PART II
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WESTERN REGION OF NIGERIA

LAW REPORTS

of Cases decided in

THE FEDERAL SUPREME COURT

(on appeal from the High Court of the Western Region)

AND

THE HIGH COURT OF THE WESTERN REGION

1957

(To be cited as 1957 W.R.N.L.R.)

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1. EGBEYEMI OGUNDIRAN
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v.

EGUNYEMI BALOGUN ... ... (*Respondent*)

[HIGH COURT OF JUSTICE : Taylor, J., 13th November, 1956.]

Native Law and Custom—Pledge of land—Moneylenders Ordinance—Conduct of parties in previous proceedings—estoppel.

Where both parties to an action have previously agreed that a transaction was based on Native Law and Custom and where previous decisions in suits relating to the transaction have been given on this basis both parties are estopped from contending in any subsequent action that the transaction is based on English Law.

Appeal dismissed.

Appeal from Magistrate's Court, Abeokuta No. AB/5A/56.

Akinrele for Appellants.

Respondent by his son *Alimi Egunyemi.*

Taylor, J. : This is an appeal against the judgment of His Worship Mr Marinho delivered on the 15th day of October, 1955. There are three grounds of appeal filed by learned Counsel for the appellants at page 17 of the Record, but at the hearing Counsel argued only the first and second grounds and abandoned the third. The effect of Counsel's submission on these two grounds may be summed up as follows :—

1. That there was evidence on which the learned Magistrate could have found that the transaction was one based on English Law and not on Native Law and Custom and therefore the learned trial Magistrate erred in holding that the land was the subject of a pledge under Native Law and Custom.

2. That being so the plaintiff's case should have been dismissed in so far as the Moneylenders Ordinance was not complied with.

Learned Counsel based his submission on the evidence at page 11 lines 11-17 which read as follows :—

"We made a document to the effect when I gave out the £300—it is with my lawyers. I am a farmer. I had a licence then to lend out money ; at the time I gave the loan he pledged the farmland to me. The interest on the loan was the produce in the farm and if rented out the rent. The document was executed in my house. We made two copies. I now say I made only one copy. The defendants have been on the land about four years ago. I have no ledger in which I enter the transaction."

The learned trial Magistrate in his judgment at page 16 lines 16-22 held that Johnston J. having held in Suit 48/54 of 6th September, 1954 that the land the subject matter of the action was one pledged under Native Law and Custom, the defendants are now estopped from claiming that the mortgage was under the Moneylenders Ordinance. It is necessary to refer to this judgment of Johnston J. which was Exhibit "C" in the lower court and appears at page 23 of the Record. The important passages are as follows :—

See lines 1-4 :—

"It is common ground in this suit that the plaintiff's father was a Customary Lessee of land which he pledged as security for a loan to the defendant under Native Law and Custom in 1927."

This being so both parties then led evidence to show what was the Native Law and Custom dealing with pledges of land and the learned trial Judge at the same page from lines 8-10 says as follows :—

"Both parties have called expert evidence on the Customary Law appertaining to the circumstances of the pledge of the land."

It is clear then that the case was fought on other ground not on the ground that the transaction was one based on the Moneylenders Ordinance. In fact both parties agreed the transaction was based on Native Law and Custom. Mention should also be made of the judgment of Gregg J. an earlier judgment to that of Johnston J. in which at page 22 of the Record he states as follows :—

"It is asserted by Counsel for the respondent, without contradiction, that both parties, are natives and that both are illiterates. Accordingly, in my opinion, one must regard the pledged land as being pledged between natives and not as mortgaged under English Law."

Both of these judgments have not been appealed against and are final judgments by competent courts. Can either party in view of these judgments be heard in a fresh action to contend the opposite to what has been in fact admitted ? It is said "*Interest republicae ut sit finis litium*". I am of the view that both parties are estopped. This appeal must therefore be dismissed. Mr Akinrele mentioned that an injunction should not be granted as that would vest the legal estate in the pledgee. This point was not made a matter of appeal in the grounds of appeal but the injunction granted by the learned trial Magistrate was from further acts of trespass on the farmland for in accordance with the writ the injunction was claimed to prevent defendants from reaping the kola nuts on the farm. If according to the judgment of Johnston J. the pledgee is entitled to the fruits of the farm then surely he is entitled to an injunction to stop the defendants from reaping such fruits.

Appeal dismissed.

S. O. OGUNSIYAKAN ... ... *(Plaintiff/Appellant)*

v.

MAKINWA ... ... *(Defendant/Respondent)*

IN *re* MAKINWA ... ... *(Applicant)*

[HIGH COURT OF JUSTICE : Thomas, J., 24th January, 1957.]

Native Court—Enlargement of time for appeal—Change in panel of judges in court of first instance—Nullity.

The plaintiff succeeded in a claim brought by him against the defendant in a Native Court of first instance. Only one of the five judges who signed the judgment was present throughout the proceedings. The defendant appealed out of time and his appeal was allowed by the Native Court of Appeal. The plaintiff appealed to the Senior Magistrate who allowed the appeal on the ground that the record did not disclose that the defendant had sought or obtained leave to appeal out of time. The defendant applied to the High Court for an order reviewing the decision of the Senior Magistrate.

Held : (1) that on his affidavit that he had sought and obtained an enlargement of time the defendant should not be prejudiced by omission of this fact from the record ; and

(2) that the trial in the court of first instance was a nullity.

Magistrate's judgment reversed and judgment of Native Court of Appeal restored.

Cases cited :—

Orlu v. *Otuji and another* 8 W.A.C.A., page 131.

Tawiah v. *Ewudzi* 3 W.A.C.A., page 52.

Application under section 93, Magistrates' Courts Law, 1955. Benin : B/20A/56.

Olowofoyeku for Applicant.

Odeku for Respondent.

Thomas, J. : The applicant Makinwa was the defendant in the Native Court of Ondo Town No. 1 Suit 168/53. The claim was as follows :—

"The plaintiff claims refund of £20 to defendant being value of cocoa farm sold to him four years ago."

The hearing commenced on the 12th August, 1953 and after several hearings during which the panel of judges varied, judgment was delivered on the 24th April, 1954 as follows :—

"The plaintiff to return £20 cost of the cocoa farm to defendant and take over his cocoa farm, the defendant has no right again to claim the said farm nor his witness Babalola, cost to be borne by the plaintiff and the defendant to pay £1 12*s* 6*d* inspection fee to plaintiff."

The judgment was signed by five judges, but four of them were entirely different from the four who had formed the Court at its first sitting.

On the 21st August, 1956, the defendant appealed to the Ondo District Native Court of Appeal and his appeal was allowed.

The plaintiff respondent then appealed to the Senior Magistrate, Akure, who allowed the appeal on the grounds that there was nothing on the record to show that the defendant respondent (Makinwa) in that Court, sought and got leave of the Ondo District Native Court of Appeal to appeal against the decision of the Lower Court out of time, and that even if he had, it would be unthinkable to grant leave to appeal out of time after three years for the original judgment.

Counsel for the applicant in this court argued that the action of the learned Senior Magistrate in setting aside the order of the Native Court of Appeal was a fetter on the right of the Native Court of Appeal and cited the cases of *Joshua Orlu* v. (*i*) *Otuji* (*ii*) *Wali* 8 W.A.C.A., page 131, and *Nanah Essell Tawiah III* v. *Kwesi Ewudzi* 3 W.A.C.A., page 52. Counsel for the respondent did not dispute the rights of the Native Court of Appeal, but argued that there was nothing on the record to show that the applicant had sought and had been granted leave to "appeal out of time" and secondly that the Native Court of Appeal had not exercised its right judicially. The 8th and 9th paragraphs of the applicant's affidavit filed read as follows :—

"Paragraph 8.—I applied to the Ondo Native Court of Appeal for leave to appeal out of time.

Paragraph 9.—In granting the leave I was surtaxed and I paid £3 2*s* 6*d* for appeal out of time instead of the usual £1 2*s* 6*d*."

Furthermore he has exhibited his receipt dated 29th August, 1956 along with his affidavit. No counter affidavit has been filed by the respondent.

It is possible that it might have been the fault of the court or the clerk of the court that this fact has been omitted from the record. I do not think that the applicant should be prejudiced by this fact.

This application has been made by virtue of section 93 of the Magistrates' Courts (Western Region) W.R.L. 5 of 1955.

"I grant that the applicant was a long time in exercising his right of appeal, but the Appellate Court by section 37 of the Native Courts Ordinance, Cap. 142 possesses a discretion to grant leave to appeal out of time upon such terms as to the particular court might seem just."

In *Joshua Orlu* v. *Otuji and another* cited above it was stressed that this discretion must be exercised judicially, in that the "Appellate Court should be satisfied that there is some substance in the appeal and that there is a reasonable excuse" for such delay which in the particular case "made it necessary to apply for appeal out of time".

I find after perusing the record of appeal that the Appellate Court found as indeed they ought to find that there was some substance in the appeal. They found that the decision of the court below was erroneous in law, according to Native Law and Custom and inequitable. In my view the whole trial was a nullity in that the panel of judges was varied at several sittings and that when judgment was eventually delivered, Chief Logbosere was the only judge who had sat throughout the proceedings.

The Appellate Court did not express its opinion as to whether the delay was reasonable or excusable. But as I am satisfied that in reversing the judgment of the Native Court of first instance there has been no miscarriage of justice to the respondent. I will allow the applicant's prayer and will annul the judgment of the Senior Magistrate and restore the judgment of the Native Court of Appeal.

Application granted. Judgment of Magistrate's Court set aside. Judgment of Native Court of Appeal restored.

JIMO AMOO... ... ... *(Plaintiff)*

v.

RUFAYI ADIGUN ... ... *(Defendant)*

[HIGH COURT OF JUSTICE : Stuart, J., 25th January, 1957.]

Customary Law—Pledge of land—Rights of parties.

The plaintiff claimed an account of rents collected by the defendant during his possession of the plaintiff's shop as pledgee in respect of a loan made by defendant to plaintiff.

Held : that the transaction was an "indigenous mortgage" or pledge of land and that the plaintiff is entitled to credit for the defendant's exploitation of the premises while in possession.

Judgment for plaintiff.

Cases cited :—

Adjei v. *Dabanka*, 1 W.A.C.A., page 66.

Ibadan Suit No. I/158/56.

Agbaje for Plaintiff.

Ademola for Defendant.

Stuart, J. : In this case the plaintiff claims an account of rents collected by the defendant during his possession of the plaintiff's shop as a mortgagee since the 15th October, 1952 and payment of the amount found due on the taking of such account.

By paragraphs 2 and 3 of the Statement of Defence the defendant admits paragraphs 2 and 3 of the Statement of Claim and, in so far as it relates to the hiring of the shop to one tailor, he admits paragraph 4 of the Statement of Claim. The defendant has thus, by his pleading, specifically admitted that on the 15th October, 1952 the plaintiff executed a memorandum acknowledging receipt of £35 on loan from the defendant on the security of the plaintiff's shop at Iyalode Compound, Ojaba, Ibadan, that the defendant (in pursuance of the said memorandum of agreement) entered into possession of the said shop on the 15th October, 1952 until the loan is repaid, when the shop shall then be redeemed and that the defendant has hired the shop to one tailor. The hiring to a watch repairer is not admitted.

In vew of the admissions contained in his pleading it is somewhat surprising, and leaves a rather bad taste, that the defendant has seen fit to dispute the plaintiff's claim. The defendant did not produce the memorandum of agreement, the existence of which is admitted by his Statement of Defence, and objection was taken on his behalf to an alleged copy tendered in evidence by the plaintiff.

The plaintiff's oral account of the agreement in conjunction with the defendant's Statement of Defence leaves no doubt however that the transaction between the parties was what is appropriately described as "a kind of indigenous mortgage" by Mr T. O. Elias, until recently Simon Senior Research Fellow, the University of Manchester : *see* his "Nigerian Land Law and Custom" at page 178 *et sequentia*. In referring to a distinction between an "indigenous" mortgagee's rights and those of an English mortgagee the learned author cites the dictum of Michelin J. in *Adjei* v. *Dabanka* (1930) 1 W.A.C.A. at pages 66-67 :

> "It is an essential of a native mortgage that possession of the mortgaged premises should be given to the mortgagee at the time when the transaction takes place between the parties. This is made clear from the following passage which appears in Sarban's Fanti Customary Law at page 261 :
>
> Mortgage or rather pledge of land is a transaction in the presence of witnesses, the possession of the land pledged being given to the lender of the money."

And the learned author proceeds :

"Under the indigenous system, however, the pledge creditor obtains possession of the land from the very inception of the deal and also enjoyed the usufruct of the land for as long as it is considered necessary to give him an equivalent credit."

And in referring to agricultural land :

"if he plants permanent or economic trees like kola, palm or cocoa trees on the pledged land he is usually not allowed any compensation for improvements when the time comes for him to vacate the land on payment of the debt or satisfaction of the credit by the pledgee's exploitation of the land. Since the whole original arrangement does not envisage a permanent state of affairs, this custom is understandable."

The wide research and deep learning of Mr T. O. Elias entitle his views to the greatest respect and I regard him as an authority. There can be no doubt that the elements and principles of a native mortgage, or "indigenous" mortgage, are applicable to the transaction the subject of the present case and that the plaintiff is entitled to the credit for the defendant's exploitation of the shop the subject of the charge or pledge given on the 15th October, 1952. There will be judgment for the plaintiff for an account to be taken of the rents collected by the defendant since the 15th day of October, 1952 in respect of the plaintiff's shop at Iyalode Compound, Ojaba, Ibadan, and for payment of the amount found due upon the taking of such account to the plaintiff. And it is adjudged that the defendant shall not upon the taking of the said account be allowed any compensation for improvements. The costs of this suit to the date of this judgment assessed at 24 guineas including out of pocket costs will be paid by the defendant to the plaintiff and also the costs of the taking of the said account to be assessed after the taking of the account. The defendant is hereby ordered to file within fourteen days from this day his account of the rents collected by him, his servants and agents from the 15th day of October, 1952 in respect of the premises. And the plaintiff is at liberty to file his surcharge thereof within seven days after the service on him of a copy of the said account. The admitted debt of £35 payable by the plaintiff is to be taken into account on a final settlement and parties are at liberty to apply as they may be advised.

