts, the commission of any of which renders the offender liable to a penalty of anything between £20 and £100.

The section starts with the words "no person shall" and then follow the prohibited acts. It does not say "no person shall unlawfully do so and so." The meaning of this word was fully

(1) 15 Cr. App. R. 134. 1921 2 K.B., 119.

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discussed in Regina *v.* Prince (*supra*). It appears to have some significance, and the absence of it is of some assistance in construing the penal provisions of this Ordinance.

There are sections of the Ordinance in which the prohibited acts are excused if an absence of *mens rea* is proved.

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J.

To turn to Part XIII, Division 1, which deals with forfeitures, section 212 imposes a fine of £1,000 on the owner of a ship exceeding 250 tons for certain prohibited acts. The absence of *mens rea* in subsection (1) is clearly a defence under the subsection.

Then with regard to Division 2 dealing with penalties, there is section 221. There the possession of smuggled goods or import or export of prohibited goods is punishable with a fine of £100, but it is clearly laid down that the absence of *mens rea*, the proof of which is on the persons charged, is a defence.

The master or owner of a ship used for smuggling is excused from a charge under section 222 if he can show the absence of *mens rea*, and any person prosecuted under section 223 (*a*) or (*c*) will be discharged if he shows a reasonable excuse for having in his possession prohibited imports, and so would the aider and abetter under subsection (*d*) if there were no *mens rea*.

But there are in section 224 certain prohibited acts without any qualifying terms. They seem to me to be absolute prohibitions, and no proof of the absence of *mens rea*, or even of positive good faith, can in my opinion avail.

I have not omitted to consider the meaning or effects of section 233. In my opinion it strengthens the argument in favour of absolute prohibition. It reads as follows:—

> "233. Any person may at the same time be charged "with an offence against this Ordinance and with an "intent to defraud the revenue, and if in addition "to such offence he is convicted of such intent the "maximum penalty shall be double that otherwise "provided."

It might be argued, when read with section 248.

> "248. In every Customs prosecution the averment of the "prosecutor or plaintiff contained in the information, "declaration or claim shall be deemed to be proved "in the absence of proof to the contrary, but so that—
> "(*a*) when an intent to defraud the revenue is "charged the averment shall not be deemed sufficient to prove the intent, and—

" (*b*) In all proceedings for an offence directly " punishable by imprisonment the guilt of the " defendant must be established by evidence."

that this might be construed to mean that, where the prosecution prefer this additional charge of intent with a view to obtaining twice the maximum penalty, the onus is on them to prove the intent, and that without such additional averment it is a competent and good defence if the defendant can prove no such intent. In other words, that it is a question of the onus of proof; that where intent is averred, the onus is on the prosecution; where not averred, the absence of it is on the defendant. I do not think this is the true construction, and if the prosecution had charged the defendants with the prohibited act of making a false entry and added a charge of intent to defraud the revenue, and if proof of such intent failed, the Magistrate could have convicted on the finding that the prohibited act was committed, even though the defendant had proved conclusively the absence of such intent.

I decide the stated case as follows:—

1. The Magistrate was right in dismissing charges 1, 2, 5 and 9.
2. The proof of absence of *mens rea* was not a good defence to charges 3, 4, 6, 7 and 8 and the defendants should have been convicted.

CHIEF EKEI EPHRAIM ADAM

AS REPRESENTING THE ETIM EFIOM HOUSE ... *Plaintiff.*

v.

ETUBOM ADAM EPHRAIM DUKE,

AS ETUBOM OF DUKE FAMILY ... ... *Defendant.*

Claim for declaration and injunction—Chancery Procedure Act, 1852, Section 50—R.S.C. (England) Order xxv, rule 5—Declaration cannot be granted where no cause of action.

The plaintiff sought for a declaration that he and the members of the Etim Efiom House (Calabar) were under no obligation to serve the defendant in his capacity as Etubom of the Duke House, and that they were not liable under native law and custom to make any contributions by way of tribute or taxes to the defendant in the same capacity.

The plaintiff also claimed an injunction to restrain the defendant from attempting to enforce any such alleged obligation or liability.

