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PATERSON ZOCHONIS AND COMPANY LIMITED *v* MALAM MOMO GUSAU AND MALAM BABA DAN KANTOMA

[High Court (Bate, J.)—April 22, 1960]
[Kano—Civil Action—No. K/154/1959]

Illiterates Protection Ordinance, Cap. 88, *sections* 3 *and* 4—*Object of Ordinance—guarantee written in English—guarantor unable to understand English—signature and address of writer required by section* 3 *not affixed until date of hearing.*

The 2nd defendant was sued as guarantor for the payment of a debt owed by the 1st defendant to plaintiffs. The guarantee was a form typed in English by plaintiff's clerk with blank spaces left for 2nd defendant's name, the amount and the date. The 2nd defendant did not understand English and the document was read over to him in Hausa by another of plaintiffs' clerks. The plaintiffs' manager filled in the blank spaces in his own handwriting but did not at that time write his name on the document, as the writer, or his address. He did however do so at the date of the hearing, some eighteen months after the date of the guarantee.

Held:

(1) As 2nd defendant could not read the guarantee in the language in which it was written he was an "illiterate person" within the meaning of section 3 of the Illiterates Protection Ordinance.

(2) Plaintiffs' manager was the writer of the document.

(3) There had been sufficient compliance with section 3 of the Ordinance.

Cases referred to:

U.A.C. v Edems and Ajayi 1958 N.R.L.R. 33 applied.

S.C.O.A. v Okon 1959 (F.S.C. 147/1959—unreported) applied.

CIVIL ACTION

Horn for Plaintiffs.

Hughes for 2nd Defendant.

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Bate, J.

Bate, J.: The Plaintiffs claim £512-10*s*-7*d* from the 1st defendant as principal debtor upon a produce account and from the 2nd defendant as guarantor of the payment of the 1st defendant's debt. The 1st defendant has admitted liability and judgement has been given against him. The 2nd defendant denies liability.

The plaintiffs produced a form of guarantee in respect of the debts of the 1st defendant to the plaintiffs. The 2nd defendant admitted that he signed it. It has not been suggested that this guarantee fails to cover the debt in respect of which judgement has been given against the 1st defendant and I find that this is in sufficiently wide terms to cover that debt.

The 2nd defendant has raised two defences. In the first place it is alleged that the 2nd defendant is illiterate, that there has been no compliance with section 3 of the Illiterates Protection Ordinance, and that therefore the guarantee is not binding on the 2nd defendant. The second defence is that the effect of the guarantee was misrepresented to the 2nd defendant and that he is therefore not liable; it is alleged that when the guarantee was read over to the 2nd defendant he was informed by the plaintiffs that he would only be liable if the 1st defendant died or absconded. Since the 1st defendant has neither died nor absconded, it is contended that the 2nd defendant is not liable.

A question common to both defences is whether the 2nd defendant is illiterate. The 2nd defendant gave evidence tha he could not read a word of the guarantee which is in English His evidence was supported by that of the 1st defendant wh gave evidence that the 2nd defendant could only read an write in Arabic. The manager of the plaintiffs' branch at Gusa where this dispute arose said that he did not think that th 2nd defendant could read the guarantee and had caused o allowed one of his clerks to read it over to the 2nd defenda in Hausa. The clerk said that he had interpreted the guarante to the 2nd defendant in Hausa. Neither of these two witnesse for the plaintiffs suggested that the 2nd defendant is literate i English and their actions indicate that they both thought h was illiterate. I conclude from the evidence that the 2n defendant is not literate in English. The Illiterates Protectio Ordinance does not supply any definition of the expressio "illiterate person" in section 3 but I take it to mean a perso who is unable to read the document in question in the languag in which it is written, subject to the proviso that the expressio includes a person who, tho' not totally illiterate, is n sufficiently literate to read and understand the contents of t

document. The proviso follows from the decision of the Federal Supreme Court in S.C.O.A. *v* Okon (FSC147/59—unreported): I find that the 2nd defendant is illiterate in English and is an "illiterate person" within the meaning of that expression in section 3 of the Illiterates Protection Ordinance.

It will be convenient to consider next the defence that there was misrepresentation. The 2nd defendant gave evidence in Hausa that the Plaintiffs' clerk, Mohammadu Kura, had read the guarantee over to him on the day he had signed it in the plaintiffs' office in Gusau and had told him that he would only be liable if the 1st defendant died or ran away; the reading had only taken five minutes. The 1st defendant who was the 2nd defendant's only witness said on the other hand that Kura never read the guarantee to the 2nd defendant or explained it to him. This evidence is inconsistent with that of the 2nd defendant and with the paragraph 4 of the 2nd defendant's defence. Kura was called as a witness by the plaintiffs and said that he had translated the guarantee to the 2nd defendant in Hausa and the 2nd defendant had said that he had understood. Kura said that his mother tongue is Hausa; so far as I could judge, he has a good command of English.

The plaintiffs' manager at Gusau also gave evidence that Kura had interpreted the guarantee to the 2nd defendant and that the latter had said that he understood. The explanation and translation had taken about forty-five minutes. The witness admitted frankly that he could only speak and understand a little Hausa and could not translate the guarantee word for word tho' he could carry on a conversation with a trader.

The two witnesses for the plaintiffs impressed me as witnesses of truth. The 2nd defendant was under a temptation to depart from the truth in order to escape liability; there is no obvious or compelling reason on the other hand why the plaintiffs' witnesses should perjure themselves. Their account is also more likely than that of the 2nd defendant. The latter conceded that Kura read the guarantee over to him and I can see no reason why Kura should have misinformed the 2nd defendant as grossly as the latter alleges. And apart from these considerations there is the letter, Exhibit 2, written by Kura on behalf of the 2nd defendant to the plaintiffs' legal advisers. I accept Kura's evidence that he wrote this on the 2nd defendant's instructions and interpreted it to him word by word; I do not believe the 2nd defendant's allegation

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that he gave Kura no instruction apart from saying that he was only liable if the 1st defendant died or absconded and that he did not understand when Kura read the letter over to him. This letter asks the plaintiffs not to commence proceedings against the two defendants but it does not contain a single word to suggest that the 2nd defendant believed his liability to be restricted as he now alleges. I conclude that this defence is an afterthought on the part of the 2nd defendant. Taking these factors into consideration, I accept the evidence adduced by the plaintiffs that the guarantee was interpreted to the 2nd defendant in a language which he understood and I reject the evidence for the defence. The defence of misrepresentation therefore fails.

I now come to the defence under the Illiterates Protection Ordinance. It has been decided in United Africa Company *v* Edems and Ajayi 1958 N.R.L.R. 33 and in S.C.O.A. *v* Okon 1959 (FSC147/1959—unreported) that the writer of a document at the request, on behalf or in the name of an illiterate person, who fails to comply with the requirement of section 3 of the Ordinance that he shall write on the document his own name as the writer thereof and his address, cannot enforce any legal rights which would otherwise accrue to him under the document. The evidence in the present case is that the guarantee was typed by a typist in the plaintiffs' office in Gusau; blank spaces were left for the 2nd defendant's name, the amount and date. The plaintiffs' manager at Gusau filled in the blank spaces in his own handwriting; he did not write his name on the document as the writer or his address at the time but did so on the day of the hearing, i.e. about eighteen months after the date on the guarantee. This evidence was not disputed and I accept it.

The first question which arises is whether it is possible to identify the writer of the guarantee. I think that I should be guided by the decision of this Court in United Africa Company *v* Edems and Ajayi where the facts were very similar. In that case it was held that the plaintiffs' clerk who filled in the blank spaces on the document was the writer and that since the clerk was the plaintiffs' agent for this purpose the act of the clerk was the act of the plaintiffs'; since the clerk had not complied with section 3 of the Ordinance, the plaintiffs could not enforce their rights under the documents. In the present case I find that the plaintiffs' manager, Mr Alevizopoulos, filled in the particulars in the blank spaces on the guarantee on behalf and in the name of the 2nd defendant. I conclude that the plaintiffs' manager must be regarded as the writer of the guarantee and I so find.

The next question is whether it is sufficient compliance with the Ordinance for the writer to write his name and address on the document, not at the time of execution, but afterwards. I find this difficult to answer. My attention has not been drawn to any authority on this point. There is no express provision in the Ordinance with regard to the time of compliance and I can find nothing in the Ordinance to guide me by implication. The Ordinance certainly does not prohibit *ex post facto* compliance. I think I must therefore consider the purpose and spirit of the Ordinance to discover, if I can, whether *ex post facto* compliance is contrary to that purpose or spirit.

The title of the Ordinance shows that it is intended to provide for the protection of illiterate persons. The object of section 3 and 4 must, I think, be to enable the writer of a document for an illiterate person to be identified and questioned whether the statement implied by his writing his name and address on the document is true, and to provide a penalty for non-compliance with the Ordinance or if the implied statement is found to be untrue. It seems to me that if the writer writes his name and address on the document so that, if and when a dispute arises, he may be identified and questioned, the purpose of ss. 3 and 4 is achieved; and provided the writer complies so that his identity and whereabouts are made known to the person disputing the document, it does not matter whether there is compliance at the time of execution or afterwards. The Ordinance which was passed in 1915 appears to be applicable to the activities of professional letter writers whose identity and whereabouts may be difficult to establish rather than to a transaction such as is the subject of the present case where the writer is the agent of a well known trading company. In the present case the writer has not sought to conceal his identity but has answered questions frankly about the guarantee. I am satisfied that the guarantee was read over and explained to the 2nd defendant and that he subsequently signed it; I am satisfied that the 2nd defendant said that he understood the guarantee and I reject his evidence that the plaintiffs' clerk misinformed him with regard to his liability.

I am satisfied that the 2nd defendant raised no objection when the guarantee was read over to him and I conclude that the guarantee correctly represents his instructions. The plaintiffs have done nothing to injure the 2nd defendant or against which he deserves protection. I cannot see that compliance with s. 3 after the date when the guarantee was

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Without wishing to lay down any general rule, I therefore find that in the present case there has been compliance with s. 3 of the Illiterates Protection Ordinance and consequently the 2nd defendant's defence under that section fails. But, as I have already observed, the question is one which I have found difficulty in answering and I hope that early opportunity will be taken to test my decision.

Judgement is entered for the plaintiffs against the 2nd defendant for £512-10*s*-7*d* with costs.

AYO SOLANKE *v* ABRAHAM ABED AND S. B. OGUNLOWO

[High Court (Reed, J.)—July 23, 1960]
[Kano—Suit No. K/229/59]

Trespass—sub-lease of premises by holder of certificate of occupancy—sub-lease in possession—consent of Governor not obtained—sub-lease null and void under section 11 *Land and Native Rights Ordinance—action for trespass by sub-lessee against sub-lessor—section* 11 *Land and Native Rights Ordinance.*

The first defendant who was the occupier under a certificate of occupancy of certain premises agreed to sub-let part of the premises to the plaintiff. In pursuance of this agreement the plaintiff paid six months rent in advance and entered into possession. The consent of the Governor to the sub-lease as required by section 11 of the Land and Native Rights Ordinance had not been obtained. The plaintiff now brought an action for trespass against the defendants for trespass committed by the 2nd defendant who was the servant of the 1st defendant.

Held:

(1) that as the consent of the Governor to the sub-lease had not been obtained the lease was null and void under section 11 of the Land and Native Rights Ordinance.

(2) the agreement whereby the plaintiff claimed title from the first defendant being null and void the plaintiff could not maintain an action for trespass against the defendants.

Cases referred to:

Delaney v T.P. Smith Ltd.—(1946) I.K.B. 393 applied.

CIVIL ACTION

Ogunsanya for plaintiff.

Quinn for the defendants.