Judgment for the Plaintiff.

FRANCIS IZEDOMWEN ... ... (*Appellant*)

v.

INSPECTOR-GENERAL OF POLICE ... ... (*Respondent*)

[HIGH COURT OF JUSTICE : Thomas, J., 26th January, 1957.]

Criminal Law—Accepting reward contrary to section 99 of the Criminal Code—Proof of "proper pay and emoluments"—Judicial notice—sections 3 and 57 of the Police Ordinance—Demanding reward—Acceptance—Sentence.

The appellant, a police constable of the Nigerian Police Force, was convicted of accepting a reward beyond his proper pay and emoluments for having released on bail a person who was in his custody. He appealed on the ground that there was no proof of what was his "proper pay and emoluments" and that the case for the presecution being that he had demanded a reward he was wrongly charged under section 99 of the Criminal Code. He also appealed against sentence.

Held : (1) that the Magistrate was right in taking judicial notice of the fact that the appellant would receive proper pay and emoluments under sections 3 and 57 of the Police Ordinance and that the quantum thereof is immaterial.

(2) that on proof of taking or accepting a reward whether demanded or not is immaterial.

(3) that the sentence was not excessive.

Appeal dismissed.

Case cited :

R v. *Osakwe*, 12 W.A.C.A., page 366.

Benin Suit No : B/24CA/56.

Aghahowa for Appellant.

Fasinro for Respondent.

Thomas, J. : The appellant was convicted by the learned Chief Magistrate at Warri on the 6th September, 1955 on the following count :—

"That you at the same time and place being a person employed in the Public Service of the Federal Government of Nigeria to wit :—a Police Constable of the Nigeria Police Force, accepted from Robinson Obanyedo (*m*) the sum of two pounds in West African Currency Notes Nos. C/V 436436 and B/J 690095 all of 31st March, 1953, as a reward beyond your proper pay and emoluments, for having released on Police Bail one Ogberhagha Oniogbo (*f*) who was on 22nd July, 1955, in your custody, for an offence of conduct likely to cause a breach of the peace, and thereby committed an offence punishable under section 99 of the Criminal Code, Cap. 42, Vol. 11, Laws of Nigeria."

Against this conviction, he has now appealed on the following grounds :—

(1) That having regard to section 73 of the Evidence Ordinance, Cap. 63 the question of the accused's proper pay and emoluments is one of proof and not one to be judicially noticed.

(2) That the learned trial Magistrate erred in law in convicting the accused under section 99 of the Criminal Code, there being no proof of what was the accused's proper pay and emoluments.

(3) That the case for the prosecution being of repeated demands by the accused, the learned trial Magistrate erred in convicting under the above section.

(4) Verdict against weight of evidence.

(5) That the sentence is excessive.

First Ground of Appeal :

The learned Chief Magistrate was right in taking judicial notice of the fact that the "proper pay and emoluments" with reference to the appellant would come from the Nigeria Government, his employers in view of the fact that the Police Force is a Statutory Establishment.

Section 3 of the Police Ordinance, Cap. 172 refers and it is also clear from section 57 of the same Ordinance that police constables receive "proper pay and emoluments." This ground of appeal therefore fails.

Second Ground :

What was not proved was the quantum of emoluments and I agree with the learned Chief Magistrate in holding as he did that "The quantum of his actual pay appeared to me to be irrelevant". This ground therefore fails.

Third Ground :

Section 99 of the Criminal Code reads as follows :—

"Any person who, being employed in the public service, takes or accepts from any person, for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, or any promise of such reward, is guilty of a felony, and is liable to imprisonment for three years."

It is in my opinion immaterial as to whether the appellant demanded the reward or not provided, in the spirit of the words of the enactment, he takes or accepts a reward.

The learned Chief Magistrate being satisfied that the appellant accepted the reward was entitled to convict him. *Rex* v. *Patrick Osakwe* 12 W.A.C.A., page 366.

Fourth Ground :

I will not consider this point as it is not a ground of appeal and Crown Counsel for the respondent has requested that it be struck off citing *Aladeseru* v. *Regina* July cyclostyled copy, W.A.C.A. 1953 and Weekly Law Reports, page 515.

This ground of appeal is accordingly struck off.

Fifth Ground :

The learned Chief Magistrate gave his reason for the sentence and in my own view, considering the prevalence of this type of offence, I do not consider the sentence excessive.

Appeal dismissed.

ONUN ETEM IKPI ... ... (*Petitioner*)

v.

1. JENNY JONAH EKPIKEN IKPI ... ... (*Respondent*)

2. S. C. OTUKA ... ... (*Co-Respondent*)

and

JENNY JONAH IKPI ... ... (*Petitioner*)

v.

ONUN ETEM IKPI ... ... (*Respondent*

[HIGH COURT OF JUSTICE : Ademola, C. J., 28th January, 1957.]

Divorce—Cross petitions—Cruelty—Desertion—Standard of proof in charge of adultery.

In cross petitions by each spouse the husband charged the wife with adultery and desertion and the wife charged the husband with cruelty and desertion. The charge of desertion against the wife was based on her persistent refusal to join the husband in the matrimonial home and the charge of adultery upon a single alleged incident from the nature of which the Court was asked to infer that adultery had taken place. The charge of cruelty against the husband was based upon several alleged acts of violence and the charge of desertion upon an allegation that the husband had "created an atmosphere which makes it inexpedient for the petitioner to resign her job as a teacher and join the respondent at his station". The facts are fully set out in the judgment.

Held : (1) that the wife had failed to establish both charges against the husband ;

(2) that a period of separation by mutual consent having been terminated the persistent refusal by the wife to return to the husband and resume cohabitation over a period exceeding three years constituted desertion notwithstanding two or three occasional visits to the husband's home during which cohabitation was not resumed.

(3) that the allegation of adultery was not supported by evidence sufficient to establish the charge beyond reasonable doubt.

Wife's petition dismissed.

Decree nisi granted husband on ground of desertion.

Cases cited :

Fitz Gerald v. *Fitz Gerald* 19 L.T., page 575.
Pulford v. *Pulford* (1923) P., page 19.
Sotherdon v. *Sotherdon* (1940) P., page 73.
Pardy v. *Pardy* (1939) P., page 302.
Ross v. *Ellison* (1930) A.C., page 1.
Ginesi v. *Ginesi* (1948) 1 All E.R., page 373.
Churchman v. *Churchman* (1945) 2 All E.R., page 195.
Gower v. *Gower* (1950) 1 All E.R., page 804.
Wright v. *Wright* (Australia) 77 C.L.R. (2), page 191.
Preston-Jones v. *Preston-Jones* (1951) 1 All E.R., page 124.
Goller v. *Goller* (1954) 1 All E.R., page 536.

Ibadan Suit No : I/97/55.

Rosiji (*Agbaje Williams* with him) for husband.
Onagoruwa for wife.
Olowofoyeku for Co-respondent.

Ademola, C. J. : The husband petitioner filed his petition on the 16th June, 1955. The wife, possibly unknown to her that a petition for divorce had been filed against her by the husband, filed her petition for divorce on the 13th July, 1955. On the 9th January, 1956, an order was made consolidating the two petitions. They were both heard together.

Parties were married in the Marriage Registry, Lagos, on the 4th May, 1943. They lived and cohabited together at Ibadan. There are three issues of the marriage, two living at present with the husband and one with the wife.

The husband, at the time of the marriage, was Science Master in the Agriculture Department, Ibadan. The wife was the headmistress of a school at Aro-Chuku in the Eastern Region : After her marriage she secured a job as Domestic Science mistress at Moor Plantation, Ibadan. She has continued in that work up till now. The husband, however, is now an Administrative Officer attached to the Public Service Commission at Enugu in the Eastern Region. Both parties are natives of Nigeria from the Eastern Region.

The husband's petition for dissolution of his marriage with the wife is grounded on a charge of desertion and on adultery, which he alleged, she committed frequently with the Co-respondent. The wife's petition for dissolution, on the other hand, charged the husband with cruelty and with desertion. Each asked for custody of the children.

It is more convenient to deal first with the wife's petition. She alleged that the petitioner, since their marriage, had treated her with cruelty which has undermined her health. That he is a man of violent and ungovernable temper and has frequently struck her, threatened her and abused her. She gave one instance in 1944 when the husband beat her mercilessly, dragged her about and she was left rolling on the ground. This, according to her, was due to a protest that she was dissatisfied with food allowance given her, a situation which, she said, started since the third month of their married life. She also alleged that in 1950 when she was pregnant with a child, the husband beat her and she was faced with threatening abortion for a few days. Although not alleged in her petition, the wife also gave an instance in October 1951 when the husband hit her on the face with a book. Lastly, she gave evidence of an occasion when the husband refused his food alleging he suspected the food contained some poison.

The husband denied the allegation of beating ; he admitted, however, that they had quarrelled on some occasions and did scuffle but he has never beaten her as such ; he has always been considerate during any disagreement. He denied hitting the wife on the face with a book but admitted throwing an exercise book at her when she was deliberately annoying him by singing and disturbing him from writing, after a quarrel. He also admitted he refused his breakfast one morning because he had seen his wife with some native medicine in the form of a powder, and he was afraid she might have put some in his food. He did not suspect her of wishing to harm him but as he knew nothing about this medicine in her possession during one of his visits to Ibadan from the north to entreat his wife to join him, he felt she might be given a love potion in order that she might get her way with him. She had flatly refused to leave Ibadan and go up north with him.

One can hardly blame the husband for refusing the food at that time, since the wife on her own admission before me, had been accepting, without the knowledge of her husband native medicine from some friends although she did say the medicine was being used for her own health. There is nothing unnatural in the husband being suspicious, in the circumstances, about a medicine he had no knowledge of.

As for the evidence about the hitting with a book, I am satisfied from the evidence of the husband and the wife's witness that the incident was no more than the throwing of a book at the wife to stop her from annoying him further with her songs.

With regard to the two instances of cruelty alleged in 1944 and 1951 respectively, it is enough to say that I do not believe the evidence of the wife which she tried to substantiate by calling two relations of hers who were mere children at the material time. Although one of them said he shouted for help when the wife was being beaten and many people came and settled the matter between the husband and wife, not one of them has been called to give evidence.

The charge of desertion in the wife's petition stated as follows :—

"10. That the respondent has deserted the petitioner since the past three years in that the respondent created an atmosphere which makes it inexpedient for the petitioner to resign her job as a teacher and join the respondent at his station."

Whatever this may mean in relation to a charge for desertion, I fail to see anything in the evidence creating an atmosphere which makes it impossible for the wife to resign her job and join the husband.

A perusal of the wife's petition, and the evidence adduced to substantiate her allegations, leaves me with the impression that the petition was not filed in all seriousness but merely to save her face. There is no substance whatever in the allegations of cruelty and desertion. Her petition, therefore, will be dismissed.

I will now consider the husband's petition which charged the wife with desertion and with adultery with the Co-respondent.

The charge of desertion is based on the persistent refusal of the wife to join the husband in the matrimonial home. After their marriage in 1944, the husband went to the United Kingdom in 1945, the wife continued as headmistress of the Domestic Science Centre. In 1948 she went to join her husband in the United Kingdom. They both returned to Ibadan in August 1950 ; the wife continued her teaching career. In November 1950 the husband was transferred to Zaria in Northern Nigeria. The case of the husband was that there was an agreement between them that the wife should stay behind at Ibadan as she was making a baby and maternity facilities are not assured at Zaria ; in any case, it was near the end of the school year and the schooling of the children would thereby not be disturbed. He (the husband) would return to Ibadan on leave in December, and if maternity facilities are assured at Zaria, the wife and the children would go up with him in February 1951. Under this condition he left for Zaria.

In due course he wrote assuring the wife of maternity facilities at Zaria ; she was to get ready to go up with him in February 1951. The wife protested ; she said she would not get a teaching appointment at Zaria and in any case, she said, her health was not good. She pleaded to be allowed to stay on at Ibadan until she had the baby. The husband agreed. After his leave at Ibadan in 1951, he went back with two children on the understanding that the wife would join them after the baby shall have arrived. In June 1951, the wife had a still-born. After this she refused to go up to Zaria ; the husband sent her travelling warrants but she refused to go up to Zaria ; she said she would not give up her job and lose her pension rights. Meanwhile, the husband was transferred to Yande, near Makurdi. Again he entreated the wife to join him but she refused. She was granted leave. She went to her home town in Eastern Nigeria and did not go up north to see the husband and the children. Not long after this he had a motor accident and lost, temporarily, the use of his right hand. He was unable to look after the children. Once more he appealed to the wife to come ; again she turned a deaf ear to his appeal. He later came to Ibadan and with Dr Eni Njoku, lecturer at the University College, Ibadan, the husband visited the wife. Dr Njoku had, for months, at the instance of the husband, done everything to persuade the wife to go up north to join the husband but it was of no avail. Both Dr Njoku and the husband went and made a strong appeal to the wife. He (the husband) said if there was a time he ever wanted a wife in his life that was the time. He could hardly make use of one arm and he was finding it difficult to look after the two children with him. To all this appeal the wife turned a deaf ear ; she was still very concerned about losing the continuity of her service. The husband had to return to the North uncomforted. In April 1952, he was transferred to Abakaliki in Eastern Nigeria. A week after he got there he became critically ill. His next-of-kin was sent for. At that invitation the wife came, stayed two days and left. He spent three months in the hospital and after his discharge he was transferred to Enugu. About nine months later, in March 1953, the wife was on leave. She passed through Enugu on her way to Itu, her home town. She stayed the night to see the children and left next morning. She spent the night in the visitors room

and had nothing to do with the husband. The relationship since 1951 has been on the breakin point ; there was no marital relationship between them and the wife has withdrawn all suc relationship. Again in 1954, she called, with a friend, to take the children to see her dyin father at Itu. She occupied the visitors room with her friend. The husband refused th children going with her and she left next morning. Such has been the relationship upon whic the husband now grounds his petition for desertion. The wife's answer to all this, which have dealt with, is that she refused to join the husband on account of his conduct or rathe cruelty to her, which made it impossible to live with him.