The Statement of Claim filed was as follows:—

1. The plaintiff and his people of the Etim Efiom House are a branch of the Efiom Okoho House.
2. They are the descendants of Etim Efiom, the eldest son of Efiom Okoho.
3. The Duke House or Edem Ekpo House are the descendants of Ekpo Efiom, a younger son of Efiom Okoho.
4. Ekpo Efiom had two sons, Edem Ekpo and Archibong Ekpo.
5. Each of these sons founded a separate house. Edem Ekpo founded Duke House and Archibong Ekpo the Archibong House.
6. In a judgment given by His Honour Mr. Justice Webber at Calabar on the 11th day of April, 1913, in the case of Chief Egbo Ephraim Adam v. Obon Adam Ephraim Duke, this Court has declared that "the Etim Efiom Family are now regarded as independent and separate".
7. In 1924 the plaintiff was gazetted as Etubom of the Etim Efiom House.
8. The defendant is asserting that the plaintiff and his people are not a separate and independent house and claims that they compose and are a portion of and are subject to the Duke House and are therefore subject to the authority and are under the control of the Etubom of the Duke House.
9. He also claims that the plaintiff and his people are liable for fees, tributes and contributions to him and to the Duke House according to native law and custom.

10. Under protest from the plaintiff and his people the defendant qua Etubom of Duke House has insisted upon them doing manual work for which members of the Duke House alone are liable.

11. The defendant qua Etubom of Duke House claims to exact from the plaintiff and his people obligations, services, contributions, fees, tribute and dues for which members of a house are, under native law and custom, liable to the Etubom of that house.

12. The plaintiff claims—

(1) A declaration that he and his people of the Etim Efiom House being distinct and separate from neither originating from nor subject to the Duke House are not under any obligation or liability to serve the defendant qua Etubom, nor to do any work for or on behalf of or under the defendant qua Etubom. Nor are they liable for any contribution, tribute or taxes to the defendant qua Etubom under native law and custom.

(2) An injunction to restrain the defendant from calling upon the members of the Etim Efiom House or forcing them in any way whatsoever to work for him, serve him or to pay any dues to him qua Etubom under native law and custom.

Held, that no cause of action was disclosed by the Statement of Claim.

Held also, that the point whether a declaration could be made where no consequential relief could be given was governed by section 50 of the Chancery Procedure Act, 1852, and that the later, and wider, rule of English practice—Order XXV, rule 5—does not apply in Nigeria. Consequently no declaration could be made in this case.

Clinton, Graham Paul and *Ephraim* for the plaintiff.

Macaulay and *Esin* for the defendant.

The judgment of the Divisional Court at Calabar was delivered on the 21st November, 1927, by

WEBBER, J.

This is a peculiar case. The plaintiff seeks a declaration that he and the members of his house are not under any obligation or liability to serve the defendant qua Etubom of Duke House nor to do any work for and on behalf of or under the defendant qua Etubom, nor are they liable for any contributions, tribute or taxes to the defendant qua Etubom under native law and custom.

The plaintiff says that his house is a branch of the Efiom Okoho House and separate from the Duke House.

The plaintiff further claims an injunction to restrain the defendant from calling upon the members of Etim Efiom House or forcing them to work for him, serve him or to pay dues to him qua Etubom under native law and custom.

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This claim is based on the fact that it is alleged that the defendant (*a*) is asserting that the plaintiff and his people are not a separate and independent house and are subject to the authority of the Duke House and are under the control of the defendant qua Etubom (*b*) claims that they are liable for fees, tribute and contribution to Duke House according to native law and custom, (*c*) insists upon them doing manual work for which members of the Duke House alone are liable (*d*) claims to exact from them fees, etc., in (*b*) and obligations and services. The defendant says that the Etim Efiom House became attached to the Duke House. He denies that he ever asserted or claimed what he is alleged to have asserted or claimed under paragraphs 7, 8, 9, 10 and 11 of the statement of claim. The defendant further pleads estoppel, and contends that the claim discloses no cause of action and that the action should be dismissed. After a careful consideration of the evidence I have come to the following conclusions on the facts.

The plaintiff's house is separate and independent and is in no way under the control of the Duke House. It is true that in the old days the Tete House was attached to the Duke House. Since the House Rule Ordinance was abolished this House became independent, not only by reason of the fact that it had grown in importance and was quite capable of managing its own affairs—so much so that in 1924 the Governor was pleased to appoint its Etubom as a Native Authority. I find that the defendant has asserted and continued to assert that the Tete House is attached to the Duke House.

I am unable to find that the defendant qua Etubom of Duke House at any time called upon the members of Tete House to work or forced them to do so or to serve him. The allotment of work on the road was an arrangement made by the Political Officer, and what the defendant did was merely to exercise the powers given over an area to him qua Native Authority under an Ordinance.

With reference to the claims for contributions, as far back as October, 1922, the defendant sent written demands to the plaintiff and Nkoyo Umo, representing Umo Ephraim Adam's House (Tete), for contribution. The demand does not state what the contribution was for, and the only threat for failing to comply was that such failure would lead the defendant to think that they had refused to respect the name or position of their father, Umo Ephraim Adam.