Reed, J: This is a claim against the defendants jointly and severally for general and special damages for trespass committed by the second defendant, the servant of the first defendant.

Solanke v Abed and Ogunlowo

Reed, J.

The writ alleges that

> "The plaintiff was lawfully in possession of the premises by virtue of a tenancy agreement between the first defendant and the plaintiff dated 15th August, 1959".

and that

> "The second defendant forcibly entered the premises occupied by the plaintiff while the plaintiff was in lawful possession".

Upon the evidence I find the following facts proved. The first defendant was, at all material times, the occupier of plot No. 9 of the "Trading Plots Layout" at Katsina under Certificate of Occupancy No. 5342. On 18th August, 1959, he agreed to sub-let part of the premises erected on the plot to the plaintiff and, in pursuance of the agreement, the plaintiff paid him six months' rent in advance and entered into possession of the premises. Neither the plaintiff nor the first defendant was aware of section 11 of the Land and Native Rights Ordinance which required the consent of the Governor to the sub-lease and no attempt was made to obtain such consent. Subsequently the Resident of Katsina Province drew the attention of the first defendant to his failure to comply with section 11 and required him to show cause, in writing, why his right of occupancy over the plot should not be revoked. Thereupon the first defendant informed the plaintiff of what the Resident had said and asked him to vacate the premises.

There followed certain events on 22nd November, 1959, at the premises occupied by the plaintiff at the aforesaid plot which, the plaintiff alleges, amounted to trespass. These events are disputed but it is not necessary for me to make findings of fact upon them; the first issue is whether, upon the findings of fact which I have made, the plaintiff can maintain an action against the defendants for trespass.

Trespass is actionable at the suit of the person in possession. The plaintiff was in *de facto* possession of the premises. He had, therefore, a right to retain the possession and undisturbed enjoyment against all wrongdoers. *De facto* possession is not, however, sufficient as against the lawful owner. The plaintiff claims his possession through the first defendant and to do so he must set up a title derived from the

first defendant. Accordingly he relies upon the agreement to sub-let to which the Governor's consent was not obtained. Section 11 of the Land and Native Rights Ordinance reads:

> ".....it shall not be lawful for any occupier to alienate his right of occupancy, or any part thereof by sale, mortagage, transfer of possession, sub-lease or bequest or otherwise howsoever without the consent of the Governor first had and obtained, and any such sale, mortgage, sub-lease, transfer or bequest, effected without the consent of the Governor, shall be null and void".

The agreement whereby the plaintiff claims title from the first defendant was, therefore, "null and void". The plaintiff cannot, therefore, maintain an action for trespass against the defendants.

In arriving at these conclusions I rely upon *Delaney v T.P. Smith Limited* (1946) 1 K.B. 393. In that case the defendants were the owners of a dwellinghouse which had been damaged by enemy action. In April, 1944, an oral agreement was made between the plaintiff and the defendants that the plaintiff should become the tenant of the house when repaired, and two weeks' rent was paid in advance. The repairs were effected and the house was ready for occupation in December, 1944. The defendants, however, decided to sell the house and on 4th December so informed the plaintiff by letter. Thereafter, the plaintiff managed to get a key of the premises and took possession on 11th December. On 20th December the defendants forcibly ejected the plaintiff and the plaintiff sued the defendants for trespass. It was held that although the plaintiff's possession of the premises was sufficient to support it against a wrongdoer, it was not sufficient to support it against the lawful owner of the premises. To support an action against the defendants the plaintiff had to prove a title derived from the defendants. The plaintiff had to rely upon an oral agreement to support his action; and section 40 of the Law of Property Act, 1925, laid it down that no action might be brought upon any contract for the sale or other disposition of land unless the agreement upon which such action was brought, or some memorandum or note thereof, was in writing.

The plaintiff's claim is dismissed. Judgment is entered for the defendants with costs assessed at thirty guineas.

Claim dismissed.

THE QUEEN *v* ANTHONY C. ENYE

[High Court (Skinner, J.)—May 21, 1960]

[Minna—Criminal Case No. K/60/1960]

Failure by Crown to call witnesses named on back of Information, whose evidence they did not require—circumstances in which position may be remedied by application of Section 200 of the Criminal Procedure Ordinance.

Counsel for the Crown having failed to call three witnesses whose names were on the back of the Information, it was submitted in the final speech for the Defence that the omission was fatal and that the accused must be acquitted. The omission was inadvertent, and Counsel for the Crown considered that the witnesses would add nothing to the Crown case.

Held:

The trial not having yet finished, and there being no attempt to remedy the omission in the prosecution case, the Court could properly call the witnesses under the provisions of Section 200 of the Criminal Procedure Ordinance.

Cases referred to:

R. v Chigeri, 3 W.A.C.A. 201
R. v Kalfalla and Others, 5 W.A.C.A. 157
The Queen v Suberu Balogun, 1958 W.R.N.L.R. 65
Yebosh v The Queen, 14 W.A.C.A. 484
Ejukorlem v I.G.P., 14 W.A.C.A. 161
R. v Owen, 36 Cr. App. R. 16
Horvat v Police, 20 N.L.R. 52
I.G.P. v Egbo and Another, 1957 W.R.L.N.R. 143

CRIMINAL TRIAL

Goodbody for the Crown:

Chukwura for the Defence:

RULING

In the course of his final address learned Counsel for the Defence has submitted that the failure of the Crown to call three witnesses named on the back of the Information and who had given evidence before the committing magistrate, is fatal to the present proceedings and that the accused must therefore be acquitted. In support of this contention he has cited the decisions of the West African Court of Appeal in *R v Chigeri* (3 W.A.C.A. 201) and *R. v Kalfalla and Ors.* (5 W.A.C.A. 157)

and the judgment of the High Court of the Western Region of Nigeria (Doherty, Ag. J.) in the case of *The Queen vs Suberu Balogun* (1958 W.R.N.L.R. 65). These cases all endorse, expressly or by implication, the statement in Volume 9 of Halsbury (2nd Edition), paragraph 232, which reads—

> "All the witnesses whose names are on the back of the indictment should be called by the prosecution. Even if it is not proposed to call a witness whose name is at the back of the indictment, counsel for the prosecution should, unless there are reasons to the contrary, place him in the witness-box so that the defendant may have an opportunity of cross-examining him."

In *Chigeri's* case the Appeal Court did not find it necessary to decide whether the omission to call four witnesses who had previously given evidence at the preliminary inquiry was so material as to justify the quashing of the appellant's conviction (it was quashed on other grounds) and in *Kalfalla's* case they allowed the appellants' Counsel to cross-examine, before them, one of the three witnesses who ought to have been called by the prosecution at the trial. Having done so they found that his evidence was such as might, if believed, have discredited the case for the prosecution and, for this reason, they felt compelled to quash the convictions. In the course of their joint judgment their Lordships stated—

> "The question of the proper procedure to be followed when the Prosecution does not consider it necessary or desirable to call one or more of the witnesses on the depositions was considered by the West African Court of Appeal in the case of *Rex v Chipi Chigeri* (3 W.A.C.A. 201). The conclusion arrived at was that the usual and proper practice was that set out at 9 Halsbury (2nd Edn.) p. 232 . . . . . "

> "We now endorse the opinion then expressed and state that it is intended as a guide to all Courts to which an appeal lies to this Court in order to resolve a doubt which is apparent on the face of the English decisions and textbooks. For instance, in 1847 in the case of the *Queen v Barley* (2 Cox Cr. Cas. 191) Chief Baron Pollock, after consulting Coleridge, J., decided in favour of the view taken in the above quotation from Halsbury. On the other hand in a number of other cases a contrary decision was given. The last of them which we have been able to find reported is *Reg. v Thompson* in 1876 (13 Cox Cr. Cas. 181).

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We opine that the reason there are no recent decisions on the point is that for many years now the practice as laid down in Halsbury has been followed in England, and we think it should be generally followed in British West Africa, subject to possible legislation to the contrary."

It is clear then that the "rule" as stated in Halsbury should be followed in our Courts. But the effect of an omission to follow it would seem to depend on the circumstances of each particular case; this is illustrated by the following passage from the judgment of Coussey, J.A., in the case of *Yeboah vs The Queen* (14 W.A.C.A. 484, at p. 487).

> "The names of all twenty-two witnesses appeared at the back of each of the three informations. In the case of the appellant only those witnesses who could give evidence relevant to the charge against him were called by the prosecution. From the standpoint of the prosecution no purpose would have been served by offering the evidence of the remaining witnesses on the back of the information and who would testify in one or other of the other charges of murder to be separately tried against persons other than the appellant.
>
> In these circumstances it does not appear to us that in strictness it was necessary to call those witnesses although the prosecution might have offered them for the appellant to cross-examine but omitted to do so. On the other hand the defendant was represented at the trial by counsel and it does not appear from the record that he applied to cross-examine any of the witnesses referred to or to have Kwasi Tuah called or his statement adduced in evidence.
>
> In our opinion no inference adverse to the prosecution is to be drawn from the above . . . . . "

In reply to Mr Chukwura's submission, Crown Counsel has conceded that he ought to have called the three witnesses for cross-examination, but contends that this omission can still be cured by the Court calling them by virtue of the power conferred upon it by section 200 of the Criminal Procedure Ordinance. The section reads thus—

> "The court at any stage of any trial, inquiry or other proceedings under this Ordinance may call any person as a witness or recall and re-examine any person already examined and the court shall examine or recall and re-examine any such person if his evidence appears to the court to be essential to the just decision of the case."

Against this Mr Chukwura has invited my attention to the recent judgment of Doherty, Ag. J., *supra* and, also *Ejukorlem vs I.G.P.* (14 W.A.C.A. 161) and the English case of *R. v Owen* (36 Cr. App. R. 16) and I now proceed to consider the effect of these decisions in regard to the position which has arisen in the present case.

The full report of the leading case of *Owen* is unfortunately not available to me at present but the gist of it is clear from the report of *Horvat vs Police* (20 NLR 52) in which it was cited, namely, that the calling of additional evidence after the defence has been closed is within the discretion of the Court and that the Court should apply such discretion with caution. Lord Goddard, C.J., who delivered the judgment of the Court in *Owen*, said. . . . . .

> . . . . . "The theory of our law is that he who affirms must prove, and therefore, it is for the prosecutor to prove his case, and, if there is some matter which the prosecution might have proved, but have not, after the summing up it is too late to allow further evidence to be given."

The Editor's Note in *Horvat's* case indicates that *Owen* has been followed here. One of the cases mentioned in the Note is *Ejukorlem vs I.G.P.* (14 W.A.C.A. 161) to which learned Defence Counsel has invited my attention. A passage from that judgment reads—

> "It appears to us that the learned Magistrate did not consider the evidence before him at the close of the case for the defence sufficient to enable him to convict the appellant, hence he found it necessary to call three additional witnesses to strengthen the case for the prosecution. The learned Magistrate should, in the circumstances, have acquitted and discharged the appellant instead of calling more witnesses."

It follows then that section 200 of our Criminal Procedure Ordinance is to be construed in the light of these decisions. The matter was more recently dealt with by Ademola, C.J., (as he then was) in the case of *I.G.P. vs Egbo and Anor.* (1957 WRNLR 143) when it was stated in considering the effect of section 200—

> "This section should not, in my view, be invoked in order to perpetrate an injustice. It must not be used as means to establish a case which has not been proved . . . . . I have referred to it (*Owen's* case) to show that the Court is somewhat limited in the exercise of its

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discretion under section 200 Criminal Procedure Ordinance when to exercise such discretion was likely to cause an injustice or tend to be against the spirit of the Law."