Now, what constitutes desertion in law ? Lord Penzance in *Fitz Gerald* v. *Fitz Geral* 19 Law Times Rep. 575 says :—

"desertion means abandonment, and implies an active withdrawal from a cohabitatio that exists."

This definition has been criticised as not exhaustive, and in *Pulford* v. *Pulford* (1923) P. 19 Sir Henry Duke, P. criticising Lord Penzance's definition said :—

"It is not exhaustive definition. The conduct of the party charged must be looked at If he or she has not recognised the duty of cohabitation in the married state, desertion ha arisen."

Pulford v. *Pulford* (above) was followed in *Sotherdon* v. *Sotherdon* (1940) P. 73 where the criticism of Sir Henry Duke, P. was approved of. Also in *Pardy* v. *Pardy* (1939) P. 302, Lord Penzance's definition was criticised and departed from.

In *Pardy* v. *Pardy*, Sir Wilfrid Green, Master of the Rolls put the position thus :—

"The first question which arises is whether or not it is possible in law for a separation which began by being consensual to acquire the character of desertion without a previous resumption of cohabitation.

Looking at the question on principle and apart from authority I can see no reason why the answer to it should not be in the affirmative. The "desertion" may describe a state. For the act of desertion, both the factum of separation and the "animus deserendi" are required. A "de facto" separation may take place without there being an "animus deserendi", but if that "animus" supervenes, desertion will begin from that moment, unless, of course, there is consent by the other spouse".

It will be seen therefore that it is of great importance that the spouse who alleges desertion satisfied the Court that he is not a consenting party to the continuance of the separation. Also, to arrive at a conclusion whether or not there is desertion, the whole of the conduct of the parties and their words must be taken into account. With the wife in the present case it is a question of her career coming first ; the home has been relegated into the back-ground. Although the husband at first agreed to her staying at Ibadan, later he made it clear that there must be an end to the separation by asking the wife to join him at Zaria. This she refused to do despite all entreaties. She withdrew completely from the husband's company and refused to share his home and all consortium. He turned to his trusted friend Dr Njoku to reason with the wife. She was adamant and Dr Njoku did not get any further with her. She was still very much concerned with her unbroken period in the Government service and her pension rights. Undaunted, and in ill health, the husband came all the way to Ibadan from the North. Both Dr Njoku and the husband tried to reason with her. She was not amenable to reason and to all their supplications she paid no heed. The husband returned to his station, a dejected man. He soon broke down in health and the wife merely put in an appearance for two days when she was summoned to his bed side, critically ill. He spent three months in the hospital uncared for by the wife. After his discharge from the hospital, he was transferred to Enugu. Again, the wife refused to join him. She made two visits spending a night each, at different times, when she was passing through Enugu ; her object was to see the children or take them away. On these two occasions she did not keep the husband's company ; there was no resumption of the common life.

It is clear from all these that the husband has put an end to the separation which they both agreed upon ; he was ready to resume cohabitation but the persistent refusal of the wife to return and her withdrawal from her matrimonial home became the factum of separation and the "animus deserendi". From her conduct and her words, a state of desertion on her part has, to my mind, arisen. This desertion, in my view, started from June 1951, when the husband sent her travelling warrants but she refused to join him. Nor, in my view, can that period be broken by two or three occasional visits; one, on being summoned to his sick-bed and the other two calls to see their children. I am satisfied the husband has proved desertion.

With regard to the charge of adultery, I am unwilling to enter upon this case, either on the one side or the other, beyond what its necessity requires. I am therefore referring only to important facts.

Now, it is common ground that at the wife's quarters at Moor Plantation on 12th day of June, 1955, both the husband and the Co-respondent met at about 9.30 or 10 p.m. and there was a brief encounter. Each gave a different account of this meeting. According to the husband's story, he and five others, apparently from reports received, surprised the wife at about 10 p.m. when all doors and windows have been shut and lights were out. One of the men with him knocked at the door which was not opened ; the husband then knocked at the door and shouted out his name. The lights were at once switched on and the wife opened the main door. She was in her night gown.

The husband and his men entered the house and made straight for the bedroom. There, it was stated, the Co-respondent was found stark naked and trying to put on his clothes. These were taken from him after a struggle. To attract the neighbours, the men who came with the husband shouted "thief, thief". The neighbours came. A police constable was sent for. After about an hour or more of this encounter a constable came and they all went to the Police Station where they made statements.

On the other hand, the wife and the Co-respondent's story was to this effect. The Co-respondent had promised to take the wife out in his car to see a friend. It rained heavily and he did not come. Later in the evening, about 9.30 p.m. when the weather had improved, he went to apologise to the respondent (wife) and to explain why he was unable to make it. The respondent said she had on an old evening frock (and not a night gown), as it was a cold evening. The windows were all wide open and the lights were on ; she and her servants or relatives were in the parlour ; her daughter was sleeping in the only bedroom in the house. The Co-respondent came in and sat down on a chair near the kitchen with his back to the bedroom. As they were talking, she switched the radio off. At about 9.50 p.m. there was a knock at the door. Then she heard the voice of her husband. She went and opened the door which, in any case, was not locked. The petitioner and the men with him rushed in. They seized the Co-respondent, stripped him naked and dragged him into the bedroom where he was severely assaulted and left with bruises on his body until a crowd gathered and a policeman came.

Now, if the evidence of the husband petitioner and his witnesses on this issue is believed, it is left to the court to say whether, in the circumstances, there is evidence of adultery. The courts have from time to time, demanded strict proof in a charge of adultery. But strict proof does not mean that the court cannot, without direct evidence, infer from circumstances that adultery has been committed. Suspicion, however high, is not necessarily a ground for adultery. *Ross* v. *Ellison* (1930) A.C. 1.

It may here be necessary to consider how high the standard of proof should be in adultery cases. Of recent years Judges have defined what standard or proof is required.

In *Ginesi* v. *Ginesi* (1948) 1 All E.R., page 373 it was stated that standard of proof in adultery cases is a high one and that it was a matter of history that adultery is a quasi criminal offence. This follows *Churchman* v. *Churchman* (1) (1945) 2 All E.R., page 195 where Lord Merriman, P. said :—

"The same strict proof is required in a case of a matrimonial offence as is required in connection with criminal offence properly so called."

Strict proof of adultery as required in criminal offences was criticised and doubted by Denning L. J. in *Gower* v. *Gower* (1950) 1 All E.R., page 804. He said :—

"I do not think that this court is irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge, to be proved beyond all reasonable doubt. The Supreme Court of Judicature (Consolidated) Act, 1925, section 178 (2), as substituted by the Matrimonial Causes Act, 1937, section 4, which simply requires the court on a petition for divorce to be "satisfied on the evidence that the case for the petitioner has been proved" lays down a standard and puts adultery on the same footing as cruelty, desertion or unsoundness of mind. So far as that Act of 1925 is concerned no valid distinction can be drawn between the standard of proof of cruelty and adultery, nor does public policy require any such distinction."

This view was approved of in the High Court of Australia in *Wright* v. *Wright* (1948) 77 C.L.R. (2) 191 where the court refused to follow *Ginesi* v. *Ginesi* (above) and held that on a charge of adultery, the criminal standard of proof was not appropriate.

In more recent cases, however, the courts have leaned towards the standard in criminal cases and have adopted the general standard of proof beyond reasonable doubt. In *Preston-Jones* v. *Preston-Jones* (1951) 1 All E.R., page 124, the view was expressed by Lord MacDermott at page 138 that in adultery cases, the standard of proof is no less than in criminal cases. The same general standard—proof beyond reasonable doubt—is the appropriate one. This view was followed in a recent case *Goller* v. *Goller* (1954) 1 All E.R., page 536.

Thus it is evident that the standard required to prove adultery is a high one. At the same time, it is up to the court to consider in every case, the facts before it as well as the circumstances.

In the present case, if I am satisfied that the story as told by the husband (petitioner) and his witnesses are true, there are grounds upon which adultery can be inferred. But in matters of this nature, regard must be paid to the evidence of persons who are disinterested in the matter as well as other circumstances. There was evidence before me that the Co-respondent was in the habit of visiting the wife (respondent) at night and leaving his car outside. There was an instance, according to evidence, when he was in the house late at night. It was alleged he had to get out by the back door when friends of both the petitioner and the respondent knocked at the wife (respondent's) door that night.

Now, if the evidence of the husband (petitioner) is true, that the door of his wife's house was locked and lights were out when he and his friends went there and that they knocked for about ten minutes but the door was not opened until he himself knocked and announced his name, there was sufficient time, was there not, for the Co-respondent to get dressed before the wife (respondent) opened the door, especially when it became known that the husband was at the door ? Also if the Co-respondent had been in the habit of getting away by the back door, would he not have made sure that at the time the front door was being opened, he was making good his escape by the back ?

I have to consider the evidence of two independent witnesses—two night watchmen—who were together that night in the neighbourhood. The senior watchman told me he passed by the wife's (respondent's) house, saw the windows opened and lights were on. He passed near the window saw the respondent and a man sitting in the parlour. He greeted them as he passed by. He went and talked to the junior watchman nearby. They talked together for a few minutes ; the latter walked a little distance with him and he again passed near the house and went away. A few minutes later he heard a noise from the direction of the house and came back. The junior watchman, who also rushed to the scene, told the same story. Both saw a naked man who was being beaten in the room.

I cannot treat lightly the evidence of these two disinterested men who were not shaken in cross examination.

Equally important is the evidence of the young girl, a child of the petitioner and the respondent, who, unfortunately, has been dragged into this case. Her evidence, which I believe, although it did not go very far, was to the effect that she was asleep on the bed in the only room in the house. On this bed she and her mother sleep regularly. She was fast asleep and was woken up by a noise in the room. She woke up to see some men struggling in the room ; one of them, with whom others were struggling, was naked.

On a careful and impartial analysis of the evidence on both sides, I have come to the conclusion that the wife's story with that of the Co-respondent about the incident of the night of 12th June, is nearer the truth than the story of the husband and his witnesses.

As there are no other grounds upon which the charge of adultery is based, I must therefore find against the husband on this charge.

In the event, the wife's petition on the whole is dismissed. The charge of adultery brought by the husband is dismissed against the wife respondent and against the Co-respondent with 15 guineas costs in favour of the Co-respondent.

The husband's petition, however, succeeds on the ground of desertion.

A decree nisi will be granted in favour of the husband on the ground of desertion.

He will have custody of the three children.

Wife's petition dismissed.

Decree nisi granted husband on ground of desertion with custody of children.

ITEM ... ... (*Appellant*)

v.

FELIX PAUL ... ... (*Respondent*)

[HIGH COURT OF JUSTICE : Onyeama, Ag. J., 2nd February, 1957.]

Contract—Letting of building on Crown Land—Illegality—In pari delicto—Repudiation.

The defendant agreed to let part of a building on Crown land to the plaintiff but after the completion of the building the plaintiff refused to enter into occupation on the ground that the defendant had a certificate of occupation for one family only and that a family was already in occupation of part of the building. The plaintiff claimed a refund of an advance payment made by him and damages. The defendant counter-claimed for balance due on agreed yearly rent. The Magistrate held that the contract of letting was illegal and that neither party could recover thereunder. On appeal to the High Court.

Held : (1) that an assignment of Crown land without consent though it might be ground for forfeiture was not illegal ;

(2) that the plaintiff was in the circumstances right to repudiate the agreement when he learned the terms of the certificate of occupancy ;

(3) that the parties were not *in pari delicto* and the plaintiff was entitled to a refund of the advance payment.

Appeal allowed.

Cases cited :

Esi v. *Moruku* 15 N. L.R. 116 (not followed).

Harry v. *Martins* 19 N.L.R. 42.

Marques v. *Edematie and another* W.A.C.A. No. 3321 (not reported, referred to in head-note 19 N.L.R. 75).

Civil Appeal from Magistrate's Court No. W/67A/56.

Boyo for Appellant.

Izuora for Respondent.

Onyeama, Ag. J. : This is an appeal from the judgment of the Acting Chief Magistrate, Benin, sitting at Sapele, dismissing the claim and the counter-claim of the parties.

The plaintiff who now appeals claimed recovery of £300 damages for breach of contract. It appears that the defendant agreed to let part of a building on Crown land to the plaintiff at a rental of £300 a year and in consideration of the agreement received advance payment in goods to the value of £215.

After the building had been completed, the plaintiff refused to take up occupation of the part agreed on the ground that the defendant had obtained a certificate of occupancy for one family only for the house, and the Whittick family was already in occupation of part of the house. The plaintiff contended that it would be illegal for him to occupy the other part in view of the certificate of occupancy, and he therefore claimed refund of £215, interest at 10 per cent and general damages.

The defendant counter-claimed for £85 balance due on the agreed yearly rent.

The learned magistrate accepted the evidence that the plaintiff had in fact occupied the part of the building covered by the agreement between the parties for some time. He however held on the authority of *Sam Warri Esi* v *Moruku* 15 N.L.R. 116 that as the prior consent of the Governor in writing for the sublease to the plaintiff had not been obtained, the contract of letting was illegal and he held that neither party could recover under the agreement. He accordingly dismissed the claim and the counter-claim.

The attention of the magistrate does not appear to have been drawn to two cases which are in conflict with the case on which he relied. The cases are *Harry* v. *Martins* 19 N.L.R. 42 and *Marques* v. *Edematie and another*, W.A.C.A. No. 3321 referred to in the head-notes in 19 N.L.R. 75. In the latter case the Court of Appeal (according to the head-notes) was of the opinion that an assignment of Crown land without consent, though it might be a good ground for forfeiture, was not null and void, (illegal ?) and it could be lawfully made and would be effective until action for forfeiture was taken by the Commissioner of Lands. This decision appears to me to put an end to *Esi* v. *Moruku* as a correct statement of the law on the point.

In view of this, I am of the opinion that the learned Magistrate was in error in holding that the agreement between the parties was illegal for the reasons he stated.

The learned Magistrate does not appear to have given adequate consideration to the effect of the certificate of occupancy which permitted one family only in the house. At the time the agreement to let was made in April 1954, the certificate of occupancy had not been issued and so it could not be said that the agreement itself was illegal.