The evidence also goes to show that the Native Court ordered Offiong Oyo Ita to pay £5 subscription for her father Oyo Ita to the defendant. Oyo Ita House is by the evidence a branch of Duke

House, and it would appear that the order of the Native Court was in accordance with native law and custom.

I am therefore unable to find any substance in the statement of claim, nor can I find that any legal demand or claim was made for subscriptions or tribute or contributions as alleged.

On these findings there would appear to be no legal cause of action. The plaintiff has failed in paragraphs 9, 10 and 11 of his claim. The first five paragraphs are not in issue, paragraph 6 is not strictly correct. Paragraph 7 very clearly supports the status of independence and paragraph 8 is the only part of the whole claim upon which it might be said that a cause of action has arisen.

The claim for an injunction must fail. There is nothing to restrain, nor does any reason exist for an injunction. The Court will not restrain the defendant from making assertions.

There must be a violation, a real and substantial violation of some right, before a Court grants an injunction. (Halsbury's Laws of England vol. 17, p. 208). As far as I am to judge on the facts, it is difficult to understand what relief is sought in respect of any cause of action. I am unable to trace any cause of action; there seems to be an absence of such facts as would rise to an enforceable claim. What has been interfered with or even threatened?

That the defendant is an Etubom there can be no possible doubt. In 1924 the defendant as Etubom was gazetted a Native Authority by Government.

It is true that he is now no longer a Native Authority, but he is still an Etubom. I must agree with Counsel for the defendant that the claim discloses no cause of action, and the question arises whether the Court can or will, if it can, make the declaration asked.

I am of opinion that the Chancery Procedure Act, 1852, section 50, whereby it is enacted that " No suit in the said Court shall be " open to objection on the ground that a merely declaratory decree " or order is sought thereby and it shall be lawful for the Court " to make binding declarations of right without granting conse- " quential relief ", applies to this country, it being an act of general application and section 11 of our Supreme Court Ordinance rests in our Courts all the jurisdiction and powers of the High Court of Justice in England.

This section (50 of the Act of 1852) bore the interpretation that a declaratory judgment could not be given unless consequential relief could also be given although in fact it was not (*per* Pickford, L.J., in Guaranty Trust Co. of New York *v.* Hannay & Co. (1)).

(1) 1915 2 K.B. at p. 558.

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This was extended in 1883 by a Rule of Court—Order XXV r. 5—as follows:—

> "No action or proceeding shall be open to objection on "the ground that a merely declaratory judgment or "order is sought thereby, and the Court may make "binding declarations of right whether any conse- "quential relief is or could be claimed or not."

The difference in procedure between the Act and the Rule appears to be this. By the Act there must be a cause of action before a declaratory order can be made, and by the Rule a general power is given to make a declaration, whether there be a cause of action or not. Holding, as I do, that there is no cause of action, it will not be competent for this Court to make a declaration unless this English Rule applied. I am unable to hold that this Rule applies. The Rule is an extension of procedure laid down in the Act of 1852 (*per* Bankes, L.J., in the above case at p. 568). It was an enabling rule—without it mere declaratory orders could not be made.

The English Rules do not apply here and therefore our procedure is guided by the Act of 1852 only.

I find, therefore, that the whole action must be dismissed, but I should like to add that, were it competent for me to make the declaration, I should be inclined to do so. There can be no doubt as to the independence and separate entity of the Tete houses. The word "Etubom" is Efik for "Head or Chief". Each family or house has its Etubom. Now, if the plaintiff's house is attached to the Duke House, as persistently asserted by the defendant, certain objections would flow under native law and custom. The plaintiff's house would become liable for subscriptions and contributions and these claims are recoverable in the Native Courts.

In 1924 the Etubom of the Tete House was gazetted Native Authority. This appears to be the first occasion on which the Etubom was recognised as an Etubom by Government.

The next year a new list was issued, and the Etubom of the Tete House was omitted as a Native Authority. All the other Etuboms in Calabar were included in the new list. Now in a native community such as this that omission must have been a serious blow in prestige to the Etubom and the members of the Tete House; and, more than this, the defendant's persistent assertions that the plaintiff and his House are attached to the Duke House may have had some small part in influencing Government in its action. Indeed in 1925 the District Officer issued a memorandum to the

effect that there are only seven Houses of Old Calabar, and gives a list. On this list Tete House is omitted, and the members were allotted work which was under the control of the Etubom of Duke House. All these circumstances might carry weight in a possible claim in the Native Court for contributions. The plaintiff had no cause of action against anyone; but the circumstances which arose since 1924 would entitle him to some relief in the sense explained by Bankes, L.J., in the above case at p. 572—not relief in respect of cause of action, but relief used in its fullest sense.

The action is accordingly dismissed with fifteen guineas costs.

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