Now in all of these cases there had been an attempt to remedy an omission *in the prosecution case* and the decisions indicate that additional evidence, whether by recall or otherwise, should not be received where this would deprive an accused person of the benefit of the doubt on the prosecution evidence as originally presented, an exception being made in the event of some matter arising *ex improviso.* But I venture to think that the position before me now is quite different. Here we have an inadvertent omission by the prosecution to call three witnesses *whose evidence they do not require* and who, they consider, will not add anything to their case. These witnesses ought to have been made available for cross-examination and I suppose that if I were to proceed to judgment without this being done it is possible that there would be an injustice. But the case is not finished and they may still be called should I so decide in the exercise of the discretion conferred upon me by section 200. Having considered the matter most carefully and bearing in mind that no evidence has been adduced by or for the accused and that accordingly, Counsel's conduct of the defence could not, in this case, have been adversely affected by the omission to call these prosecution witnesses at the proper time, I can see no possible injustice resulting if they are now tendered for cross-examination.

In so deciding I wish to make it clear that I have not overlooked the decision of Doherty, Ag. J., in *Balogun's* case where the learned Judge acquitted owing to a similar omission. The report of that case shows that the witnesses not called by the prosecution were the persons from whom the accused was alleged to have demanded a bribe, the subject of the charge; and it seems clear that the Judge regarded the accused to have been prejudiced by the omission to call them at the proper time and was not prepared to allow them to be called at a later stage. The evidence of the three witnesses in the present case would appear, from their depositions, to relate to the Eighteenth Count of the charge before the magistrate and that count has not been pursued by the Crown. As I said earlier it is for each case to be considered in the light of the particular circumstances; and the overriding consideration must be that justice is done and not that it merely appears to have been done. The circumstances here are such as, in my opinion, make it proper for me in the exercise of my discretoin to call

the three witnesses now should learned Counsel for the Defence desire to cross-examine them; he could, of course, have applied to do so at an earlier stage but apparently decided otherwise—hence the somewhat artificial situation which has arisen.

MOHAMMED KAMAL AND S. SOUFAN & SONS *v* MOHAMMED ZAIN

[High Court (Reed, J.)—October 8, 1960]

[Kano—Civil Action—No. K/19/1960]

Practice and procedure—debt—equitable assignment—notice—consideration—assignor joined as plaintiff—statement of claim—cause of action—Supreme Court of Judicature Act, 1873, *section* 25 (6)—*Northern Region High Court Law*, 1955, *section* 28 (*c*).

On 14th May, 1959, the second plaintiffs and the defendant entered into a written agreement whereby the 2nd plaintiffs agreed to accept payment of the sum of £1,500 in full and final satisfaction of a debt of £3,285 owed by the defendant to one Deik. Payment was to be made by monthly instalments of £100, the first instalment being due in October, 1959. It was agreed that on default in payment of any instalment the total sum of £1,500 or the balance then remaining due should become immediately payable. After the payment of the first instalment the second plaintiff on 24th October, 1959, assigned in writing to the first plaintiff the balance of £1,400 outstanding standing "to hold the same unto the said Mohammed Kamal absolutely". The defendant paid the second instalment but defaulted in the third instalment.

The plaintiffs in their writ of summons claimed "the sum of £1,300 due and owing by the defendant to Messrs D. Soufan and Sons by an agreement in writing dated 14th May, 1959 and by an assignment in writing made on 24th October, 1959, the said Messrs D. Soufan and Sons assigned to the first plaintiff the debt to them from the defendant and Notice in writing of the said assignment was given by the first plaintiff to the defendant." In their final paragraph of their statements of claim filed separately the plaintiffs set out the relief sought as follows: "The defendant has still refused to pay the balance of £1,300 claimed as per writ."

Held:

1. The concluding paragraph of the statements of claim amounted to a claim for the relief set out in the writ.

2. There was no objection to the second plaintiffs claiming under an equitable assignment and they were properly joined as plaintiffs.

Although section 25 (6) of the Supreme Court of Judicature Act, 1873, provided for the assignment of debts or other legal rights thereto and enabled the assignee to sue in his own name it is still possible to make an equitable assignment.

3. Although there was no express promise made by the second plaintiffs in the agreement of 14th May, 1959 to forbear from suing D. the clear implication in the facts of this case was that the defendant requested the second plaintiffs to forbear from suing D. for the debt of £3,285 and this was sufficient consideration for the defendant's promise to pay the sum of £1,500 by instalments.

4. Failure to give notice of the assignment does not invalidate the assignment as between assignor and assignee and the question of whether or not notice of the assignment was given to the defendant was immaterial in this case since both assignor and assignee were joined as plaintiffs.

Cases referred to:

Durham Brothers v Robertson (1898) I Q.B. 765 referred;

William Brandt's Sons & Co. v Dunlop Rubber Co. Ltd 1905 A.C. 454 referred;

Crears v Hunter (1887) 19 Q.B.D. 341 applied;

Re City Life Assurance Co. (1926) Ch. 191 applied.

CIVIL ACTION:

Nwajei for plaintiffs.

Thomas for defendant.

Reed, J.: The writ states that:

"The plaintiffs' claim against the defendant is for the sum of £1,300 due and owing by the defendant to Messrs D. Soufan and Sons by an agreement in writing dated 14th May, 1959 and by an Assignment in writing made on 24th October, 1959, the said Messrs D. Soufan and Sons assigned to the first plaintiff the debt due to them from the defendant and Notice in writing of the said Assignment was given by the first plaintiff to the defendant."

No evidence was called by the defendant and upon the evidence of the plaintiffs' witnesses I find the following facts proved. On 14th May, 1959, the second plaintiffs and the defendant entered into a written agreement, exhibit 'A'. This

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agreement recited the fact that one Said Deik owed the second plaintiffs the sum of £3,285 and stated that the second plaintiffs had agreed to accept payment from the defendant "of the sum of £1,500 in full and final satisfaction of the said sum of £3,285." The second plaintiffs and the defendant agreed that the defendant should pay the said sum of £1,500 in monthly instalments of £100, the first instalment being due in October, 1959. Finally it was agreed that if the defendant made default in the payment of any of the monthly instalments the total sum of £1,500, or the balance then remaining due, should become immediately payable. The defendant gave the second plaintiffs post-dated cheques for all the instalmental payments. On 24th October, 1959, the defendant still owed the second plaintiffs the sum of £1,400 under the agreement of 14th May, 1959; and on that day, 24th October, 1959, the second plaintiffs assigned in writing (exhibit 'B') to the first plaintiff "the said principal sum of £1,400 still outstanding under the agreement between D. Soufan and Sons and Mohammed Zain to hold the same unto the said Mohammed Zain absolutely." The defendant paid the second instalment of £100 but when the first plaintiff presented the next three post-dated cheques for payment on the dates when payment was due the bank refused payment. Accordingly this suit was commenced claiming £1,300, being the balance due under the agreement of 14th May, 1959.

Mr Thomas for the defendant, raises four matters and I shall deal with each of them, though not in the order in which he raised them.

First, Mr Thomas complains that no relief has been claimed in the Statement of Claim. He referred me to *Bullen and Leake's Precedents of Pleadings* and I quote from the 11th edition at page 39:

> "The plaintiff must state specifically the relief which he claims, either simply or in the alternative . . . . . If, when drafting his Statement of Claim, he omits to ask for any relief which is claimed on the writ, he will be deemed to have abandoned that claim."

Each plaintiff has filed a separate Statement of Claim and each concludes with the paragraph:

> "The defendant has still refused to pay the balance of £1,300 claimed as per writ."

I have already set out the plaintiffs' claim in the writ and in my view the paragraph in the Statements of Claim which I have quoted amounts to a claim for the relief set out in the writ. I reject Mr Thomas's submission that no relief has been claimed in the Statements of Claim.

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Secondly, Mr Thomas objects that the second plaintiffs should not be a party as they have assigned the debt to the first plaintiff. Mr Nwajei, for the plaintiffs, replies that they are claiming equitable relief and that therefore both assignor and assignee may be joined as plaintiffs. Now I understand the law to be as follows. An equitable assignment of a chose in action passes to the assignee the right to sue for its recovery. If the chose in action is legal—and a debt is a legal chose in action—the assignee must be a party to the action either as plaintiff or defendant, even where the assignment is absolute. I quote from *Durham Brothers v Robertson* (1898) I Q.B. 765, C.A. at page 769:

> ". . . . . an ordinary debt or chose in action before the Judicature Act was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. In his suit of equity the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, party in order primarily to bind him and prevent him suing at law, and also to allow him to dispute the assignment if he thought fit."

The question, however, is whether Mr Nwajei is right in saying that the plaintiffs are claiming under an equitable assignment. Today in England a chose in action may be transferred from the one person to another either by a legal assignment in accordance with the provisions of the *Law of Property Act*, 1925, section 136 (1), or by an equitable assignment. An English Act of Parliament of 1925 is not in force in the Northern Region of Nigeria, but the *Law of Property Act*, 1925, repealed and substantially re-enacted section 25 (6) of the *Supreme Court of Judicature Act*, 1873; and the latter statute is in force here by virtue of section 28 (*c*) of the *Northern Region High Court Law*, 1955. Section 25 (6) of the *Supreme Court of Judicature Act*, 1873, provided for the assignment of debts or other legal choses in action by giving to the assignee the legal rights thereto and so enabled the assignee to sue in his own name. Thus if the assignment now before me is a legal assignment in accordance with the provisions of section 25 (6) the first plaintiff alone should sue the defendant. I think, however, that there is no objection to the plaintiffs claiming under an equitable assignment. I quote from the judgment of Lord Macnaghten in *William Brandt's Sons and Co. v Dunlop Rubber Company, Limited* (1905) A.C. 454, at page 461:

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> "The plaintiffs' case was put in two ways. It was presented as a case within sub-s. 6 of sec. 25 of the Judicature Act. It was also presented as a simple case of equitable assignment perfected by notice. Unfortunately, the stress of the argument was laid on the Judicature Act . . . . . Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree."

I would add that in this case the assignees sued the debtors; the assignors (Kramrisch and Co.) were not parties in the suit. Lord Macnaghten said at page 462:

> "Strictly speaking, Kramrisch and Co., or their trustee in bankruptcy, should have been brought before the Court."

For these reasons I find that the second plaintiffs, the assignors, have been properly joined as plaintiffs in the suit now before me.

Thirdly, Mr Thomas submitted that there is no consideration for the promise made by the defendant in the agreement of 14th May, 1959, exhibit 'A', whereby the defendant promised to pay the second plaintiffs the sum of £1,500. He submits that there must be consideration "moving from the promisor to make it lawful consideration." I do not agree. Consideration is defined in *Halsbury's Laws of England*, third edition, volume 8 at page 113, paragraph 198, as follows:

> "Valuable consideration has been defined as some right, interest, profit, or benefit accruing to the one party, or some forebearance, detriment, loss, or responsibility given, suffered or undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration. It is sufficient if the promisee does some act from which a third person benefits, and which he would not have done but for the promise."

Forebearance to sue a third person at the request of the promisor is sufficient consideration for the promise and it is not necessary that there be an express promise to forbear; it is sufficient if circumstances existed from which such a promise may be implied, *Crears v Hunter* (1887) 19 Q.B.D. 341 C.A is authority for both these propositions. In this case the defendant's father had borrowed money from the plaintiff. The defendant was under no obligation whatever to the plaintiff.

This page will be re-issued in the next part.

Subsequently, the defendant's father and the defendant signed a promissory note whereby they jointly and severally promised to pay the debt of the defendant's father by instalments. It was held that the plaintiff, having forborne from suing the defendant's father at the defendant's request, there was a good consideration for the defendant's liability on the note, although there was no contract by the plaintiff to forbear from suing. Lord Esher M.R. said at page 344:

> "It may be true that there was no evidence of any request in express terms by the son that the plaintiff would forbear to sue the father, but what was the substance of the transaction contemplated in the minds of the parties? Was not the understanding obviously that, if the plaintiff would forbear to sue the father, the defendant would become liable on the note?"

and at page 345:

> "It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request."