The certificate was issued under statutory authority by the Health Officer, the Development Officer and the Local Authority, and I think that it would be illegal for the defendant to have more than one family in the building in view of the certificate, and for the plaintiff to continue to occupy part of the building while another family was in occupation of another part as soon as he became aware of the terms of the certificate.

The plaintiff's manager in evidence stated that he did not at any time see the certificate, but that before the house was completed he discovered that it was "illegal" for him to stay in it. There is nothing to show that the Magistrate disbelieved this evidence.

Although the learned Magistrate found that the plaintiff by his agents occupied the part of the building agreed upon, I consider that before the plaintiff can be disentitled, the Magistrate should find further that he was at the time of the occupation aware of the illegality ; for it is only then that the parties can be said to be "*in pari delicto*". It appears to me that the knowledge which the plaintiff's manager admitted he had before the building was completed was knowledge in the plaintiff-company.

The learned Magistrate said he believed the evidence of the defendant to the effect that the plaintiff occupied the part of the building agreed on "because the witness Halbertsma made it clear that he went on leave *immediately* after negotiations and was not in Sapele when other members of the firm's staff occupied the house and because Whittick admitted that they kept their wardrobe there as well as garage their car in the part reserved for occupants of the newly completed portion of the premises."

I assume that the first witness for the plaintiff is Halbertsma as there is no one else on the record who has a name anything like it. It is true he stated under cross-examination that after making the arrangement with the defendant he went on leave, but he did not give any evidence of the kind attributed to him by the Magistrate ; nor did Whittick state that the plaintiffs kept their wardrobe in the rooms in question. It therefore appears that the reasons given by the Magistrate for believing the defendant in preference to the plaintiff were not wholly valid. I should say they were invalid for the most part.

The Magistrate appears to have confused the evidence of the defendant with the evidence of the plaintiff's witnesses, and I consider that by reason of this, he failed properly to assess the weight of the evidence tendered which, on the issue of the occupation of the new portion, appears to me from the record to be in favour of the plaintiff.

It appears to me therefore that the plaintiff-company had led evidence to show that they did not occupy the new portion of the building and that this evidence had not been adequately countered.

The evidence that the garage was occupied does not prove that the plaintiff's agents had occupied the new portion of the building.

The position appears to me to be that the plaintiff became aware of the terms of the certificate of occupancy and declined to take up occupation of the agreed set of rooms. I consider that in the circumstances the plaintiff was right to repudiate the agreement and that he is entitled to a refund of the advance payment on the agreement. The parties were not *in pari delicto*.

I accordingly allow the appeal and reverse the judgment of the Chief Magistrate. I substitute for that judgment a judgment for the plaintiff for £215 and costs assessed at £12 12*s* in the Court below. I allow the appellant the costs of this appeal assessed at £15 15*s* 0*d*.

Appeal allowed.

Judgment entered for appellant.

D. E. Y. AGHAHOWA ... ... (*Plaintiff*)

v.

PETER AGUEBOR ... ... (*Defendant*)

[HIGH COURT OF JUSTICE : Thomas, J., 11th February, 1957.]

Libel—Complaint of misconduct against legal practitioner—Privilege—Legal Practitioners Ordinance.

The defendant having engaged the services of the plaintiff in his professional capacity as a legal practitioner in certain criminal proceedings sought the plaintiff's further services in a civil action arising out of the same incident. The plaintiff declined to act in the civil suit on behalf of the defendant and eventually appeared on behalf of the defendant's opponent therein. The plaintiff furthermore refused to refund any portion of the fees paid to him in the Criminal case which was eventually heard in a Native Court in which the plaintiff had no right of audience and refused also to return to the defendant the brief or papers in that case. The defendant then addressed a complaint in writing to a Judge of the High Court and sent copies thereof to the Chief Magistrate, the Magistrate and the Superintendent of Police. He made further complaint in writing to the Attorney-General. Being himself illiterate both these communications were written on his behalf by a letter writer.

Held : (1) that the contents of both communications were defamatory ;

(2) that publication to the Judge, Chief Magistrate and Magistrate were absolutely privileged as words written in the ordinary course of proceedings in a court recognised by law ;

(3) that publication to the Superintendent of Police was not privileged ;

(4) that publication to the Attorney-General was absolutely privileged by reason of the provisions of the Legal Practitioners Ordinance ;

(5) that publication to the letter writer was absolutely privileged the defendant being illiterate and entitled to secure the services of the letter writer for the purposes of making his lawful complaint.

Judgment for the plaintiff in respect of (3) above.

Cases cited :

Clay v. *Roberts* (1865) 8 L.T. 397.

Myroft v. *Sleight* 90 L.J. K.B. 883.

Dawkins v. *Rokeby* 8 Q.B. 255.

Lilley v. *Roney* (1892) L.J. Q.B. 727.

Benin Suit No : B/37/1955.

Longe for Plaintiff.

Ihua-Maduenyi for Defendant.

Thomas, J. : The plaintiff's claim against the defendant is for the sum of £2,000 for false and malicious publication in a letter dated the 27th September, 1954, written to the Judge of the High Court, Benin City, and copied to the Chief Magistrate, Magistrate and the Superintendent of Police. The text of the letter is as follows :—

"U B.N.A. Forestry Dept.,
Benin City.
27th September, 1954.

His Lordship,
The Judge,
Supreme Court,
Benin City.

Suit No. M.B. 290 and 291/54

My Lord,

I have the honour most humbly to protest against Barrister Aghahowa appearing for my opponent in the above quoted Magistrate Court Benin Cases on account of the reasons stated below :—

1. On or about 30th May, 1954, I was assaulted by one Osifo who is now a defendant in the above suit.

2. The assault occasioned battery whereby I spent seven (7) days in the Benin General Hospital, later Nigeria Police changed the assault to affray before Magistrate Court, Benin, for this reason I employed the services of Barrister Aghahowa. I consulted him and he charged me £18 18*s* 0*d* (Eighteen pounds eighteen shillings) out of which I paid him £10 10*s* 0*d* (Ten pounds ten shillings) part payment on the 6th July, 1954 with receipt, having a balance of £8 8*s* 0*d* and no receipt was given for the consultation fee of £1 3*s* 6*d*.

3. Later on, the Nigeria Police said that the Magistrate refused the case of affray, thereby it was sent to the Benin Criminal Court where the charge was dismissed.

4. I made a clear statement to Barrister Aghahowa at the time that I employed him. Immediately the case was dismissed by the Benin Criminal Court I went to Barrister Aghahowa for advice also he directed me to take action against Osifo, and I consented to do so. When I got to Barrister Aghahowa's house for further arrangement at one time to my utter disappointment I met my opponent reading my statement I gave to the lawyer before ; this made me to run away from him and employ another lawyer for the action. Now Osifo my opponent employed Barrister Aghahowa against me in this very cause in which I had given statement to him (Barrister Aghahowa).

In view of the above my Lord I pray that :—

(*a*) Barrister Aghahowa be made to refund the amounts of £10 10*s* 0*d* I have paid as part payment on the 6th July, 1954, with receipt balance £8 8*s* 0*d* out of £18 18*s* 0*d* he charged me for appearing in the Magistrate Court, Benin in respect of the case for which no service was rendered ;

(*b*) Barrister Aghahowa be disallowed to defend my opponent in this suit ; and

(*c*) Barrister Aghahowa returns my statements made to him in this suit.

I have the honour to be,

Sir,

Your obedient Servant,

(*Sgd.*) PETER A. AGUEBOR.

Copy to :—

Chief Magistrate, Benin City,
Magistrate, Grade I,
S.S.P., Benin City."

The portion of the letter complained of reads as follows :—

"When I got to Barrister Aghahowa's house for further arrangement at one time to my utter disappointment I met my opponent reading my statement I gave to the lawyer before, this made me to run away from him and employ another lawyer for the action. Now Osifo my opponent employed Barrister Aghahowa against me in this very cause in which I had given statement to him (Barrister Aghahowa)".

The plaintiff alleged, further, that the said false and malicious publication was repeated to the Attorney-General, Lagos, and to a letter writer, Egbon of Benin City on the 4th July in paragraph 3 as follows :—

"He obtained full statements from me together with four of my corroborated witnesses, being the usual procedure as a client to a lawyer, *I endeavoured, moved from my house to visit him, fortunately, I met my opponent Osifo in my Counsel's house when reading my statements to his hearing and advised him to interview the Inspector of Police and tip him in order to have the case transfer to the Benin Native Court for judgment with the aspect that I will have him dash off in the Magistrate's Court.*"

The defendant is an illiterate motor driver employed by the Benin Divisional Native Administration. He does not deny writing the letters, but pleads (*a*) as regards the letter of the 27th September, 1954 that he "does not admit that there was any publication, the words in their natural and ordinary meaning and without the alleged meanings are true in substance and in fact, made in good faith upon a privileged occasion". Also with reference to the letter of the 4th July, 1955, "he denies the said words bore or were understood to bear any of the meanings alleged." He denies publication and further states that "the alleged statements are true in substance and in fact made in good faith on a privileged occasion."

I am satisfied that the defendant published the words complained of. I must now set out the circumstances under which the defendant published the said words. He and his sister had been charged with a criminal offence along with another gentleman who, it was alleged, had assaulted them. The defendant then went and briefed plaintiff, who is a Barrister and Solicitor of the Federal Supreme Court. He paid him his consultation fee and was charged £18 18*s* 0*d*. The defendant paid £10 10*s* 0*d* and was issued with a receipt. Plaintiff took a statement from the defendant and his witnesses.

Owing to congestion in the Magistrates' Courts, the defendant and others were brought to trial in the Native Court where the plaintiff had no right of audience.

Defendant alleges the following facts, which are disputed by the plaintiff, that he then approached the plaintiff with a request that he should institute an action for damages for assault against the other gentlemen whom I will hereinafter, refer to as the opponent. He testified that the plaintiff told him that he and the opponent were schoolmates and that he was the present husband of his (plaintiff's) sister and that he would not take this action.

It is not disputed that he refused to refund defendant's fees or any portion thereof, that he refused also to hand the brief or papers to the defendant and eventually did appear on behalf of the defendant's opponent in the Chief Magistrate's Court, in a suit for damages instituted against him by the defendant.

It is also not disputed that at that Court the defendant again protested and that the Chief Magistrate, after consulting with the Judge, advised the plaintiff to withdraw from the Defence of the defendant's opponent and that plaintiff accepted the advice.

It is admitted also by the plaintiff that he has not refunded any fees to the defendant or returned his papers or brief.

There is one other question of fact that I have to decide, whether on the evidence, I do believe that the defendant actually found the plaintiff reading his statements that he had made to him as Counsel to his opponent as is alleged by the defendant. It should be noted that the facts are rather dissimilar in each letter but I think that is accounted for by the fact that an illiterate letter-writer was responsible for writing both letters at the dictation of the defendant.

I have only the plaintiff's testimony as against the defendant's and his only witness, who is also illiterate, that they visited the house at 11 p.m. or thereabouts. That they saw the defendant's opponent in plaintiff's house, I have no doubt, but I do have some doubt as to what actually transpired, as the testimony of the defendant and his witness is not clear on the point. It is a most serious allegation in my view against Counsel and might be fraught with dire consequences, and that being so, I feel that I should treat this piece of evidence in the way I ought to, had I been trying the plaintiff on a Criminal charge. I will therefore be liberal to him and give him the benefit of the doubt, *i.e.*, I will accept his evidence on the point, rather than that of the defendant and his witness.

Counsel for the defendant has urged on this Court, that the words complained of by the plaintiff were not defamatory of him, in that the allegation against him amounted to a breach against conventional etiquette or at most was conduct on the part of the plaintiff which was merely distasteful or objectionable according to the notions of certain people and was therefore not libellous. He cited in support *Clay* v. *Roberts* (1865) 8 L.T. 397.

In my opinion the principle of the decision was clearly laid down by McCardie J. in *Mroft* v. *Sleight* (1921) 90 L.J. K.B. 883, after referring *Mawe* v. *Piggott* 1869 1R. 4 C.L. 54, *Clay* v. *Roberts supra* and *Leetham* v. *Rank* (1912) 57 S.J. 11:—

> "These cases seem to show that the words complained of must be such as would injure the plaintiff's reputation in the minds of ordinary, just, and reasonable citizens. And, applying that test to the facts of the case : I imagine that it would not be defamatory merely to say of an ordinary trade unionist that he had left his union, or that he had openly continued at work in spite of the orders of his union,.....But here the words, amounted to a charge of trickery, or of underhand disloyalty or hypocrisy, a very different matter. Such a charge to my mind, is as defamatory of a trade unionist as it is of any other man."

It is my opion, therefore, that the portion complained of by the plaintiff in the letter of the 27th September, 1954 is defamatory of the plaintiff, because it charges him with trickery, underhand disloyalty or hypocrisy.

The letter of the 27th September, 1954 which the plaintiff complains of, is headed Suit No. MB 290/1954. It is not disputed that this suit was then pending in the Chief Magistrate's Court and that in consequence of this letter and the defendant's protest in court, that the Chief Magistrate had an interview with the Judge and that at the resumed trial, he persuaded the plaintiff to withdraw from the defence of the defendant's opponent.

I have stated as my opinion *supra* that I did not believe that the defendant actually found the plaintiff reading his statements, made to the plaintiff in the relation of client and Counsel, when he visited the plaintiff, on the night in question, at about 11 p.m.

The publications to the Judge, the Chief Magistrate and the Magistrate were absolutely privileged. "The authorities are clear, uniform and conclusive, that no action of Libel, or Slander lies, whether against Judges, Counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law" per Kelley C.B. *Dawkins* v. *Rokeby* (*Lord*) 1873 L.R. S.Q.B. 255.

But the publication to the Superintendent of Police was quite a different matter, it was an excess of publication, as there was nothing the Superintendent of Police could do about it.

He was a complete stranger to the proceedings and I must find against the defendant in respect of this publication which was not covered by the privilege.

With reference to the letter of the 4th July, 1955 to the Attorney-General, the plaintiff is subject to the Legal Practitioners Ordinance, Cap. 110, section 10 provides for the establishment of a Legal Practitioners Committee and sections 17, 18 and 19 are as follows :—

> "The Attorney-General may at any time convene a meeting of the Committee for the purpose of inquiring into any allegation of misconduct made against a legal practitioner."