In my view the clear implication, in the case before me, is that the defendant requested the second plaintiffs to forbear from suing Said Deik for the debt of £3,285 and the second plaintiffs agreed to forbear to sue Said Deik in consideration of the defendant promising to pay the sum of £1,500 by instalments as set out in exhibit 'A'. There was, therefore, valuable consideration for the promise of the defendant. I would add that I think there was also valuable consideration for the promise of the defendant in that the second plaintiffs suffered loss in so far, at the request of the defendant, they agreed to accept the sum of £1,500 only "in full and final satisfaction of the said sum of £3,285."

Mr Thomas's fourth and final point is that it has not been proved that notice of assignment was served on the defendant, the debtor. There was evidence from a witness who, it must be admitted, was not impressive, to the effect that a notice, of which exhibit 'H' is a copy, was sent by registered post to the defendant and that the registered letter was not returned; and the defendant has not denied in the witness-box that he received the original of exhibit 'H'.

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However in my view it is immaterial whether or not notice of assignment was served on the defendant. The reason for serving notice of assignment is to make the assignee's title effective against the debtor and third parties. Thus the serving of notice would be material in certain cases. It would be material, for instance, if the debtor, after a debt had been assigned, paid the assignor instead of the assignee; this was done in *William Brandt's Sons and Co. v Dunlop Rubber Company, Limited* (supra) where it was held that the debtors were liable to pay the debt again to the assignees because the debtors had had notice of the assignment when they paid the assignors. And, again, notice would be relevant in deciding rights if there was a subsequent assignment.

But in the case before me both the assignors and the assignee are joined as plaintiffs and it is apparent that, upon my findings already recorded, either one or other is entitled to judgment. If the failure to give notice of assignment rendered the assignment invalid as between the assignors and the assignee, then the second plaintiffs, the assignors, would be entitled to judgment. But the law on this issue is clear and I quote from *Re City Life Assurance Co.* (1926) Ch. 191, C.A. at page 215 per Pollock M.R.

> "It is quite clear that as between the assignor and the assignee an assignment is complete without notice given. If modern authority for that is needed it will be found in *Gorringe v Irwell India Rubber and Gutta Percha Works* 34 Ch. D. 128, 132, where Cotton, L.J., says: It is contended that in order to make an assignment of a chose in action, such as a debt, a complete charge, notice must be given to the debtor. It is true that there must be such a notice to enable the titles of the assignee to prevail against a subsequent assignee. That is established by *Dearle v Hall* (1823) 3 Russ. I, but there is no authority for holding this rule to apply as against the assignor of the debt. Though there is no notice to the debtor the title of the assignee is complete as against the assignor."

I find that the assignment of the debt from the second plaintiff to the first plaintiff, exhibit 'B', is a valid assignment and the first plaintiff is, therefore, for the reasons which I have given, entitled to judgment against the defendant.

I enter judgment for the first plaintiff against the defendant for £1,300.

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PATERSON ZOCHONIS AND COMPANY LIMITED *v* MALAM MOMO GUSAU AND MALAM BABA DAN KANTOMA

[High Court (Bate, J.)—April 22, 1960]

[Kano—Civil Action—No. K/154/1959]

Illiterates Protection Ordinance, Cap. 88, *sections* 3 *and* 4—*Object of Ordinance—guarantee written in English—guarantor unable to understand English—signature and address of writer required by section* 3 *not affixed until date of hearing.*

The 2nd defendant was sued as guarantor for the payment of a debt owed by the 1st defendant to plaintiffs. The guarantee was a form typed in English by plaintiff's clerk with blank spaces left for 2nd defendant's name, the amount and the date. The 2nd defendant did not understand English and the document was read over to him in Hausa by another of plaintiffs' clerks. The plaintiffs' manager filled in the blank spaces in his own handwriting but did not at that time write his name on the document, as the writer, or his address. He did however do so at the date of the hearing, some eighteen months after the date of the guarantee.

Held:

(1) As 2nd defendant could not read the guarantee in the language in which it was written he was an "illiterate person" within the meaning of section 3 of the Illiterates Protection Ordinance.

(2) Plaintiffs' manager was the writer of the document.

(3) There had been sufficient compliance with section 3 of the Ordinance.

Cases referred to:

U.A.C. v Edems and Ajayi 1958 N.R.L.R. 33 applied.

S.C.O.A. v Okon 1959 (F.S.C. 147/1959—unreported) applied.

CIVIL ACTION

Horn for Plaintiffs.

Hughes for 2nd Defendant.

P. Zochonis Limited
v
Momo Gusau and Dan Kantoma
Bate, J.

Bate, J.: The Plaintiffs claim £512-10*s*-7*d* from the 1st defendant as principal debtor upon a produce account and from the 2nd defendant as guarantor of the payment of the 1st defendant's debt. The 1st defendant has admitted liability and judgement has been given against him. The 2nd defendant denies liability.

The plaintiffs produced a form of guarantee in respect of the debts of the 1st defendant to the plaintiffs. The 2nd defendant admitted that he signed it. It has not been suggested that this guarantee fails to cover the debt in respect of which judgement has been given against the 1st defendant and I find that this is in sufficiently wide terms to cover that debt.

The 2nd defendant has raised two defences. In the first place it is alleged that the 2nd defendant is illiterate, that there has been no compliance with section 3 of the Illiterates Protection Ordinance, and that therefore the guarantee is not binding on the 2nd defendant. The second defence is that the effect of the guarantee was misrepresented to the 2nd defendant and that he is therefore not liable; it is alleged that when the guarantee was read over to the 2nd defendant he was informed by the plaintiffs that he would only be liable if the 1st defendant died or absconded. Since the 1st defendant has neither died nor absconded, it is contended that the 2nd defendant is not liable.

A question common to both defences is whether the 2nd defendant is illiterate. The 2nd defendant gave evidence that he could not read a word of the guarantee which is in English. His evidence was supported by that of the 1st defendant who gave evidence that the 2nd defendant could only read and write in Arabic. The manager of the plaintiffs' branch at Gusau where this dispute arose said that he did not think that the 2nd defendant could read the guarantee and had caused or allowed one of his clerks to read it over to the 2nd defendant in Hausa. The clerk said that he had interpreted the guarantee to the 2nd defendant in Hausa. Neither of these two witnesses for the plaintiffs suggested that the 2nd defendant is literate in English and their actions indicate that they both thought he was illiterate. I conclude from the evidence that the 2nd defendant is not literate in English. The Illiterates Protection Ordinance does not supply any definition of the expression "illiterate person" in section 3 but I take it to mean a person who is unable to read the document in question in the language in which it is written, subject to the proviso that the expression includes a person who, tho' not totally illiterate, is not sufficiently literate to read and understand the contents of the

document. The proviso follows from the decision of the Federal Supreme Court in S.C.O.A. *v* Okon (FSC147/59—unreported): I find that the 2nd defendant is illiterate in English and is an "illiterate person" within the meaning of that expression in section 3 of the Illiterates Protection Ordinance.

It will be convenient to consider next the defence that there was misrepresentation. The 2nd defendant gave evidence in Hausa that the Plaintiffs' clerk, Mohammadu Kura, had read the guarantee over to him on the day he had signed it in the plaintiffs' office in Gusau and had told him that he would only be liable if the 1st defendant died or ran away; the reading had only taken five minutes. The 1st defendant who was the 2nd defendant's only witness said on the other hand that Kura never read the guarantee to the 2nd defendant or explained it to him. This evidence is inconsistent with that of the 2nd defendant and with the paragraph 4 of the 2nd defendant's defence. Kura was called as a witness by the plaintiffs and said that he had translated the guarantee to the 2nd defendant in Hausa and the 2nd defendant had said that he had understood. Kura said that his mother tongue is Hausa; so far as I could judge, he has a good command of English.

The plaintiffs' manager at Gusau also gave evidence that Kura had interpreted the guarantee to the 2nd defendant and that the latter had said that he understood. The explanation and translation had taken about forty-five minutes. The witness admitted frankly that he could only speak and understand a little Hausa and could not translate the guarantee word for word tho' he could carry on a conversation with a trader.

The two witnesses for the plaintiffs impressed me as witnesses of truth. The 2nd defendant was under a temptation to depart from the truth in order to escape liability; there is no obvious or compelling reason on the other hand why the plaintiffs' witnesses should perjure themselves. Their account is also more likely than that of the 2nd defendant. The latter conceded that Kura read the guarantee over to him and I can see no reason why Kura should have misinformed the 2nd defendant as grossly as the latter alleges. And apart from these considerations there is the letter, Exhibit 2, written by Kura on behalf of the 2nd defendant to the plaintiffs' legal advisers. I accept Kura's evidence that he wrote this on the 2nd defendant's instructions and interpreted it to him word by word; I do not believe the 2nd defendant's allegation

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Beta, J.

that he gave Kura no instruction apart from saying that he was only liable if the 1st defendant died or absconded and that he did not understand when Kura read the letter over to him. This letter asks the plaintiffs not to commence proceedings against the two defendants but it does not contain a single word to suggest that the 2nd defendant believed his liability to be restricted as he now alleges. I conclude that this defence is an afterthought on the part of the 2nd defendant. Taking these factors into consideration, I accept the evidence adduced by the plaintiffs that the guarantee was interpreted to the 2nd defendant in a language which he understood and I reject the evidence for the defence. The defence of misrepresentation therefore fails.

I now come to the defence under the Illiterates Protection Ordinance. It has been decided in United Africa Company *v* Edems and Ajayi 1958 N.R.L.R. 33 and in S.C.O.A. *v* Okon 1959 (FSC147/1959—unreported) that the writer of a document at the request, on behalf or in the name of an illiterate person, who fails to comply with the requirement of section 3 of the Ordinance that he shall write on the document his own name as the writer thereof and his address, cannot enforce any legal rights which would otherwise accrue to him under the document. The evidence in the present case is that the guarantee was typed by a typist in the plaintiffs' office in Gusau; blank spaces were left for the 2nd defendant's name, the amount and date. The plaintiffs' manager at Gusau filled in the blank spaces in his own handwriting; he did not write his name on the document as the writer or his address at the time but did so on the day of the hearing, i.e. about eighteen months after the date on the guarantee. This evidence was not disputed and I accept it.

The first question which arises is whether it is possible to identify the writer of the guarantee. I think that I should be guided by the decision of this Court in United Africa Company *v* Edems and Ajayi where the facts were very similar. In that case it was held that the plaintiffs' clerk who filled in the blank spaces on the document was the writer and that since the clerk was the plaintiffs' agent for this purpose the act of the clerk was the act of the plaintiffs'; since the clerk had not complied with section 3 of the Ordinance, the plaintiffs could not enforce their rights under the documents. In the present case I find that the plaintiffs' manager, Mr Alevizopoulos, filled in the particulars in the blank spaces on the guarantee on behalf and in the name of the 2nd defendant. I conclude that the plaintiffs' manager must be regarded as the writer of the guarantee and I so find.

The next question is whether it is sufficient compliance with the Ordinance for the writer to write his name and address on the document, not at the time of execution, but afterwards. I find this difficult to answer. My attention has not been drawn to any authority on this point. There is no express provision in the Ordinance with regard to the time of compliance and I can find nothing in the Ordinance to guide me by implication. The Ordinance certainly does not prohibit *ex post facto* compliance. I think I must therefore consider the purpose and spirit of the Ordinance to discover, if I can, whether *ex post facto* compliance is contrary to that purpose or spirit.