"In the exercise of this power under the last preceding section the Attorney-General may act upon information which is brought to his notice in any manner whatsoever."

"The Attorney-General may require any person who makes allegations of misconduct against any legal practitioner to support such allegations by an affidavit setting out the facts on which he relies as proof of the misconduct."

Lilley v. *Roney* (1892) L.J. Q.B. 727 was a decision almost on the same point :

"A letter of complaint against a Solicitor in respect of his professional conduct, with affidavit of alleged charges attached, forwarded to the Registrar of the Incorporated Law Society, in accordance with Form 1 in the Schedule of the Rules under Solicitors Act, 1888 (Cap. 65) is so essentially a step in a judicial proceeding that the statements in such letter or affidavit will be absolutely privileged."

quotation from 32 Digest, page 109.

It has been argued that the defendant went to a letter-writer's office to write the letter. What else could an illiterate man have done in the circumstances ?

I hold that the letter was published to the letter-writer, but that such publication was absolutely privileged in a like manner to that to the Attorney-General as it was necessary for the defendant to dictate his letter to someone who could write.

In the circumstances I will dismiss the plaintiff's claim against the defendant in respect of the publications to the members of the Bench and the Attorney-General and will find against him in respect of the publication to the Superintendent of Police.

I must point out that the law appertaining to the relation between Counsel and client is stated thus in Volume 3, page 55 of the 3rd Edition of Halsbury's Laws of England—

"A Barrister ought not to accept a brief against a former client, even if the client refuses to retain him, if the Barrister by reason of his former engagement knows of anything which may be prejudicial to the client in the later litigation."

I am satisfied that the plaintiff should not have acted and appeared for the defendant's opponent and that the defendant had a just grievance in the matter. Further, plaintiff has not refunded defendant's fees or any portion thereof.

I will award £5 damages to the plaintiff and each party is to bear his own costs.

Judgment for plaintiff, each party to bear his own costs.

1. J. A. DOHERTY AND ... ...
2. H. A. A. DOHERTY, ...
Surviving Executors of the Estate of J. H. Doherty, deceased. } (*Plaintiffs*)

v

1. NIGERIAN PROPERTIES CO., LTD
2. MICHAEL COURIE ABOUD } ... (*Defendants*)

[HIGH COURT OF JUSTICE : Ademola, C. J., 7th March, 1957.]

Recovery of possession of land—Forfeiture of lease and sublease—Breach of covenants—Right of re-entry—Landlord's right of action against sublessee.

By a deed of lease the plaintiffs leased to the first defendants certain premises comprising a shop fronting on one street and a piece of land at the back thereof fronting on another street. The first defendant with the plaintiffs' consent sublet the shop to the second defendant who went into occupation thereof. Subsequently the first plaintiff visited the premises and found four persons in occupation thereof and a building erected on the land behind the shop, such land having been sublet by the first defendant to the second defendant with the plaintiffs' consent subsequent to the subletting of the shop. The second defendant had sublet this building without the plaintiffs' consent. The plaintiffs claimed to recover possession of the entire premises on the ground of forfeiture by reason of (1) the subletting of the shop by the second defendant without the plaintiffs' consent ; (2) the building on the land by the second defendant without the plaintiffs' consent ; (3) the use of the premises for purposes other than the business of general merchants in breach of convenants in the lease and sublease, and (4) the subletting of the newly erected building without the plaintiffs' consent. The hearing proceeded on the basis that the shop and the land at the back thereof should be treated as two separate lots notwithstanding that these were comprised in one lease.

Held : (1) that the second defendant had not sublet the shop in that the occupants thereof were factors and not tenants ;

(2) that the erection of the new building was in pursuance of a covenant in the sublease and not in breach of any covenant of the lease ;

(3) that whether or not it is part of the business of a general merchant to let out premises would not affect the case if the second defendant had obtained consent to sublet the new building ;

(4) that the subletting of the new building without the plaintiffs' consent was a breach of the covenants in the lease and sublease and that forfeiture may be granted in respect thereof ;

(5) that the plaintiffs cannot maintain an action against the second defendant with whom they have no privity of contract.

Judgment for the second defendant.

Judgment for the plaintiffs as against the first defendant for possession of land on which building erected by second defendant stands.

Case cited :—

Fletcher v. *Noakes* (1897) 1 Ch.D. 271.

South of England Dairies Co. v. *Baker* (1906) 2 Ch.D. 361.

House Property and Investment Co. Ltd., v. *James Walker and Goldsmith and Silversmith Ltd.* (1947) 2 All E.R. 789.

Eastern Telegraph Co. Ltd., v. *Dent and Others.* (1899) 1 Q.B.D. 835.

Barrow v. *Isaacs and Son* (1891) 1 Q.B.D. 417.

Wilson v. *Fynn and Others* (1948) 2 All E.R. 40.

Great Western Railway Co. v. *Smith* (1875-6) 2 Ch.D. 235.

Ibadan Suit No. I/3/55.

Soetan for Plaintiffs.

Miss Grant for first Defendant.

Adenekan Ademola for second Defendant.

Ademola, C. J : The plaintiff in this case claim for a recovery of possession of all that piece or parcel of land, with the buildings thereon, demised by them to the first defendant company by virtue of a deed of lease dated the 22nd day of August, 1946, portion of which land the first defendant sublet to the second defendant under and by virtue of a deed of sub-lease dated the 11th day of July, 1953. The basis of this claim was that the terms created by the said lease and sublease respectively, have ceased and determined by reason of breach of the covenants contained in the said lease and sublease. In other words, the plaintiffs claim forfeiture of the said lease and sublease respectively for breach of covenants contained therein.

The fact which are not seriously in dispute, are as follows :—

In 1939 by a deed of lease (Exhibit A) the plaintiffs leased to the first defendant, for consideration, a piece of land at Lebanon Street, Ibadan, for a term of sixteen years dating from 1937. In 1946, there was an extension of that lease by a deed of lease Exhibit B granting to the first defendant a further term of twenty-five years.

The property consists of a shop in the front and a substantial piece of land at the back which opens to another street known as New Court Road. The first defendant, at first, occupied the shop. He later sought the consent of the plaintiffs, in accordance with the terms of the agreement Exhibits A and B, to sublet the shop to the second defendant.

The plaintiffs readily gave their consent and the second defendant went into occupation.

In 1953, when the first plaintiff visited the site, he discovered that the second defendant had left the shop and new tenants—four in all—have occupied the shop. He also found that the land behind the shop and abutting New Court Road had been built upon by the second defendant. In this respect, it would appear that in 1952 the first defendant sought permission of the plaintiffs to sublet to the second defendant the land behind the shop. By letter Exhibit D, the plaintiffs gave their consent and a sublease (Exhibit C) between the first defendant and the second defendant was the outcome. When the first plaintiff visited the site in 1953 he found that a substantial building has been erected on this land and fourteen persons in all were tenants of the second defendant in the building, which consists of shops and stores. The plaintiffs protested complaining that their consent was not obtained or asked for before the building was erected and also the underleases were made without their consent. The first defendant thereby wrote (Exhibit E) asking for such consent to the underleases already made by the subtenant, the second defendant. This the plaintiffs refused to do. The second defendant himself wrote letters to the plaintiffs stating that the first defendant gave their consent to his acts, and praying that the plaintiffs may now give their consent. He did not, however, despite his promise to do so in his letters, quit his tenants or regularise the position as requested by the plaintiffs.

Such are the facts upon which the plaintiffs rely. It would appear that the plaintiffs were prepared to accept compensation ; a sum of £10,000 was mentioned as basis for discussion. The plaintiffs argued that the second defendant collects rents of £2,000 per annum on the new building thus erected and should therefore pay substantial compensation. As the second defendant was not prepared to pay more than £500, no further negotiations were entered into. The plaintiffs therefore sued both defendants for possession of the land covered by the lease and sublease with the buildings thereon.

The first defendant's attitude to the matter, in respect of the shop is that the four men who were occupying the shop are not tenants ; they are the first defendant's factors. They are in the shop selling first defendant's goods and paying no rents. It was argued that although the second defendant was in the position of a factor at one time, the plaintiffs' consent was obtained to give him a sublease of the shop, but it was strictly not necessary to have asked for such consent.

With regard to the new building on the remaining land, it was agreed, for the first defendant, that when the plaintiffs' consent was asked for and given (Exhibit D) to sublet the land to the second defendant, it was implied that the land was to be built upon. The first defendant however agreed that the plaintiffs' consent was not sought for the underletting by the second defendant.

The second defendant offered no evidence. His Counsel relies on the legal position with which I shall deal later.

It appears to me from the way the plaintiff case is presented, and I do agree myself it is the fairest way in the circumstances, that the property contained in the lease Exhibits A and B must be treated as two separate lots. The first is the shop which is in Lebanon Street, and the second is the piece of land shown in the sublease Exhibit C carved out of the original land demised in Exhibits A and B. This is the piece of land at the back of the shop aforesaid and abutting New Court Road.

The first, namely, the shop, appears to present no difficulty. The plaintiffs complained that after the second defendant had left the shop the first defendant did not obtain their consent before subletting to the four men now found in the shop. It is clear from the evidence of these men, who were themselves called as witnesses by the plaintiffs, that they are factors of the first defendant and are paying no rents.

The plaintiffs Counsel has submitted that nevertheless they are tenants at will and therefore are tenants. I find myself unable to subscribe to this view. If the men are trading for the first defendant and are in first defendant's premises to carry out their trade, I am unable to construe this as subletting. It was unfortunate that the first defendant did not explain the true position to the plaintiffs and had to wait until the hearing of the case before doing so. In respect of this shop, there is, in my view, no breach for which a forfeiture can be asked for.

The difficult case is the new building put up by the second defendant for which, according to the plaintiffs, no consent was obtained and no permission was asked for or given to sublet.

The second defendant based his defence on two grounds :—

1. That the plaintiffs did not give defendants notice complaining about the breach of convenant before taking action and failure to give notice is fatal.

2. That there is no privity of contract or Estate as between the plaintiffs and the second defendant.

For the first proposition, Counsel for the second defendant argued that as a general rule before a forfeiture is applied, the lessor must give notice to the lessee complaining of the breach and asking that it should be remedied as laid down in section 14 (1) of the Conveyancing Act, 1881. The section, Counsel agreed, does not apply to subletting in which case no notice would be served. But, Counsel submitted, in case of non-user or using for other purposes not demised, a notice must be served.

The case *Fletcher* v. *Noakes* (1897) 1 Ch.D. 271 is relied upon. It was submitted that as plaintiffs complained that the second defendant is trading with the property and not carrying on business of a merchant himself on the premises, according to the terms of the original lease, it was a question of using the property for purposes not demised and a notice must be served. My reading of *Fletcher* v. *Noakes* (supra) does not support the proposition of law put forward by Counsel. What the case decided is that a general notice of breach of a specified covenant is not sufficient. The notice must be given in detail to enable the lessee to understand what is complained of.

With regard to the second ground on which the second defendant relies, namely, that there is no privity of contract between him and plaintiffs, it was submitted that in a sublease, the covenant can only bind those who are parties to it. The case *South of England Dairies Co.* v. *Baker* (1906) 2 Ch.D. 631 at page 638 was referred to. This is a strong point in favour of the second defendant and to which I shall later return.

I will now deal with the breaches complained of by the plaintiffs. It is necessary to recite the covenants in the lease and sublease respectively which plaintiffs say have not been observed. In the lease dated 20th June, 1939 (Exhibit A) convenants 2 and 5 respectively, are complained of. Covenant 2 reads :—

"2 Not to use or permit the said premises to be used for any other purposes than for carrying on the business of general merchants", and covenant 5 reads :—

"5 Not to underlet or assign the premises or any part or parts thereof without the consent of the lessors, the Olubadan and Council of Ibadan, and of the Governor such consent not to be unreasonably withheld by the lessors."

In the deed of sublease (Exhibit C) the following covenants are material.
Covenant 3, which reads :—

"(3) not to assign or underlet the premises or any part thereof without the consent of the Head lessors, the sublessors, the Olubadan of Ibadan and of the Lieutenant-Governor, Western Region."

Covenant 6, which reads :—

"(6) To use the premises for the purpose of carrying on his business of a general merchant only, and to begin to use the premises for such purpose within six months from the date thereof."

Covenant 7, which reads :—

"(7) To erect and complete upon the premises buildings to the minimum value of £3,500 within two years from the date of these presents."

In both the lease and the sublease, there is a provision for a right of re-entry for breach of any of the covenant.

The plaintiffs' complaints about breach of covenants appear to be three :—

(*a*) That the second defendant built on the land without permission or consent. I think this is easily disposed of. As rightly pointed out, when the plaintiffs gave their consent to the grant of a sublease of the land, was it not implied it was for building purposes, which was clearly stated on the sublease (Exhibit C) ? Further, there is no covenant in the lease (Exhibit A) or sublease (Exhibit C) that the plaintiffs must give their consent before any building is erected on the vacant land. On the contrary, in the penultimate clause of the lease, permission was expressly granted for buildings to be erected at any time on this particular plot on which the second defendant has now built.

(*b*) That covenant 2 of the lease (Exhibit A) and covenant 6 of the sublease (Exhibit C) have not been observed ; in that the premises demised was to be used for no other purpose than for carrying on the business of general merchants.

Covenant 6 of the sublease (Exhibit C) (*see* supra) between first defendant and second defendant expressly stated that the second defendant was to use the premises for the purpose of carrying on *his* business of a general merchant. The plaintiffs argued that this could only mean that the second defendant was to trade in the premises himself and not to trade with the premises by letting it out. In other words that he was making money out of it—collecting rents of £2,000 per annum. It is a question whether or not it is part of the business of a general merchant to let out premises. The point, however, does not to my mind, seem to affect the case. If the second defendant obtained necessary consent to underlet, there would be no question of breach of covenant whether or not as a general merchant he could let out premises.

(*c*) I come to the more important covenant which is covenant 5 in the lease (Exhibit A and covenant 3 in the sublease (Exhibit C), namely, covenant not to sublet or assign withou previous consent. There is no doubt that the second defendant underlet without consent Attempts were made by first defendant to ask for consent—*see* letter Exhibit E. As thi was after the breach and after the plaintiffs have made a complaint, I think the plaintiff rightly refused such permission or consent : *see* letter Exhibit F. There can be no questio of the plaintiffs arbitrarily withholding consent as defendants' Counsel tried to make out

A point argued was that there was no notice from the plaintiffs pointing out the breach The plaintiffs say that their letter dated 10-4-54 (Exhibit P) to the first defendant was notic complaining of the breach. The defendants argued it was not a proper notice. It is clea from Exhibits J and K from the second defendant and other Exhibits that the plaintiffs sufficientl brought the matter to the notice of the defendants and finally gave Exhibit P as notice. I am of the view that it is a proper notice. It however appears to me unnecessary to decide the point about notice in view of section 14 (*b*) (1) of the Conveyancing Act, 1881, which does no extend the doctrine of notice complaining of breach of covenant to a covenant of conditio against assigning, underletting, etc. The Conveyancing Act, 1881 grants no relief agains forfeiture for underletting, etc.

Now section 146 (2) of the Law of Property Act, 1925 gives the Court power to gran relief from forfeiture for breach of covenant against assigning or underletting without consent *House Property and Investment Co. Ltd.*, v. *James Walker, Goldsmith and Silversmith Ltd* (1947) 2 All E.R., page 789. But the Law of Property, 1925 is not a statute of general applica tion. And since by section 14 of the High Court Law, No. 3 of 1955, only the Commo Law, the doctrines of equity and the statute of general application which were in force i England on the 1st January, 1900, shall be in force or shall be applicable in this country, Law of Property Act of 1925 will therefore not be applicable in this case.

Now, is subletting without consent a breach of covenant for which there is no equitabl relief ? In the case *Eastern Telegraph Co. Ltd.* v. *Dent and others* (1899) 1 Q.B.D., page 835 wher the lessees, without asking for the consent of the lessors, in breach of covenant, underlet part of the premises to a tenant who already occupied under the lessors, and to whom n objection could have been reasonably taken, following the case *Barrow* v. *Issacs and Son* (1891 1 Q.B.D., page 417, it was held that the fact that the breach of covenant had been committe through forgetfulness, or because the lessees thought it unimportant, did not form a groun for giving them equitable relief against forfeiture for breach of a covenant, and that th plaintiffs were entitled to succeed.

Also *Wilson* v. *Fynn and others* (1948, 2 All E.R., page 40 where consent was later aske for after the breach but refused. No relief was granted from forfeiture.

I now come back to the argument of Counsel for the second defendant that as betwee plaintiff and the second defendant there is no privity of contract or Estate, and that the sub lease Exhibit C can only bind the first defendant and the second defendant who are partie to it. In the case *South of England Dairies Ltd.* v. *Baker* (supra) it was held that an under lessee, not being an assignee, has no right of action against the lessor on a covenant in th principal lease because there is no privity of contract between him and the original lesso

Joyce J. said in that case :—

"As I understand the Law stands in this way. The original lessor has no right of actio against the underlessee personally for breach of any positive covenant of the lessor's containe in the original lease. The original lessor's remedy in such a case is against the origina lessee, who is liable for breach of the covenant. The underlessee is liable however, i equity to be restrained from breach of a negative or restrictive covenant contained in th original lease of which he had notice, express or implied, when the underlease is granted What I have said refers only to the liability under the covenants, but it is clear that the sam principle applies to the benefit....."

In the present case, learned Counsel for the plaintiffs submitted that the law as applied by Joyce J. in the above named case will not apply because it was a case where underlessee sought to sue the principal lessor on an original lease ; he argued that this is the reverse and as the covenant runs with the land, the original lessor is entitled to sue, since a right of action would exist aginst the lessee.

After considering this submission, I have come to the conclusion that it would not be correct to attach any importance to this difference. I do not think that there should be any distinction ; if the underlessee cannot sue on the covenant, I see no reason why the original lessor should have a right of action. It appears to me that the law is plain on the matter. As no privity exists between the underlessee and the original lessor, the covenants entered into between the original lessor and the original lessee, though they be covenants running with the land, cannot affect the underlessee personally either by way of right or liability. And to my mind, it would make no difference even though the underlessee in this case covenanted with the lessee (first defendant) in Exhibit C that he would not assign or sublet "without the consent of the *Head Lessor*, the sublessors, the Olubadan of Ibadan and of the Lieutenant-Governor, Western Region".

The only effect of this, to my mind, is that the underlessee himself would be acting in breach of his covenant to the sublessor (first defendant) if he assigns or sublet only with the consent of the sublessor (first defendant) and without the consent of the headlessor (plaintiff) or the Olubadan of Ibadan or the Lieutenant-Governor, Western Region. He must obtain the consent of all.

The plaintiffs therefore, in my judgment, cannot maintain an action for breach of covenant against the second defendant with whom they have no privity of contract. The action against him therefore must fail and the case against second defendant will be dismissed.

But, it is clear that where a lessor re-enters on a forfeiture, the rights of the underlesse are gone. *Great Western Railway Co.* v. *Smith* (1875) to (1876) 2 Ch.D., page 235. If therefore, there is a forfeiture in this case, the second defendant's rights are gone ; and well may it be so because it was up to the second defendant to obtain the consent of the plaintiff (quite apart from obtaining first defendant's consent) before subletting in accordance with the terms of his sublease (Exhibit C).

As I stated earlier, the whole case was put before me and argued on the premises that the portion of the land demised containing the shop at Lebanon Street and the land at the back of it, which is a portion of the demised land and later built upon by the second defendant, be treated separately. On that premises, I would grant forfeiture only in respect of the portion of land carved out of the original lease and contained in the sublease Exhibit C.

There will therefore be judgment for the plaintiffs for possession of that portion of land contained in the sublease Exhibit C and on which the new building erected by the second defendant stands. This order will not extend to the portion on which the shop at Lebanon Street stands for which I find no breach.

The plaintiffs are entitled to costs against first defendant. The second defendant is entitled to costs.

Judgment for second defendant.

Judgment for plaintiffs as against first defendant for recovery of possession of that portion of land on which the new building erected by the second defendant stands.

1. BUSARI GOKE ... ...
2. SALAMI ADISA ... ...
3. OYENIWUN SINATU ... ...
4. MUNIRATU AGBEKE ... ...
5. ASIMOWU OLAWUNMI ... ...
6. TIAMIYU AJADI ... ...
7. LAWANI ADEWUYI ... ...
8. ALFA BUSARI ... ...
9. SANUSI OJUOLAPE ... ...
10. RAJI ISHOLA ... ...
11. RAJI IYALODE... ... ...
12. HUNMANI LAGBENJO ... ...
13. RALIATU ADERIN ... ...
14. ASIMOWU IYASUNA ... ...
15. RALIATU AJOO ... ...
16. KUNLE FABIYI ... ...
17. MUSTAFA AREMU ... ...
18. NOSIRU AKANDE ... ...
19. LASISI AROHUNMU... ... ...
20. AFOLABI AJAGBE ... ...

} (*Appellants*)

v.

INSPECTOR-GENERAL OF POLICE ... ... (*Respondent*)

[HIGH COURT OF JUSTICE : Hedges, J., 11th March, 1957.]

Criminal Law and Procedure—Appeal from Magistrate Court—Appeal against conviction and sentence—Consideration of section 391 of the Criminal Procedure Ordinance (Cap. 43) when giving an accused person the option of a fine.

The appellants were convicted on a charge of riot. Some of them were also convicted on charges of unlawful damage connected with the riot. On appeal against conviction and sentence,

Held : (*i*) that since there is nothing in the record to show that the learned Magistrate considered the question of the ability of the accused to pay the fine imposed as enjoined by section 391 of the Criminal Procedure Ordinance, it is not clear that the learned Magistrate applied the right principle in imposing the fines ; and

(*ii*) that the option of a fine is illusory if an accused person has no hope of paying it.

Appeal against conviction dismissed.

Appeal against sentence in respect of the 7th, 8th, 9th and 14th appellants allowed.

Appeal from Magistrate Court in a Criminal Case : Appeal No. I/40.CA/56.

Lloyd, Senior Crown Counsel, for Inspector-General of Police (Respondent).

Agbaje for the Appellants.

Hedges, J. : This is an appeal against the decision of the Magistrate, Ife (Mr Begho), dated 26th September, 1956. Each of the appellants was convicted on a charge of riot, and some of the appellants were convicted on charges of unlawful damage connected with the riot.

The only ground of appeal in the first instance was that the decision was altogether unwarranted, unreasonable and could not be supported having regard to the weight of evidence. Later leave was sought by way of motion to file two additional grounds of appeal as follows :—

(1) The learned trial Magistrate visited the *locus in quo* in the absence of the appellants and he therefore erred in law.

(2) The sentence is excessive.

There is nothing whatever on the record to support the suggestion contained in the first of these additional grounds and the motion was adjourned to enable Mr Agbaje, Counsel for the appellants, should he so desires, to move the Court to grant leave to call additional evidence. Instead of doing so he filed an affidavit, and at the resumed hearing he sought leave orally that this affidavit evidence should be admitted. The deponent is one of the appellants and the affidavit is to the effect that whilst the appellants were in custody the Magistrate visited the *locus in quo*. Such evidence could at most only be hearsay. Annexed to the affidavit is what purports to be a certified copy of a "note of inspection" of a scene at Oshogbo in connection with certain riot cases which arose there. The cases specified do not include the present case. It is true that the Magistrate's note mentions "all the cases in respect of the riot", but his note is dated 8th September, 1956, and according to the record the present case did not come before the Magistrate until 12th September, 1956. When this was pointed out to Counsel he said that the certified copy of the note was inaccurate, and he desired to show that by further evidence. In other words, he was now asking leave to establish that the additional evidence which he sought to have admitted, and which he was seeking to tender, was not in fact accurate. In these circumstances leave was refused. Leave to appeal against sentence was granted.

I have read the record with care and considered Mr Agbaje's arguments. So far as the evidence is concerned I find that the judgment of the learned Magistrate is satisfactory and in each case there is evidence to support his findings. I am unable to find any ground upon which I could interfere.

Most of the appellants were sentenced to nine months imprisonment on the first count and to three months imprisonment on the eighth count, the sentences to run concurrently. The learned Magistrate, however, said that he would be extremely lenient with the 10th, 11th, 12th and 17th accused in view of their age, and would give them the option of a fine. He did not in fact do so in the case of the 10th accused and I think that must have been due to a slip on his part. In the case of the 11th, 12th and 17th accused he gave the option of a fine of £75 on the first count and £25 on the eighth count, the fines being cumulative. In effect, in order to escape imprisonment, each of these elderly people must pay a fine of £100. There is nothing in the record to show that the learned Magistrate considered the question of the ability of the accused to pay the fine as enjoined by section 391 of the Criminal Procedure Ordinance. The option of a fine is illusory if an accused person has no hope of paying it. In the circumstances, although I am unable to regard any of the sentences passed as excessive, I am not satisfied that the learned Magistrate applied the right principle in imposing the fines.

In the result the appeal against conviction is dismissed in each case.

The sentence is varied in the case of the following appellants :—

Lawani Adewuyi—7th appellant (10th accused) ;

Alfa Busari—8th appellant (11th accused) ;

Sanusi Ojuolape—9th appellant (12th accused) ;

Asimowu Iyasuna (*f*)—14th appellant (17th accused).

In the case of each of these appellants the sentence imposed is set aside and the following sentence is imposed in lieu thereof in each case :

On the first count—a fine of £40 ; in default four months imprisonment. On the eighth count—a fine of £10 ; in default two months imprisonment. Fines to be cumulative ; terms of imprisonment concurrent.

In the case of all other appellants the appeal against sentence is dismissed.

Appeal against convictions dismissed. Sentences varied in regard to 7th, 8th, 9th and 14th appellants.

INSPECTOR-GENERAL OF POLICE ... ... (*Respondent*

v.

WILLIAM OMOIGUI ... ... (*Appellant*

[HIGH COURT OF JUSTICE : Thomas, J., 19th March, 1957.]

Criminal Law and Procedure—Charge of stealing under section 390 of the Criminal Code—Obtaining by false pretences—Section 174 (2) of the Criminal Procedure Ordinance—Powe of appeal court—Section 106 of the Magistrates' Courts (Western Region) Law, 1954.

Where an appellant has been charged with stealing under section 390 of the Criminal Cod and convicted thereof and it was proved that he obtained the thing he was convicted of stealin in such a manner as would amount to obtaining it by false pretences with intent to defrau the appeal court will alter the finding of the Magistrate and substitute a conviction fo obtaining by false pretences.

(*Note : This case is reported on the above point only*).

Appeal from conviction in Magistrate's Court, Benin. Appeal No : B/3CA/1957.

Fregene for Appellant.

Ademola for Respondent.

Thomas, J. : The learned Chief Magistrate in his considered judgment concluded a follows :—

"The evidence satisfies one that the first accused took advantage of the instructions t debit A. I. Williams' Labour Wages to Road Maintainance to prepare fictitious Pay Shee for payment. I am satisfied that at no time did first accused call nominal roll for any A. I. Williams' labourers and that the Time Sheets and the Pay Sheets in the cases charge in counts 2, 4, 6 and 8 are false and false to the knowledge of first accused. Defence Couns has contended that the first accused has not been proved to have received any money an therefore cannot be convicted of stealing. The evidence satisfies one that first accuse prepared these four fictitious Pay Sheets and that monies were paid out on them. Suc monies I am satisfied were paid out to first accused through his agents. I accordingly fin the first accused guilty on counts 2, 4, 6 and 8".

Under section 174 (2) of the Criminal Procedure Ordinance, Cap. 43, the learned Chi Magistrate had power and ought in my opinion to have convicted the appellant for obtainin the separate sums charged in counts 2, 4, 6 and 8 by false pretences with intent to defrau although he was never charged with these offences.

By section 106 (*a*)(*ii*) of the Magistrates Courts (Western Region) Law, 1955 on appeal fro a conviction I could "alter the finding, maintain the sentence, etc."

I therefore alter the findings in each of the counts 2, 3, 6 and 8 and find the appellant guil in each case of obtaining the separate sums of money by false pretences with intent to defrau although he was never charged with them.

The Appeal is dismissed and the sentences on each count affirmed and will run co currently.