The title of the Ordinance shows that it is intended to provide for the protection of illiterate persons. The object of section 3 and 4 must, I think, be to enable the writer of a document for an illiterate person to be identified and questioned whether the statement implied by his writing his name and address on the document is true, and to provide a penalty for non-compliance with the Ordinance or if the implied statement is found to be untrue. It seems to me that if the writer writes his name and address on the document so that, if and when a dispute arises, he may be identified and questioned, the purpose of ss. 3 and 4 is achieved; and provided the writer complies so that his identity and whereabouts are made known to the person disputing the document, it does not matter whether there is compliance at the time of execution or afterwards. The Ordinance which was passed in 1915 appears to be applicable to the activities of professional letter writers whose identity and whereabouts may be difficult to establish rather than to a transaction such as is the subject of the present case where the writer is the agent of a well known trading company. In the present case the writer has not sought to conceal his identity but has answered questions frankly about the guarantee. I am satisfied that the guarantee was read over and explained to the 2nd defendant and that he subsequently signed it; I am satisfied that the 2nd defendant said that he understood the guarantee and I reject his evidence that the plaintiffs' clerk misinformed him with regard to his liability.

I am satisfied that the 2nd defendant raised no objection when the guarantee was read over to him and I conclude that the guarantee correctly represents his instructions. The plaintiffs have done nothing to injure the 2nd defendant or against which he deserves protection. I cannot see that compliance with s. 3 after the date when the guarantee was executed is contrary to the spirit or purpose of the Ordinance.

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Without wishing to lay down any general rule, I therefore find that in the present case there has been compliance with s. 3 of the Illiterates Protection Ordinance and consequently the 2nd defendant's defence under that section fails. But, as I have already observed, the question is one which I have found difficulty in answering and I hope that early opportunity will be taken to test my decision.

Judgement is entered for the plaintiffs against the 2nd defendant for £512-10*s*-7*d* with costs.

AYO SOLANKE *v* ABRAHAM ABED AND S. B. OGUNLOWO

[High Court (Reed, J.)—July 23, 1960]
[Kano—Suit No. K/229/59]

Trespass—sub-lease of premises by holder of certificate of occupancy—sub-lease in possession—consent of Governor not obtained—sub-lease null and void under section 11 *Land and Native Rights Ordinance—action for trespass by sub-lessee against sub-lessor—section* 11 *Land and Native Rights Ordinance.*

The first defendant who was the occupier under a certificate of occupancy of certain premises agreed to sub-let part of the premises to the plaintiff. In pursuance of this agreement the plaintiff paid six months rent in advance and entered into possession. The consent of the Governor to the sub-lease as required by section 11 of the Land and Native Rights Ordinance had not been obtained. The plaintiff now brought an action for trespass against the defendants for trespass committed by the 2nd defendant who was the servant of the 1st defendant.

Held:

(1) that as the consent of the Governor to the sub-lease had not been obtained the lease was null and void under section 11 of the Land and Native Rights Ordinance.

(2) the agreement whereby the plaintiff claimed title from the first defendant being null and void the plaintiff could not maintain an action for trespass against the defendants.

Cases referred to:

Delaney v T.P. Smith Ltd.—(1946) I.K.B. 393 applied.

CIVIL ACTION

Ogunsanya for plaintiff.

Quinn for the defendants.

Reed, J: This is a claim against the defendants jointly and severally for general and special damages for trespass committed by the second defendant, the servant of the first defendant.

Solanke v Abed and Ogunlowo

Reed, J.

The writ alleges that

> "The plaintiff was lawfully in possession of the premises by virtue of a tenancy agreement between the first defendant and the plaintiff dated 15th August, 1959".

and that

> "The second defendant forcibly entered the premises occupied by the plaintiff while the plaintiff was in lawful possession".

Upon the evidence I find the following facts proved. The first defendant was, at all material times, the occupier of plot No. 9 of the "Trading Plots Layout" at Katsina under Certificate of Occupancy No. 5342. On 18th August, 1959, he agreed to sub-let part of the premises erected on the plot to the plaintiff and, in pursuance of the agreement, the plaintiff paid him six months' rent in advance and entered into possession of the premises. Neither the plaintiff nor the first defendant was aware of section 11 of the Land and Native Rights Ordinance which required the consent of the Governor to the sub-lease and no attempt was made to obtain such consent. Subsequently the Resident of Katsina Province drew the attention of the first defendant to his failure to comply with section 11 and required him to show cause, in writing, why his right of occupancy over the plot should not be revoked. Thereupon the first defendant informed the plaintiff of what the Resident had said and asked him to vacate the premises.

There followed certain events on 22nd November, 1959, at the premises occupied by the plaintiff at the aforesaid plot which, the plaintiff alleges, amounted to trespass. These events are disputed but it is not necessary for me to make findings of fact upon them; the first issue is whether, upon the findings of fact which I have made, the plaintiff can maintain an action against the defendants for trespass.

Trespass is actionable at the suit of the person in possession. The plaintiff was in *de facto* possession of the premises. He had, therefore, a right to retain the possession and undisturbed enjoyment against all wrongdoers. *De facto* possession is not, however, sufficient as against the lawful owner. The plaintiff claims his possession through the first defendant and to do so he must set up a title derived from the

first defendant. Accordingly he relies upon the agreement to sub-let to which the Governor's consent was not obtained. Section 11 of the Land and Native Rights Ordinance reads:

> "..... it shall not be lawful for any occupier to alienate his right of occupancy, or any part thereof by sale, mortagage, transfer of possession, sub-lease or bequest or otherwise howsoever without the consent of the Governor first had and obtained, and any such sale, mortgage, sub-lease, transfer or bequest, effected without the consent of the Governor, shall be null and void".

The agreement whereby the plaintiff claims title from the first defendant was, therefore, "null and void". The plaintiff cannot, therefore, maintain an action for trespass against the defendants.

In arriving at these conclusions I rely upon *Delaney v T.P. Smith Limited* (1946) 1 K.B. 393. In that case the defendants were the owners of a dwellinghouse which had been damaged by enemy action. In April, 1944, an oral agreement was made between the plaintiff and the defendants that the plaintiff should become the tenant of the house when repaired, and two weeks' rent was paid in advance. The repairs were effected and the house was ready for occupation in December, 1944. The defendants, however, decided to sell the house and on 4th December so informed the plaintiff by letter. Thereafter, the plaintiff managed to get a key of the premises and took possession on 11th December. On 20th December the defendants forcibly ejected the plaintiff and the plaintiff sued the defendants for trespass. It was held that although the plaintiff's possession of the premises was sufficient to support it against a wrongdoer, it was not sufficient to support it against the lawful owner of the premises. To support an action against the defendants the plaintiff had to prove a title derived from the defendants. The plaintiff had to rely upon an oral agreement to support his action; and section 40 of the Law of Property Act, 1925, laid it down that no action might be brought upon any contract for the sale or other disposition of land unless the agreement upon which such action was brought, or some memorandum or note thereof, was in writing.

The plaintiff's claim is dismissed. Judgment is entered for the defendants with costs assessed at thirty guineas.

Claim dismissed.

THE QUEEN *v* ANTHONY C. ENYE

[High Court (Skinner, J.)—May 21, 1960]

[Minna—Criminal Case No. K/60/1960]

Failure by Crown to call witnesses named on back of Information, whose evidence they did not require—circumstances in which position may be remedied by application of Section 200 of the Criminal Procedure Ordinance.

Counsel for the Crown having failed to call three witnesses whose names were on the back of the Information, it was submitted in the final speech for the Defence that the omission was fatal and that the accused must be acquitted. The omission was inadvertent, and Counsel for the Crown considered that the witnesses would add nothing to the Crown case.

Held:

The trial not having yet finished, and there being no attempt to remedy the omission in the prosecution case, the Court could properly call the witnesses under the provisions of Section 200 of the Criminal Procedure Ordinance.

Cases referred to:

R. v Chigeri, 3 W.A.C.A. 201
R. v Kalfalla and Others, 5 W.A.C.A. 157
The Queen v Suberu Balogun, 1958 W.R.N.L.R. 65
Yebosh v The Queen, 14 W.A.C.A. 484
Ejukorlem v I.G.P., 14 W.A.C.A. 161
R. v Owen, 36 Cr. App. R. 16
Horvat v Police, 20 N.L.R. 52
I.G.P. v Egbo and Another, 1957 W.R.L.N.R. 143

CRIMINAL TRIAL

Goodbody for the Crown:

Chukwura for the Defence:

RULING

In the course of his final address learned Counsel for the Defence has submitted that the failure of the Crown to call three witnesses named on the back of the Information and who had given evidence before the committing magistrate, is fatal to the present proceedings and that the accused must therefore be acquitted. In support of this contention he has cited the decisions of the West African Court of Appeal in *R v Chigeri*

and the judgment of the High Court of the Western Region of Nigeria (Doherty, Ag. J.) in the case of *The Queen vs Suberu Balogun* (1958 W.R.N.L.R. 65). These cases all endorse, expressly or by implication, the statement in Volume 9 of Halsbury (2nd Edition), paragraph 232, which reads—

> "All the witnesses whose names are on the back of the indictment should be called by the prosecution. Even if it is not proposed to call a witness whose name is at the back of the indictment, counsel for the prosecution should, unless there are reasons to the contrary, place him in the witness-box so that the defendant may have an opportunity of cross-examining him."

In *Chigeri's* case the Appeal Court did not find it necessary to decide whether the omission to call four witnesses who had previously given evidence at the preliminary inquiry was so material as to justify the quashing of the appellant's conviction (it was quashed on other grounds) and in *Kalfalla's* case they allowed the appellants' Counsel to cross-examine, before them, one of the three witnesses who ought to have been called by the prosecution at the trial. Having done so they found that his evidence was such as might, if believed, have discredited the case for the prosecution and, for this reason, they felt compelled to quash the convictions. In the course of their joint judgment their Lordships stated—

> "The question of the proper procedure to be followed when the Prosecution does not consider it necessary or desirable to call one or more of the witnesses on the depositions was considered by the West African Court of Appeal in the case of *Rex v Chipi Chigeri* (3 W.A.C.A. 201). The conclusion arrived at was that the usual and proper practice was that set out at 9 Halsbury (2nd Edn.) p. 232 . . . . . "

> "We now endorse the opinion then expressed and state that it is intended as a guide to all Courts to which an appeal lies to this Court in order to resolve a doubt which is apparent on the face of the English decisions and textbooks. For instance, in 1847 in the case of the *Queen v Barley* (2 Cox Cr. Cas. 191) Chief Baron Pollock, after consulting Coleridge, J., decided in favourof the view taken in the above quotation from Halsbury. On the other hand in a number of other cases a contrary decision was given. The last of them which we have been able to find reported is *Reg. v Thompson* in 1876 (13 Cox Cr. Cas. 181).

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We opine that the reason there are no recent decisions on the point is that for many years now the practice as laid down in Halsbury has been followed in England, and we think it should be generally followed in British West Africa, subject to possible legislation to the contrary."

It is clear then that the "rule" as stated in Halsbury should be followed in our Courts. But the effect of an omission to follow it would seem to depend on the circumstances of each particular case; this is illustrated by the following passage from the judgment of Coussey, J.A., in the case of *Yeboah vs The Queen* (14 W.A.C.A. 484, at p. 487).