Appeal dismissed ; Magistrate's finding altered and sentence maintained.

INSPECTOR-GENERAL OF POLICE ... ... (*Respondent*)

v.

L. ADE BELLO AND OTHERS
IN *re* LALEKAN SALAMI AND OTHERS ... (*Appellants*)

[HIGH COURT OF JUSTICE : Ademola, C. J., 20th March, 1957.]

Criminal Law and Procedure—Riot contrary to section 71 of the Criminal Code—Malicious damage contrary to section 451 of the Criminal Code—Visit to locus in quo—Absence of note in record—Miscarriage of Justice.

Where the court of first instance has visited the *locus in quo* in the presence of the accused persons the absence from the record of any note of the object of the visit or what transpired there will not vitiate conviction if the appellate court is satisfied that there has been no substantial miscarriage of justice occasioned thereby.

The appellants were convicted on charges of riot and malicious damage to a dwelling house. Among other grounds of appeal, which failed, it was submitted that although the Magistrate visited the *locus in quo* no record thereof was made. The case is reported only as to this ground.

Appeals dismissed, save that of first appellant whose appeal was allowed on other grounds.

Case cited :—

Inspector-General of Police v. *Adekunle and Others.* 1955-56 W.R.N.L.R. 16.

Appeal from Magistrate's Court, Ibadan No. 1/6.CA/57.

Fasinro, Crown Counsel, for respondent.

Moore (*Agbaje* with him) for first appellant.

M. Agbaje for other appellants.

Ademola, C. J. : The last ground of appeal worth considering which affects the first appellant as well as the other appellants is about the visit to the "locus" by the learned Magistrate. It was submitted that although the learned Magistrate visited the "locus", no record of it was made in his judgment. The case *Inspector-General of Police* v. *Alli Adekunle* and two others : In *re Stanley Bazuaye* 1955-1956, W.R.N.L.R. 16 was referred to as dealing generally with the matter of "locus in quo".

This case is concerned more with the absence of the accused person during a visit to the "locus" by the Magistrate. At the same time it stressed the desirability of making notes at such visit and the object of the visit.

Whilst I am not departing from my previous view in that case and the view expressed by Verity C. J. in the case *R.* v. *Hogan Antia and another* on this subject, it appears to me that the present case can be said to belong to that category of cases where the absence of some of these essentials cannot be said to be so grave as to amount to a substantial miscarriage of justice. The charge was one of riot and malicious damage to a house. A view of the site is more likely to see the extent of damage done to the house. It is most unlikely that the object of the visit was to see the opportunity open to the accused persons to commit those type of offences. I do not therefore think that a non-recording of the object of the visit or what transpired there, so long the accused persons were all present, create in this case a substantial miscarriage of justice. The ground of appeal also must fail.

Appeal dismissed save as to first appellant whose appeal was allowed on other grounds.

1. S. ISHOLA (*The Ejimo of Imo*) ... ...
2. S. O. FAGBEMI ... ...
(For themselves and as representing the Imo Community). } *(Plaintiffs/Applicants)*

v.

1. ALLI AMOKEOJA (*The Imam*)
2. S. OLATUNJI ... ...
(Representing the Ijesha Muslim Community). } *Defendants/Respondents*

[HIGH COURT OF JUSTICE : Taylor, J., 20th March, 1957.]

Practice and procedure—Appeal against judgment—Failure to comply with conditions of appeal within prescribed time—Application for extension of time—Principle upon which court will exercise indulgence sought by applicant.

On 15th October, 1956, judgment was given against the Plaintiffs/Applicants in a claim for declaration of title to a piece of land at Ilesha. Notice of appeal was filed on 5th December, 1956 and the settling of the record of appeal was fixed for the 14th December, 1956. This was subsequently adjourned to the 27th December, 1956 when the following conditions were imposed :—

1. Appellant to deposit £30 for records of appeal.

2. Bond in £200 and one surety.

3. All the Court notes and exhibits to be copied on payment of the fees in the first condition above.

4. Conditions to be perfected within 30 days from the 27th December, 1956.

5. All the Court fees to be paid by the appellants.

The Plaintiffs/Applicants failed to comply with these conditions and on an application for leave to appeal out of time the second applicant contended :—

(*a*) that the last time the first applicant and himself saw their Counsel before the expiration of the period was on the 14th December, 1956, the first day on which the settlement of records was fixed.

(*b*) that the first applicant fell seriously ill about the 16th December, 1956 and that he (second applicant) together with one Jacob Ishola and the wives of Ishola tended the first applicant until his death on 3rd February, 1957.

Held : that as there was nothing to prevent the second applicant from complying with the conditions of appeal within the time limit or shortly after instead of waiting until after his goods had been attached and sold in execution of the judgment, his conduct or that of his Counsel did not justify the exercise of the indulgence prayed for.

Application refused.

cases referred to and applied :—

Gatti v. *Shoosmith* (1939) 3 All E.R., page 916.

Finding v. *Finding* (1939) 2 All E.R., page 173.

Application for extension of time within which to appeal : Suit No. I/150/55.

Fakayode for the Applicants.

Akerele for the Respondents.

Taylor, J. : There are two applications before me ; one for an order to substitute Gabriel Apata of Imo for the late Samuel Ishola and the other for an order for extension of time within which to perfect the conditions of appeal. I shall deal firstly with the second application for no useful purpose would be served by my granting the application in the first motion if the second is refused.

It should be mentioned that a similar application in respect of the second prayer came before me on the 1st March, 1957 and as I was not satisfied with the statements contained in paragraphs 6, 7*a* and 7*c* of the affidavit I struck out the motion giving the applicants the opportunity of bringing another motion with a better or fuller affidavit.

The original suit was for a declaration of title to land at Ilesha, on the Ilesha-Imo road, damages and injunction. The writ was issued on the 19th July, 1954 and judgment was delivered on the 15th October, 1956. Notice of appeal was filed on the 5th December, 1956 and the settling of record of appeal was fixed for the 14th December, 1956. It was however subsequently adjourned according to the affidavit till the 22nd December, though I believe it was on the 27th December, as the 30 days fixed by the Registrar was to begin from then. On that day the following conditions were imposed :—

1. Appellant to deposit £30 for records of appeal.
2. Bond in £200 and one surety.
3. All the Court notes and exhibits to be copied on payment of the fees in the first condition above.
4. Conditions to be perfected within 30 days from the 27th December, 1956.
5. All the court fees to be paid by the appellants.

Conditions 1, 2 and 5 have not been satisfied and condition 3 could not be carried out by the Court because the applicants failed to fulfil condition 1. Condition 4 as to the time for perfection was therefore not complied with. The reasons advanced in the affidavit for the failure are shortly as follows :—

1. That the last time the applicant saw his Counsel before the expiration of the period was on the 14th December, 1956, the first day on which the settlement of record was fixed. (I say applicant because one of the appellants is now dead.)
2. That the first applicant fell seriously ill about the 16th December, 1956 and that the second applicant together with one Jacob Ishola and the wives of Ishola tended the first applicant till his death on the 3rd February, 1957.

Now stopping there for a moment for comment ; had the matter been one in which the first applicant or appellant was the only one concerned I might have been swayed by the excuse advanced, but I find it hard to believe that from the time they left their Solicitor on the 14th December, 1956, knowing fully well as I believe they well knew, although Mr Fakayode was not prepared to answer me definitely as to whether he told his clients that the matter had been adjourned till the 22nd, of the next adjourned date, the present applicant the second appellant did not have one free day to travel to Ibadan to see his Counsel in respect of their appeal. Even if Mr Fakayode did not inform them on that day it was surely his duty as their Counsel to have notified them as soon after as possible. Again it must be borne in mind that the first appellant was not the only one tending to the deceased.

The first appellant died on the 3rd February, 1957 and still the second appellant made no move to contact their Counsel till the 18th February, 1957 although Ilesha is only about 70 miles distant from Ibadan and transport presents no difficulty. It is even surprising that in spite of the fact that the defendants applied on the 3rd January, 1957 for the attachment of the plaintiffs' goods to satisfy the judgment, and the writ was executed on the 23rd January, 1957 before the death of the first appellant, yet the second appellant made no move to contact his Solicitors till nearly a month after this sale, *i.e.*, on the 18th February, 1957. I am prepared to grant extension of time wherever reasonable excuse for the delay is given. I do not however wish to set a bad precedent in this matter for the fact that the writ of attachment did not move the plaintiffs seems to me to indicate that they were then unwilling to prosecute the appeal.

In the case of *Gatti* v. *Shoosmith* 1939 3 All E.R. 916 at 919 Sir Wilfrid Greene M.R. said in a case where failure to enter the appeal within time was due to the mistake of Counsel that :—

> "What I venture to think is the proper rule which the court must follow is : that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time ; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon the argument. The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised."

Again in the case of *Finding* v. *Finding* (1939) 2 All E.R. 173 at 176 Langton J. said :—

> "The real point is whether or not there is anything on which we can say, or on which we ought to say, that the husband should be relieved from the position to which he has introduced himself technically—namely, that of being, not a little, not merely a certain amount, but a very great deal out of time."

A little lower down in the same report Justice Henn Collins at page 177 said :—

> "We are asked by the appellant to extend an indulgence to him. The court can do that only on settled principles, the chief of which is that it has an absolute discretion in the matter. That discretion must be exercised judicially and having regard to certain not very sharply defined principles—reasonably not sharply defined inasmuch as one is dealing with a question of discretion, which must vary in every case. As was pointed out by Cotton J. in the passage which Langton J. has read, one who asks the Court to grant him that indulgence must show something which entitled him to the exercise of it. That something is, as a rule, either lack of means, mistake or accident. Those are only instances, and certainly they do not constitute an exhaustive list."

The applicant has not come under any of these, though the first applicant would have done, but there was nothing to prevent the second appellant from coming to Court within the time limit or shortly after. I know that the learned Judge above said that the list of excuses is not exhaustive. In this case even the attachment of the applicants goods for the judgment and their subsequent sale did not stir him to consult his Counsel about his appeal. In this case he has not even complied with one condition of appeal and from the 27th December till the 18th February neither Counsel nor the clients made any endeavour by letter or otherwise to get in touch with each other.

Having considered the matter I do not feel that the conduct of the applicant or his Counsel is such as to justify the exercise of the indulgence prayed for. I therefore dismiss this motion and make no order in respect of the first motion for the reason already stated.

Application refused.

INSPECTOR-GENERAL OF POLICE ... ... (*Respondent*)

v.

SAMUEL OYEWUSI ... ... (*Appellant*)

[HIGH COURT OF JUSTICE : Thomas, J., 27th March, 1957.]

Criminal Law and Procedure—Demanding money with menaces—Official corruption—sections 406 and 116 of the Criminal Code—Duplicity—Sections 156 and 158 of the Criminal Procedure Ordinance—Time for objection—Section 167 of the Criminal Procedure Ordinance—Objections cured by verdict—Section 166 of the Criminal Procedure Ordinance.

The appellant, a police officer, demanded the sum of "20*s* for bail and £7 10*s*" from each of five persons who had been arrested by him and informed them that if the sums were paid "the prosecution would cease". He subsequently agreed to accept and did accept a lump sum of £30 from one of the persons on behalf of that person and his fellow prisoners. The appellant was convicted on two counts under sections 406 and 116 of the Criminal Code respectively each in respect of the total sum of thirty pounds. On a submission that each count was bad for duplicity in that the demand from each person constitute a separate offence,

Held : (1) that the facts related to one single transaction and that the appellant suffered no miscarriage of justice or embarrassment and had not been prejudiced in any manner ;

(2) that by virtue of section 166 of the Criminal Procedure Ordinance an error in the charge was not to be regarded as material the appellant in fact not having been misled thereby.

Appeal dismissed

Cases cited :—

R. v. *Molloy* 15 C.A.R., page 170.

R. v. *Wilmot* 24 C.A.R., page 63.

R. v. *Williams* (1953) 1 All E.R., page 1068.

R. v. *Asiegbu* 3 W.A.C.A., page 142.

R. v. *Kalle* 3 W.A.C.A., page 197.

R. v. *Minimah* 6 W.A.C.A., page 192.

R. v. *Thompson* 9 C.A.R., page 252.

Appeal from Magistrate's Court, Benin No. B/7CA/57.

Fregene with Longe for Appellant.

Eboh for Respondent.

Thomas, J. : The appellant was tried at the Chief Magistrate's Court, Ubiaja on four counts, *contra* sections 408 (1), 390, 406, and 116 of the Criminal Code.

He was discharged and acquitted on the first two counts, but found guilty and convicted on the last two, and has now appealed from these convictions on the following grounds :—

1. The learned trial Magistrate erred in Law in applying the *ratio decidendi* of the case *Commissioner of Police* v. *Albert Shogbamu* (W.AC.A. 2842 Cyclostyled Report) in deciding the issue involved in count 4 of the person charged.

2. The learned trial Magistrate erred in Law in that he failed to exercise his mind on whether or not it was the duty of the appellant at the material time to prosecute the five men as alleged in count 4 of the charge.

3. That count 3 is bad for duplicity in that the alleged demand from each of the five persons mentioned in this count form separate offences and should have been charged under separate counts in the charge.

4. That count 4 is bad for duplicity in that the alleged demand from each of the five persons mentioned in this count should have been charged under separate counts in the charge.

5. That the decision is altogether unwarranted unreasonable and cannot be supported having regard to the weight of evidence.

During the argument appellant's Counsel abandoned the first two grounds and so the appeal was confined to the last three.

The facts were that the appellant, who was at the time a police officer stationed with the detachment at Ubiaja, had gone in a car on the evening of the 18th August, 1956 and arrested one prisoner at one village, another at a different village and had locked up all four of them with the exception of the female prisoner in the guardroom at another village, where the police had a post.

He purported to arrest them in connection with the administering of some injections and told them that the complainant was at Ubiaja, whither he took all five prisoners on the following morning.

He took them to the Charge Office, took statements from them and told them to await the arrival of the Corporal. Later the prisoners were informed by a Lance Corporal that they could go as the Corporal would be away for three days.

Appellant, at this juncture, followed the prisoners out and informed them that they were each to give him 20*s* for bail and £7 10*s* each for his superior officers and that the prosecution would then cease.