> "The names of all twenty-two witnesses appeared at the back of each of the three informations. In the case of the appellant only those witnesses who could give evidence relevant to the charge against him were called by the prosecution. From the standpoint of the prosecution no purpose would have been served by offering the evidence of the remaining witnesses on the back of the information and who would testify in one or other of the other charges of murder to be separately tried against persons other than the appellant.
>
> In these circumstances it does not appear to us that in strictness it was necessary to call those witnesses although the prosecution might have offered them for the appellant to cross-examine but omitted to do so. On the other hand the defendant was represented at the trial by counsel and it does not appear from the record that he applied to cross-examine any of the witnesses referred to or to have Kwasi Tuah called or his statement adduced in evidence.
>
> In our opinion no inference adverse to the prosecution is to be drawn from the above . . . . . "

In reply to Mr Chukwura's submission, Crown Counsel has conceded that he ought to have called the three witnesses for cross-examination, but contends that this omission can still be cured by the Court calling them by virtue of the power conferred upon it by section 200 of the Criminal Procedure Ordinance. The section reads thus—

> "The court at any stage of any trial, inquiry or other proceedings under this Ordinance may call any person as a witness or recall and re-examine any person already examined and the court shall examine or recall and re-examine any such person if his evidence appears to the court to be essential to the just decision of the case."

Against this Mr Chukwura has invited my attention to the recent judgment of Doherty, Ag. J., *supra* and, also *Ejukorlem vs I.G.P.* (14 W.A.C.A. 161) and the English case of *R. v Owen* (36 Cr. App. R. 16) and I now proceed to consider the effect of these decisions in regard to the position which has arisen in the present case.

The full report of the leading case of *Owen* is unfortunately not available to me at present but the gist of it is clear from the report of *Horvat vs Police* (20 NLR 52) in which it was cited, namely, that the calling of additional evidence after the defence has been closed is within the discretion of the Court and that the Court should apply such discretion with caution. Lord Goddard, C.J., who delivered the judgment of the Court in *Owen*, said. . . . . .

> . . . . . "The theory of our law is that he who affirms must prove, and therefore, it is for the prosecutor to prove his case, and, if there is some matter which the prosecution might have proved, but have not, after the summing up it is too late to allow further evidence to be given."

The Editor's Note in *Horvat's* case indicates that *Owen* has been followed here. One of the cases mentioned in the Note is *Ejukorlem vs I.G.P.* (14 W.A.C.A. 161) to which learned Defence Counsel has invited my attention. A passage from that judgment reads—

> "It appears to us that the learned Magistrate did not consider the evidence before him at the close of the case for the defence sufficient to enable him to convict the appellant, hence he found it necessary to call three additional witnesses to strengthen the case for the prosecution. The learned Magistrate should, in the circumstances, have acquitted and discharged the appellant instead of calling more witnesses."

It follows then that section 200 of our Criminal Procedure Ordinance is to be construed in the light of these decisions. The matter was more recently dealt with by Ademola, C.J., (as he then was) in the case of *I.G.P. vs Egbo and Anor.* (1957 WRNLR 143) when it was stated in considering the effect of section 200—

> "This section should not, in my view, be invoked in order to perpetrate an injustice. It must not be used as means to establish a case which has not been proved . . . . . I have referred to it (*Owen's* case) to show that the Court is somewhat limited in the exercise of its

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discretion under section 200 Criminal Procedure Ordinance when to exercise such discretion was likely to cause an injustice or tend to be against the spirit of the Law."

Now in all of these cases there had been an attempt to remedy an omission *in the prosecution case* and the decisions indicate that additional evidence, whether by recall or otherwise, should not be received where this would deprive an accused person of the benefit of the doubt on the prosecution evidence as originally presented, an exception being made in the event of some matter arising *ex improviso*. But I venture to think that the position before me now is quite different. Here we have an inadvertent omission by the prosecution to call three witnesses *whose evidence they do not require* and who, they consider, will not add anything to their case. These witnesses ought to have been made available for cross-examination and I suppose that if I were to proceed to judgment without this being done it is possible that there would be an injustice. But the case is not finished and they may still be called should I so decide in the exercise of the discretion conferred upon me by section 200. Having considered the matter most carefully and bearing in mind that no evidence has been adduced by or for the accused and that accordingly, Counsel's conduct of the defence could not, in this case, have been adversely affected by the omission to call these prosecution witnesses at the proper time, I can see no possible injustice resulting if they are now tendered for cross-examination.

In so deciding I wish to make it clear that I have not overlooked the decision of Doherty, Ag. J., in *Balogun's* case where the learned Judge acquitted owing to a similar omission. The report of that case shows that the witnesses not called by the prosecution were the persons from whom the accused was alleged to have demanded a bribe, the subject of the charge; and it seems clear that the Judge regarded the accused to have been prejudiced by the omission to call them at the proper time and was not prepared to allow them to be called at a later stage. The evidence of the three witnesses in the present case would appear, from their depositions, to relate to the Eighteenth Count of the charge before the magistrate and that count has not been pursued by the Crown. As I said earlier it is for each case to be considered in the light of the particular circumstances; and the overriding consideration must be that justice is done and not that it merely appears to have been done. The circumstances here are such as, in my opinion, make it proper for me in the exercise of my discretoin to call

the three witnesses now should learned Counsel for the Defence desire to cross-examine them; he could, of course, have applied to do so at an earlier stage but apparently decided otherwise—hence the somewhat artificial situation which has arisen.

MOHAMMED KAMAL AND S. SOUFAN & SONS *v* MOHAMMED ZAIN

[High Court (Reed, J.)—October 8, 1960]

[Kano—Civil Action—No. K/19/1960]

Practice and procedure—debt—equitable assignment—notice—consideration—assignor joined as plaintiff—statement of claim—cause of action—Supreme Court of Judicature Act, 1873, *section* 25 (6)—*Northern Region High Court Law*, 1955, *section* 28 (*c*).

On 14th May, 1959, the second plaintiffs and the defendant entered into a written agreement whereby the 2nd plaintiffs agreed to accept payment of the sum of £1,500 in full and final satisfaction of a debt of £3,285 owed by the defendant to one Deik. Payment was to be made by monthly instalments of £100, the first instalment being due in October, 1959. It was agreed that on default in payment of any instalment the total sum of £1,500 or the balance then remaining due should become immediately payable. After the payment of the first instalment the second plaintiff on 24th October, 1959, assigned in writing to the first plaintiff the balance of £1,400 outstanding standing "to hold the same unto the said Mohammed Kamal absolutely". The defendant paid the second instalment but defaulted in the third instalment.

The plaintiffs in their writ of summons claimed "the sum of £1,300 due and owing by the defendant to Messrs D. Soufan and Sons by an agreement in writing dated 14th May, 1959 and by an assignment in writing made on 24th October, 1959, the said Messrs D. Soufan and Sons assigned to the first plaintiff the debt to them from the defendant and Notice in writing of the said assignment was given by the first plaintiff to the defendant." In their final paragraph of their statements of claim filed separately the plaintiffs set out the relief sought as follows: "The defendant has still refused to pay the balance of £1,300 claimed as per writ."

Held:

1. The concluding paragraph of the statements of claim amounted to a claim for the relief set out in the writ.

2. There was no objection to the second plaintiffs claiming under an equitable assignment and they were properly joined as plaintiffs.

Although section 25 (6) of the Supreme Court of Judicature Act, 1873, provided for the assignment of debts or other legal rights thereto and enabled the assignee to sue in his own name it is still possible to make an equitable assignment.

3. Although there was no express promise made by the second plaintiffs in the agreement of 14th May, 1959 to forbear from suing D. the clear implication in the facts of this case was that the defendant requested the second plaintiffs to forbear from suing D. for the debt of £3,285 and this was sufficient consideration for the defendant's promise to pay the sum of £1,500 by instalments.

4. Failure to give notice of the assignment does not invalidate the assignment as between assignor and assignee and the question of whether or not notice of the assignment was given to the defendant was immaterial in this case since both assignor and assignee were joined as plaintiffs.

Cases referred to:

Durham Brothers v Robertson (1898) I Q.B. 765 referred;

William Brandt's Sons & Co. v Dunlop Rubber Co. Ltd 1905 A.C. 454 referred;

Crears v Hunter (1887) 19 Q.B.D. 341 applied;

Re City Life Assurance Co. (1926) Ch. 191 applied.

CIVIL ACTION:

Nwajei for plaintiffs.

Thomas for defendant.

Reed, J.: The writ states that:

"The plaintiffs' claim against the defendant is for the sum of £1,300 due and owing by the defendant to Messrs D. Soufan and Sons by an agreement in writing dated 14th May, 1959 and by an Assignment in writing made on 24th October, 1959, the said Messrs D. Soufan and Sons assigned to the first plaintiff the debt due to them from the defendant and Notice in writing of the said Assignment was given by the first plaintiff to the defendant."

No evidence was called by the defendant and upon the evidence of the plaintiffs' witnesses I find the following facts proved. On 14th May, 1959, the second plaintiffs and the defendant entered into a written agreement, exhibit 'A'. This

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agreement recited the fact that one Said Deik owed the second plaintiffs the sum of £3,285 and stated that the second plaintiffs had agreed to accept payment from the defendant "of the sum of £1,500 in full and final satisfaction of the said sum of £3,285." The second plaintiffs and the defendant agreed that the defendant should pay the said sum of £1,500 in monthly instalments of £100, the first instalment being due in October, 1959. Finally it was agreed that if the defendant made default in the payment of any of the monthly instalments the total sum of £1,500, or the balance then remaining due, should become immediately payable. The defendant gave the second plaintiffs post-dated cheques for all the instalmental payments. On 24th October, 1959, the defendant still owed the second plaintiffs the sum of £1,400 under the agreement of 14th May, 1959; and on that day, 24th October, 1959, the second plaintiffs assigned in writing (exhibit 'B') to the first plaintiff "the said principal sum of £1,400 still outstanding under the agreement between D. Soufan and Sons and Mohammed Zain to hold the same unto the said Mohammed Zain absolutely." The defendant paid the second instalment of £100 but when the first plaintiff presented the next three post-dated cheques for payment on the dates when payment was due the bank refused payment. Accordingly this suit was commenced claiming £1,300, being the balance due under the agreement of 14th May, 1959.

Mr Thomas for the defendant, raises four matters and I shall deal with each of them, though not in the order in which he raised them.

First, Mr Thomas complains that no relief has been claimed in the Statement of Claim. He referred me to *Bullen and Leake's Precedents of Pleadings* and I quote from the 11th edition at page 39:

> "The plaintiff must state specifically the relief which he claims, either simply or in the alternative . . . . . If, when drafting his Statement of Claim, he omits to ask for any relief which is claimed on the writ, he will be deemed to have abandoned that claim."

Each plaintiff has filed a separate Statement of Claim and each concludes with the paragraph:

> "The defendant has still refused to pay the balance of £1,300 claimed as per writ."

I have already set out the plaintiffs' claim in the writ and in my view the paragraph in the Statements of Claim which I have quoted amounts to a claim for the relief set out in the writ. I reject Mr Thomas's submission that no relief has been claimed in the Statements of Claim.

Secondly, Mr Thomas objects that the second plaintiffs should not be a party as they have assigned the debt to the first plaintiff. Mr Nwajei, for the plaintiffs, replies that they are claiming equitable relief and that therefore both assignor and assignee may be joined as plaintiffs. Now I understand the law to be as follows. An equitable assignment of a chose in action passes to the assignee the right to sue for its recovery. If the chose in action is legal—and a debt is a legal chose in action—the assignee must be a party to the action either as plaintiff or defendant, even where the assignment is absolute. I quote from *Durham Brothers v Robertson* (1898) I Q.B. 765, C.A. at page 769:

> ". . . . . an ordinary debt or chose in action before the Judicature Act was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. In his suit of equity the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, party in order primarily to bind him and prevent him suing at law, and also to allow him to dispute the assignment if he thought fit."

The question, however, is whether Mr Nwajei is right in saying that the plaintiffs are claiming under an equitable assignment. Today in England a chose in action may be transferred from the one person to another either by a legal assignment in accordance with the provisions of the *Law of Property Act*, 1925, section 136 (1), or by an equitable assignment. An English Act of Parliament of 1925 is not in force in the Northern Region of Nigeria, but the *Law of Property Act*, 1925, repealed and substantially re-enacted section 25 (6) of the *Supreme Court of Judicature Act*, 1873; and the latter statute is in force here by virtue of section 28 (*c*) of the *Northern Region High Court Law*, 1955. Section 25 (6) of the *Supreme Court of Judicature Act*, 1873, provided for the assignment of debts or other legal choses in action by giving to the assignee the legal rights thereto and so enabled the assignee to sue in his own name. Thus if the assignment now before me is a legal assignment in accordance with the provisions of section 25 (6) the first plaintiff alone should sue the defendant. I think, however, that there is no objection to the plaintiffs claiming under an equitable assignment. I quote from the judgment of Lord Macnaghten in *William Brandt's Sons and Co. v Dunlop Rubber Company, Limited* (1905) A.C. 454, at page 461:

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"The plaintiffs' case was put in two ways. It was presented as a case within sub-s. 6 of sec. 25 of the Judicature Act. It was also presented as a simple case of equitable assignment perfected by notice. Unfortunately, the stress of the argument was laid on the Judicature Act . . . . . Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree."

I would add that in this case the assignees sued the debtors; the assignors (Kramrisch and Co.) were not parties in the suit. Lord Macnaghten said at page 462:

"Strictly speaking, Kramrisch and Co., or their trustee in bankruptcy, should have been brought before the Court."

For these reasons I find that the second plaintiffs, the assignors, have been properly joined as plaintiffs in the suit now before me.

Thirdly, Mr Thomas submitted that there is no consideration for the promise made by the defendant in the agreement of 14th May, 1959, exhibit 'A', whereby the defendant promised to pay the second plaintiffs the sum of £1,500. He submits that there must be consideration "moving from the promisor to make it lawful consideration." I do not agree. Consideration is defined in *Halsbury's Laws of England*, third edition, volume 8 at page 113, paragraph 198, as follows:

"Valuable consideration has been defined as some right, interest, profit, or benefit accruing to the one party, or some forebearance, detriment, loss, or responsibility given, suffered or undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration. It is sufficient if the promisee does some act from which a third person benefits, and which he would not have done but for the promise."

Forebearance to sue a third person at the request of the promisor is sufficient consideration for the promise and it is not necessary that there be an express promise to forbear; it is sufficient if circumstances existed from which such a promise may be implied, *Crears v Hunter* (1887) 19 Q.B.D. 341 C.A is authority for both these propositions. In this case the defendant's father had borrowed money from the plaintiff. The defendant was under no obligation whatever to the plaintiff.

Subsequently, the defendant's father and the defendant signed a promissory note whereby they jointly and severally promised to pay the debt of the defendant's father by instalments. It was held that the plaintiff, having forborne from suing the defendant's father at the defendant's request, there was a good consideration for the defendant's liability on the note, although there was no contract by the plaintiff to forbear from suing. *Lord Esher M.R. said at page 344:*

> "It may be true that there was no evidence of any request in express terms by the son that the plaintiff would forbear to sue the father, but what was the substance of the transaction contemplated in the minds of the parties? Was not the understanding obviously that, if the plaintiff would forbear to sue the father, the defendant would become liable on the note?"

and at page 345:

> "It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request."

In my view the clear implication, in the case before me, is that the defendant requested the second plaintiffs to forbear from suing Said Deik for the debt of £3,285 and the second plaintiffs agreed to forbear to sue Said Deik in consideration of the defendant promising to pay the sum of £1,500 by instalments as set out in exhibit 'A'. There was, therefore, valuable consideration for the promise of the defendant. I would add that I think there was also valuable consideration for the promise of the defendant in that the second plaintiffs suffered loss in so far, at the request of the defendant, they agreed to accept the sum of £1,500 only "in full and final satisfaction of the said sum of £3,285."

Mr Thomas's fourth and final point is that it has not been proved that notice of assignment was served on the defendant, the debtor. There was evidence from a witness who, it must be admitted, was not impressive, to the effect that a notice, of which exhibit 'H' is a copy, was sent by registered post to the defendant and that the registered letter was not returned; and the defendant has not denied in the witness-box that he received the original of exhibit 'H'.

This page will be re-issued in the next part.

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However in my view it is immaterial whether or not notice of assignment was served on the defendant. The reason for serving notice of assignment is to make the assignee's title effective against the debtor and third parties. Thus the serving of notice would be material in certain cases. It would be material, for instance, if the debtor, after a debt had been assigned, paid the assignor instead of the assignee; this was done in *William Brandt's Sons and Co. v Dunlop Rubber Company, Limited* (supra) where it was held that the debtors were liable to pay the debt again to the assignees because the debtors had had notice of the assignment when they paid the assignors. And, again, notice would be relevant in deciding rights if there was a subsequent assignment.

But in the case before me both the assignors and the assignee are joined as plaintiffs and it is apparent that, upon my findings already recorded, either one or other is entitled to judgment. If the failure to give notice of assignment rendered the assignment invalid as between the assignors and the assignee, then the second plaintiffs, the assignors, would be entitled to judgment. But the law on this issue is clear and I quote from *Re City Life Assurance Co.* (1926) Ch. 191, C.A. at page 215 per Pollock M.R.

> "It is quite clear that as between the assignor and the assignee an assignment is complete without notice given. If modern authority for that is needed it will be found in *Gorringe v Irwell India Rubber and Gutta Percha Works* 34 Ch. D. 128, 132, where Cotton, L.J., says: It is contended that in order to make an assignment of a chose in action, such as a debt, a complete charge, notice must be given to the debtor. It is true that there must be such a notice to enable the titles of the assignee to prevail against a subsequent assignee. That is established by *Dearle v Hall* (1823) 3 Russ. I, but there is no authority for holding this rule to apply as against the assignor of the debt. Though there is no notice tc the debtor the title of the assignee is complete as against the assignor."

I find that the assignment of the debt from the second plaintiff tc the first plaintiff, exhibit 'B', is a valid assignment and the first plaintiff is, therefore, for the reasons which I have given, entitled to judgment against the defendant.

I enter judgment for the first plaintiff against the defendant for £1,300.

calculated to elicit, not merely a statement, but the truth. But the better authority is the other way. *R. v. Thompson* [1893] 2 Q.B. 12 was decided by a Divisional Court on a case stated, and was cited with approval by the Judicial Committee in *Ibrahim v. R.* [1914] A.C. 599 at page 610. Cave J., in a judgment with which the other members of the Divisional Court concurred, said "In *Reg. v.* Baldry, 2 Den. C.C. 430, at page 442, it is said by Pollock, C.B., that the true ground of the exclusion is not that there is any presumption of law that a confession not free and voluntary is false, but that 'it would not be safe to receive a statement made under any influence or fear.' He also explains that the objection to telling a prisoner that it would be better to speak the truth is that the words import that it would be better for him to say *something* . . . . If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement to make a statement held out by a person in authority? . . . . (The magistrates) add that they found, as a fact, that the statements made by Crewdson were calculated to elicit the truth, and that the confession was voluntary. The first of these findings, if the ruling of Pollock, C.B., in *Reg. v. Baldry* is, as I take it to be, correct, is entirely immaterial."

A confession, by section 27(1) and section 19 of the Evidence Ordinance, is a statement made by a person charged with a crime, stating or suggesting the inference that he committed that crime. The Ordinance does not say that in order to constitute a confession the statement or the inference which it suggests must be true. That is a question for the trial court to decide, upon the whole of the evidence in the case. When section 28 speaks of an inducement, threat or promise which has caused the confession to be made, what is in contemplation as having been caused to be made is no more than a statement stating or suggesting a certain fact, irrespective of whether what is stated or suggested is the truth or otherwise. The question raised by section 28 is not "Was the confession preceded by an inducement to confess the truth?" nor is it "Was the confession preceded by an inducement calculated to make the confession an untrue one?" It is "Was the confession preceded by an inducement to make a statement?"

It is plain that there was an inducement, and a very powerful one, to make a statement here; and the confession is irrelevant and must be rejected.

MUSA ARANDUM *v.* BAUCHI NATIVE AUTHORITY

[N.C.A.D. (Reed, Ag. S.P.J., Abubakar Gummi, D.G.K., and McCarthy, Ag. J.) January 19, 1961]

[Jos—Criminal Appeal No. JD/100CA/1961]

Criminal law—culpable homicide not punishable with death—sudden fight—undue advantage—unarmed opponent—weapon in offender's hand when fight begins—Penal Code, s. 222 (4).

The appellant, without premeditation in a sudden fight in the heat of passion upon a sudden quarrel between him and Ali, aimed a blow at Ali with a knife and struck Inuwa by mistake. Ali and Inuwa were unarmed. Inuwa died as a result of the blow. When the quarrel began, the appellant had the knife in his hand and was using it to clean a rabbit.

Held:

The appellant was guilty of culpable homicide not punishable with death.

(*Editorial Note.*—Because the appellant did not take the knife into his hand for the purpose of striking the fatal blow, but already had it in his hand for another purpose, he had not "taken undue advantage or acted in a cruel or unusual manner" within the meaning of section 222 (4) of the Penal Code.)

It appears to follow that actions will not amount to taking undue advantage unless they are intended that way. This is consonant with the remaining requirement of the subsection, namely, that the offender should not have acted in a cruel or unusual manner, for cruelty is a matter of intention. On the other hand, a man's intentions may be inferred from his acts. And an intention to take undue advantage, or an intention of cruelty, may more readily be inferred from unusual acts.)

CRIMINAL APPEAL

Quinn for appellant;
Buba Ardo, Crown Counsel, for respondent.

Reed, Ag. S.P.J. (delivering the judgment of the Court): This is an appeal against the decision of the Emir of Bauchi's Court. The appellant was convicted under the Penal Code of culpable homicide punishable with death and was sentenced to death.

The appellant does not dispute that he stabbed the deceased, Inuwa, with a knife and that Inuwa died as the result of that stab wound. There were before the Emir's court two accounts of the circumstances in which the stabbing took place and these accounts varied greatly. One account was given by the witness Kusa; the other was given by the appellant himself.

Kusa's account of what happened may be summarised as follows. There had been a dispute in which one Ali and the appellant had been involved: this dispute had not been serious—it had been settled and Ali had gone away. Some time elapsed and the parties had been drinking. They had a rabbit and they were roasting it to eat. The appellant took up a knife and Inuwa who, apparently, was frightened that the appellant might attack Ali with it, asked him why he had taken the knife as Ali had gone away. Thereupon the appellant said he would do to Inuwa what he was going to do to Ali and gave Inuwa the fatal stab.

Appellant's account may be summarised as follows. He agreed that there had been, earlier in the evening, a dispute between himself and Ali. He agreed that later they prepared a rabbit to cook. But he said that Ali came back and after saying "that we both had to die with him" attacked him by pulling him off the bed. They struggled. The appellant had in his hand a knife with which he had been cleaning the rabbit and he tried to stab Ali with it. Inuwa intervened to protect Ali and the knife, aimed at Ali, struck Inuwa by mistake.

Now unfortunately the Emir's court does not state specifically which of these two accounts it accepted. The judgment does, however, suggest that it accepted the appellant's account because it found an offence proved under section 223 of the Penal Code "since you killed Inuwa with wilful intention of killing Ali". Section 223 states, in effect, that if a person causes the death of a person other than the person whose death was intended it is still culpable homicide. We think, therefore, that it is clear that the Emir's court accepted the appellant's account of what happened and rejected that of Kusa. We must, therefore, for the purposes of this appeal, treat what the appellant told the court as the facts proved in the Emir's court.

Counsel for the appellant has argued, *inter alia*, that although the appellant was guilty, on his own evidence, of

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Reed, Ag. S.P.J.

culpable homicide it was not punishable by death in view of section 222 (4) of the Penal Code which reads as follows—

> "Culpable homicide is not punishable with death if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

We think it is clear upon the facts that the stabbing was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. The requirements of the subsection—

> "Without the offender's having taken undue advantage or acted in a cruel or unusual manner".

are, however, more difficult to interpret. The appellant admits that Ali was unarmed and he, the appellant, used a lethal weapon, a knife. A matter, however, of the greatest importance to the appellant's case is that he had a perfectly valid reason for having the knife in his hand at the time he was attacked by Ali; he was cleaning the rabbit with it.

Now the Indian Penal Code has a provision exactly the same as section 222 (4) of our own Penal Code. The matter is dealt with in *Ratanlal* on the *Law of Crimes*, 19th Edn., at page 741 under the heading "Death caused without premeditation in a sudden fight in the heat of passion without taking undue advantage or acting in a cruel manner." It would appear that, in normal circumstances, if a person used a knife or dagger in a fight while the other party was unarmed, that would amount to taking undue advantage. In other words, if he managed to get hold of a knife, or drew it from his pocket, the offence would be murder (or culpable homicide punishable with death in the Northern Region of Nigeria). But we quote the last paragraph of page 742—

> "If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things, first, that there should be that provocation, and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation."

Manslaughter is, in this region, the same thing as culpable homicide not punishable by death.

We accept that statement of the law and follow it. In our view it covers the facts of the appeal before us. We accordingly allow the appeal to the extent that we set aside the finding of culpable homicide punishable by death and the sentence of death; we substitute a finding of culpable homicide under section 220 of the Penal Code and find that the culpable homicide is not punishable by death by virtue of section 222 (4) of the Penal Code.

Appeal allowed and conviction of culpable homicide not punishable with death substituted.

JAMES ABOJE *v.* COMMISSIONER OF POLICE

[C.A. (Reed, Ag. S.P.J. and McCarthy, Ag. J.)
December 8, 1960]

[Makurdi—Criminal Appeal No. JD/64CA/1960]

Criminal Procedure—judgment—oral judgment—recording reasons for judgment—where reasons necessary—Criminal Procedure Code, Cap. 43 of the Laws of the Federation of Nigeria, s. 245, proviso.

Magistrate—oral judgment—recording reasons for judgment.

The appellant was convicted of an offence of extortion under section 406 of the Criminal Code, by receiving money with intent to steal with the threat that the complainant would be arrested for destroying a prohibited tree.

The appellant's defence at the trial was that the complainant had brought the money to him and had asked him to "beg" a forest guard with it, and he had then taken it to a police constable and told him how he had received it. The police constable was a prosecution witness, and his evidence corroborated the appellant's story. The evidence of the forest guard, who was another of the prosecution witnesses, went some way towards supporting the defence, and there was circumstantial evidence to support it as well.

The trial magistrate delivered an oral judgment, and recorded "Notes of Judgment" which were to the following effect:—the defence was a denial of any demand or receipt of money; the issue was simple, namely, whether the accused or two of the prosecution witnesses (neither of them the police constable or the forest guard) were to be believed; the two witnesses seemed truthful and the appellant did not; and the magistrate had considered the defence most carefully and was convinced that the prosecution had satisfied him beyond reasonable doubt of the appellant's guilt.

Held:

The case was not one of a minor and uncomplicated nature where the giving of an oral judgment was appropriate. The defence was so complicated and received such considerable support from the prosecution evidence that it should have been set

out and dealt with by the magistrate in his judgment. The failure of the magistrate to deal with these matters of defence in his notes of judgment left the Court with the impression that he had not given the defence the consideration which was due to it. Accordingly, it would be unsafe to allow the conviction to stand; and the appeal was allowed.

Case referred to:

Otti v. Inspector-General of Police 1956 N.R.N.L.R. 1.

CRIMINAL APPEAL

Ogunkanmi for appellant;

Buba Ardo, Crown Counsel, for respondent.

Reed, Ag. S.P.J.: This is an appeal against the decision of the Magistrate Grade I, sitting at Makurdi, convicting the appellant of an offence under section 406 of the Criminal Code on 19th April, 1960. We allowed the appeal on 1st December and stated that we would give our reasons on 8th December.

The appellant appeared before the learned magistrate on 19th April on a charge of six counts. Each of the counts alleged an offence under section 406 on the 8th day of May, 1959; in each count he was charged that he "with intent to steal did receive" a sum of money "with the threats that" the complainant "will be arrested for destroying a prohibited tree". The complainant in each of the counts was a different person and the amounts alleged to have been received were different in each case but totalled £9-13*s*-0*d*. Before trial began the magistrate recorded—

> "This appears to fall within section 157 of the Criminal Procedure Ordinance. I therefore discharge accused on counts 4, 5 and 6 not on the merits."

We are of opinion that trial could have proceeded on all six counts by reason of section 158 but this is not relevant for the purposes of this appeal. Thereafter the prosecution led evidence in support of the 1st, 2nd and 3rd counts only. At the close of the case for the prosecution the magistrate recorded—

> "Accused discharged on counts 1 and 2. Case to answer count 3."

No reason is recorded why the magistrate ordered the discharge on counts 1 and 2 and the evidence of the complainants in each of these counts appears to be in identical terms with the

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evidence of the complainant in count 3. Again this is irrelevant insofar as this appeal is concerned but we think that the magistrate should have recorded his reasons for the discharge on counts 1 and 2.

We allowed this appeal because, in our view, the learned magistrate had not given proper consideration to the defence in the court below. We refer to the decision of this court in *Otti v. Inspector-General of Police* 1956 N.R.N.L.R. 1 at page 2 where the Court stated:

> "Except for cases which may properly be dealt with under the provisos to section 245 of the Criminal Procedure Code, it is important that in all criminal cases the judgment should show that the defence—no matter how weak or even frivolous—has received that full consideration which it is the right of every accused person to have. We are not saying that in this case the learned Magistrate failed to give the defence that full consideration. We are complaining that the judgment does not show it. All that we are told is that the Magistrate accepted the evidence of the prosecution: we are not told why . . . . We appreciate that under the proviso (*a*) to section 245 of the Criminal Procedure Code it is sufficient if the Magistrate records briefly in the book his decision and delivers an oral judgment. When a case is of a minor and uncomplicated character and the Magistrate considers that it is a proper case in which to deliver an oral judgment it is important that in his oral judgment he should deal adequately with the defence."

The learned magistrate in the case before us delivered an oral judgment and recorded his "Notes of Judgment". Now in our view this case was not one of a "minor and uncomplicated" nature where the giving of an oral judgment under the proviso to section 245 was appropriate. In our view the defence was so complicated, as we shall show, and received such considerable direct and circumstantial support from the prosecution witnesses that it should have been set out by the magistrate and dealt with by him.

The defence, briefly, was as follows: The complainant in count 3 (the count on which the appellant was convicted) approached him and told him that he and the complainants in the other five counts had been arrested by the Forest Guard. The six of them gave the appellant money and asked him to go to the Forest Guard with the money to "beg" the

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Forest Guard. The appellant took the money to a police constable, gave him the money, told him how he had received the money and, as a result, the six complainants were arrested. Of the defence the magistrate has recorded in his notes of judgment—

> "On the other hand the accused was most unimpressive in the box. The defence is a denial of any demand or receipt of money. I have considered this most carefully and am convinced that the prosecution have satisfied me beyond reasonable doubt of accused's guilt on count 3."

Now it is true that the third prosecution witness gave evidence which supported the allegations in the charge and his evidence was fully corroborated by another witness. The magistrate wrote in his notes of judgment—

> "The issue in this case under section 406 of the Criminal Code is simple, namely whether the accused or 3rd and 4th accused are to be believed."

and then went on to say that he believed that third and fourth accused "endeavoured sincerely to describe what occurred on 8th May, 1959". When the magistrate wrote "3rd and 4th accused" he obviously meant "3rd and 4th prosecution witnesses". But we do not agree that the issue was as simple as the magistrate stated it. We shall now give our reasons for stating that there was such direct and circumstantial evidence in the prosecution case which supported the defence that the issue was not a simple one.

First, there is the evidence of P.C. Eche, the prosecution's fifth witness. His evidence was as follows:

> "On 9th May, 1959 I was at Bagaji. I saw the accused about 6 p.m. in my compound he said Warri people had sent him with money to give to Attah; £9-13*s*-0*d*. There was £3 in notes and 73 shillings. He wanted to give me the money. I took it. I could not find the people who had given accused the money. Accused gave me their names. I later called these people and the accused. I said I would hand over the case to a P.C. from Oturkpo."

That is his evidence in full. Attah is the Forest Guard. This evidence corroborates accused's version of what happened and, if it is true, it follows that the third and fourth prosecution witnesses are liars because they both alleged that they first reported to P.C. Eche; they alleged that they reported the appellant to P.C. Eche who challenged the appellant and

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then, later, the appellant produced the £9-13*s*-0*d*. The magistrate makes no reference to the evidence of P.C. Eche in his notes of judgment but the following is recorded immediately after the evidence of that witness—

> "(Prosecutor—I will not ask further questions as this witness may incriminate himself in respect of possible prosecution.)"

Now we think that this was a very improper remark for the prosecutor to make. It leaves us with the impression that he was displeased with the evidence and sought to discredit it with this remark. There is nothing whatsoever in the evidence of P.C. Eche, as recorded, to show that he was not telling the truth; indeed it appears that some, if not all, of the six persons in respect of whom the appellant was charged with extorting money in the court below were convicted of corruptly giving this money to the appellant. Thus one of them, Enenyi Adabo, said—

> "I was subsequently arrested because accused said I gave him money. I was arrested on making my report, I was detained for ten days at Bagaji and then sent to prison for three months by the Alkali at Bagaji."

Another, Audu Ikwuaja, said—

> "Accused handed me to P.C. Ellah to take me to the prison yard. I was not taken to any court. P.C. Ellah let me out, three months later."

It is not for the prosecutor to decide that he will not question a witness because the witness may incriminate himself. It is for the court to warn a witness, when the question is asked, that he is not compelled to answer a question if the answer incriminates him.

Secondly, there is the evidence of Attah, the prosecution's sixth witness, who was the Forest Guard. This evidence is very scanty and imprecise but it does appear to bring out two matters which support the appellant's case—(1) that he, Attah, did arrest the six people from whom the appellant is charged with extorting money and (2) that the appellant did approach Attah to "beg" him on their behalf.

Thirdly, there is the circumstantial evidence which supports the defence case. It is not, of course, for an appeal court to make findings of fact on the evidence and we shall not attempt to do so. But we do observe that the circumstances offer such support to the appellant's version of what happened, and make the prosecution's version so unlikely, that we think

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the learned magistrate was bound to deal with them at length in his notes of judgment. First, it is remarkable that six persons would pay the appellant, a vaccinator, sums of money as "fines" for Forestry offences. It is true that the magistrate states that—

> "It is a measure of the ignorance of these people that they cannot differentiate between a Forest Guard and a Vaccinator"

but he does not comment upon evidence before him that the third prosecution witness, the complainant in the count upon which the appellant was convicted, was the brother-in-law of the appellant. And a vaccinator is a person likely to be well-known in the district. Secondly, there is the remarkable thing that the appellant was on one day, 8th May, extorting money from six different people for Forestry offences when, at the same time, the Forest Guard was proceeding against them for Forestry offences. And thirdly, there is a very clear motive for these six people lying against the appellant; he had let them down by going to the police and reporting the commission of a criminal offence by them and it was in their interests to tell the story they have told.

The failure of the magistrate to deal with these matters in his notes of judgment leaves us with the impression that he has not given the defence the consideration which was due to it. This was why we allowed the appeal on 1st December, set aside the conviction and sentence, and substituted a verdict of acquittal. We considered that it would be unsafe to allow the conviction to stand.

Appeal allowed.

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