The prisoners informed one Mark Arebu, a kinsman, employed in the Forestry Office, Ubiaja and he saw the appellant who affirmed his demand. The prisoners then left and their kinsman informed the Divisional Adviser about the matter.

From time to time, the appellant went to Mark Arebu and informed him that the prisoners did not appear as if they would keep their side of the bargain. Appellant was offered a lesser aggregate sum on two occasions but was annoyed and refused to accept these lesser sums.

He finally agreed to accept from the five prisoners a lump sum of £35 but said that he was to be given £30 only, and that Mark Arebu could keep the balance of £5 as his commission.

On the advice of the Divisional Adviser the numbers of the currency pound notes composing the sum of £30 were recorded by Mark Arebu.

On the 18th August the appellant of his own accord went to Mark Arebu to inquire about the money and was told to return in an hour's time. Meanwhile the Divisional Adviser was kept informed and at about 9 a.m. the appellant called at Mark Arebu's office and was handed an envelope containing the sum of £30. He checked the amount and then gave £2 to Mark Arebu for his pains. Appellant left the office and after cycling some distance, met the Divisional Adviser on the road who asked him to leave his bicycle on the side of the road as he wanted to see him at his office. As they walked, accompanied by others, a packet, *i.e.*, the envelope was dropped by the appellant. The Divisional Adviser asked him to pick it up. He was taken to the office of the Assistant Divisional Adviser where the contents of the envelope were checked and found to be £28, tallying with all the numbers previously recorded by Mark Arebu.

The appellant denied receiving the money and at the trial five witnesses for the prosecution including Mark Arebu, the Divisional Adviser and his Assistant gave evidence for the prosecution. The appellant testified and denied everything. The learned Chief Magistrate preferred the evidence of the prosecution rather than that of the appellant, which he was indeed entitled to do on the facts before him.

In the circumstances the last ground of appeal "That the decision is altogether unwarranted unreasonable and cannot be supported having regard to the weight of evidence" fails.

With regard to grounds 3 and 4, that the two counts were bad for duplicity, Counsel conceded the point that it was not taken at the trial but that on the principle of the decision in *Rex* v. *Molloy* 15 C.A.R. 170 *and Rex* v. *Wilmot* 24 C.A.R. 63 it could now be taken.

He cited section 156 of the Criminal Procedure Ordinance, Cap. 43. He argued that the framing of the counts contravened section 156 of the Criminal Procedure Ordinance as it appeared that there were five separate offences against the appellant, framed in a single count in each case.

Counsel for the respondent cited section 158 of the Criminal Procedure Ordinance, Cap. 43 and pointed out that the appellant's conduct related to one single transaction. That the appellant did not have separate dealings with the prisoners concerned. That he had arrested them all for the same offence, at the same time and in the same circumstances.

Longe for the appellant at this stage cited *The Queen* v. *Williams* 1953 1 All E.R. 1068.

The appellant was defended by Counsel who was well aware of his rights under section 167 of the Criminal Procedure Ordinance, Cap. 43 and exercised it in respect of the first count, but did not do so in respect of the others.

I will uphold the contention of the appellant's Counsel that the point could be taken on appeal, though not raised in the Court below, on the authority of *Rex* v. *Wilmot* referred to *supra*.

But *Rex* v. *Wilmot* and *Rex* v. *Molloy* must be distinguished from the instant case. In the former, the appellant had been charged under the Road Traffic Act, 1930 in the alternative, and in the latter case the appellant had been charged in the same count with alternative offences. In *Rex* v. *Wilmot* Avory J. at page 67 remarked as follows :—

"All the authorities show that if a man has been convicted of offences in the alternative, he cannot effectually plead *autrefois convict*."

The Lord Chief Justice later in the judgment said "It is an elementary principle that an information must not charge offences in the alternative since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois convict*.

I will now refer to three decisions in Nigeria.

Rex v. *Nelson Aseigbu* 3 W.A.C.A. 142.

Rex v. *Peter Kalle* 3 W.A.C.A. 197.

Rex v. *Walter Oko Minimah* 6 W.A.C.A. 192.

In the first two cases, the appeals were dismissed as in each, the appellant had neither suffered any miscarriage of justice nor had they been prejudiced nor embarrassed in any manner, and followed the decision in *Rex* v. *Thompson* 9 C.A.R. 252.

In the case, *Rex* v. *Walter Oko Minimah* the West African Court of Appeal allowed the appeal because, as is shown in the second part of the Head Note "Each transaction alleged should have formed the subject of a separate charge and not have been lumped together on one".

In this instant case, the appellant, it was true at first, demanded 20*s* each for bail and £7 10*s* each in consideration of his discontinuing the prosecution of his prisoners. When he was offered a lump sum which was less than the total of his original demand, he resented such offer, but subsequently agreed to accept and did accept a lump sum of £30 from one on behalf of that prisoner and his fellow prisoners. The prisoners had all been arrested on the same day, for the same offence and in similar circumstances.

In short, the facts related to one single transaction and it appeared from the Records that the trial proceeded as such in the Court below and there would be no difficulty in the appellant wanting to plead *autrefois convict* at any future time, should the necessity arise. He had suffered no miscarriage of justice, or embarrassment and had not been prejudiced in any manner.

Section 166 of the Criminal Procedure Ordinance, Cap. 43 states :—

"No error in stating the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission".

On the Record I do hold the appellant had in fact not been misled by any error or omission in stating the offence.

The appeal is dismissed and the verdict and sentence of court below confirmed.

Appeal dismissed.

QUEEN

v.

GABRIEL OBI

[HIGH COURT OF JUSTICE : Thomas, J., 29th March, 1957.]

Criminal law—Charge of murder—section 316 (3) of the Criminal Code—"Act of such a nature as to be likely to endanger human life"—Conviction for manslaughter.

The accused was charged with murder, the case for the Crown being that he ravished a girl of about fourteen years of age and that she died during the act. There was no evidence that the accused intended to kill or do grievous harm nor that any drug was given or her breath stopped to facilitate the rape.

Held : that the evidence did not establish that the act of the accused although done in pursuance of an unlawful purpose was of such a nature as to be likely to endanger human life.

Convicted of manslaughter.

Cases cited :

Rex v. *Okoni and others* 4 W.A.C.A. 19.

Director of Public Prosecution v. *Beard* (1920) A.C. 479.

Rex v. *Idiong and another* 13 W.A.C.A. 30.

Rex v. *Nameri* 20 N.L.R. 6.

Criminal case, Benin, No. B/10C/1957.

Eboh for Crown.

Boyo for the Defence.

Thomas, J. : The accused, Gabriel Obi stands charged of murder, in that on the 16th day of August, 1956, at Agiyoba Village, he unlawfully killed Margaret Asenebi contrary to section 319 of the Criminal Code.

The Crown's case is that the accused ravished the girl who was about fourteen years of age, and that she died during the act.

The doctor, who performed the autopsy, testified that he found (*a*) seminal fluid in the vagina (*b*) that the right side of the heart was empty. He testified also that the accused who had been brought to him for examination was fully developed male and told him that he had indulged in forcible sexual intercourse with the deceased, who cried throughout the act and died in his presence, and that in consequence, he became frightened and ran away. He testified also that "if one party is not accustomed and not willing to indulge in intercourse, and is forced, a sudden inhibition of the working of the central nervous system could cause shock, collapse and death" and that there was semen in the vagina and that the cause of death was "shock because the right side of her heart was empty."

Accused at first volunteered a statement to the Police, to the effect that himself, the deceased and her guardian had all lived together and that owing to some difference, he had gone to live elsewhere in the camp, and that he last saw the girl, when she left to collect cassava from a farm some distance away, and denied having had anything to do with her.

It is part of the case for the Crown that the girl failed to return home in the evening, when ordinarily she should have returned from the farm, and that her dead body was found, later that evening, with semen on her thighs, lying not far from a footpath leading to the farm.

Accused, later, volunteered a statement to the police similar to what he had told the doctor. On the same day he was taken to the Assistant Superintendent of Police Mr Davis, who testified that the statement was read to the accused in his presence and that he put all the questions recorded on the Attestation Form signed by him, to the accused and recorded his answers Exhibit 4.

During the trial, accused retracted the statement he had made to the Police and the doctor and gave reasons as to why the police, doctor and other witnesses had conspired against him. He denied on oath having met with the girl on the path to the farm or having had sexual intercourse with her. He admitted being in the camp, at his house and coming out to the centre of the camp, as others had done on the arrival of the police.

Having heard the evidence for and against the accused, I am satisfied that the accused and no other person ravished the deceased in the circumstance testified to by the witnesses for the prosecution.

I have now to decide whether he has committed murder in terms of section 316 of the Criminal Code.

Crown Counsel argued that the accused has committed an act which falls under section 316 (3) of the Criminal Code.

Counsel for defence has submitted that the sexual act is an innocuous act and that if death ensued, it was merely accidental and that the accused must be discharged and acquitted as he could not even be guilty of manslaughter.

The joint judgment of the West African Court of Appeal in *Rex* v. *Motesho Okoni and others* 4 W.A.C.A. 19 at page 24, dealing with the particular fact of that case stated as follows :—

> "If the death of Yesajo was caused by means of an act done in the prosecution of an unlawful purpose, which act was of such a nature as to be likely to endanger human life then the crime was murder, if not the killing was unlawful and amounted to manslaughter only."

The judgment then distinguished the interpretation of murder in England, after referring to *Director of Public Prosecutions* v. *Beard* (1920) A.C. 479 and Nigerian Law in these terms :—

> "(*a*) In England the killing must be done in the act of committing a felony involving violence whereas in Nigeria it is sufficient if death is caused by means of an act done in prosecution of an unlawful purpose, *i.e.*, not necessarily a felony, but
>
> (*b*) In Nigeria it is necessary also that the act should be of such a nature as to be likely to endanger human life ; this is not necessary in England. Returning to the facts of the present case, the learned trial Judge did not record his findings in the exact words of the sub-section, but the four propositions which he set out and which have already been quoted a portion established the two essential ingredients of sub-section 3."

The facts of the above case, shortly, was that the two of the appellants had on the instruction of the third appellant, set fire to the thatched roof of a house where all three suspected a man they all disapproved of was hiding, whilst the third appellant, the Bale was with an Oro drummer whom he ordered to beat the Oro drum in the market place. It is customary in Yoruba Towns for women to go in doors on the beating of the Oro drum. The deceased was a female inmate who had been burnt to death in the house that had been set alight by the first and second appellants on the orders of the third.

The judgment then proceeded.

> "The carrying out by the first two appellants of a felony at the bidding of the third appellant was clearly the prosecution of an unlawful purpose ; and that the act was of such a nature as to be likely to endanger human life is implicit in the finding that the fatal burning of Yesajo, an inmate of her dwelling house was a reasonable probable consequence of setting fire to the house.
>
> We are therefore of the opinion that the case is clearly within the provisions of sub-section 3 of section 316 of the Criminal Code."

In contrast, is the case of *The King* v. (1) *Udofa Unwa Idiong* (*2*) *Nkanang Akpan Umo* 13 W.A.C.A., page 30 where a native doctor had administered some concoction as an abortifacient and death had resulted, *per* Verity, C. J.

"If the analyst's certificate (which in the light of its terms is of dubious admissibility) is to be disregarded there is no evidence as to the nature of the concoction, or its probable effects. If on the other hand the certificate is to be regarded as evidence of the nature of the concoction, then it would appear that its administration could not reasonably be expected to procure abortion, let alone endanger human life. Even if we are to assume that the second appellant, as a native doctor, had sufficient knowledge of the nature of the leaves selected by him whatever they may have been, to be aware that they could be effectively used as an abortifacient there is no evidence whatever that the administration of that particular abortifacient would be likely to endanger human life. The furthest the medical evidence goes in this case is that—

'if a drug is administered to a woman who has a pregnancy of three or four months duration this, if strong enough, might cause contraction so strong as to rupture the womb.'

and so cause death, as in this case from shock and haemorrhage.

On this evidence we are not prepared to hold that the Crown has established beyond reasonable doubt that the act of the appellant was of such a nature as to be likely to endanger human life in the sense in which we have interpreted this phrase, even though in fact, it occasioned the woman's death.

The facts proved do not, therefore, in our opinion fall within section 316 of the Criminal Code. They do however, constitute an unlawful killing and the first appellant is therefore guilty of manslaughter within the meaning of section 317 of the Code."

In the present case there is no evidence that the accused intended to kill the girl or do her grievous harm ; nor was any drug given or breath stopped to facilitate the rape, paragraphs (1), (2), (4), (5) and (6) do not apply. We are thus left with sub-section 3 of 316. It is true that the girl was killed by the act of ravishment and it is immaterial that the accused did not intend to hurt her ; but the question remains as to whether the act is, *per se* of such a nature as to be likely to endanger human life.

It is clear from the case of *Idiong and another* v. *The King* referred to *supra*, that this is a question of fact which the prosecution has been silent on this point.

This was the view held by Bairamian, J. in *Rex* v. *Nameri* 20 N.L.R., page 6 where the facts were almost identical.

I will therefore find the accused not guilty of murder and discharge him thereon, but find him guilty of manslaughter contrary to section 317 of the Code.

Convicted of manslaughter.

MANDILAS AND KARABERIS LTD. ... ... *(Plaintiffs)*

v.

PHOEBUS ECONOMIDES ... ... *(Defendant)*

[HIGH COURT OF JUSTICE : Thomas, J., 30th March, 1957.]

Hire purchase agreement—Delivery—Suit for arrears of rental—Counter-claim for damages for non-delivery.

The parties entered into a hire purchase agreement in respect of two motor vehicles. In the course of delivery one vehicle developed mechanical defects. There was a conflict of evidence as to whether this vehicle was ever delivered in pursuance of the agreement. The defendant failed to pay the rental thereof as due and the plaintiffs sued to recover arrears. The defendant counter-claimed for damages for non-delivery.

Held : that there had been delivery of both vehicles and that the plaintiffs were entitled to recover arrears of rental.

Judgment for plaintiffs on claim. Defendant's counter-claim dismissed.

Cases cited :—

Brooks v. *Beirnstein* (1909) 1 K.B. 98

Williams v. *United Africa Co. Ltd.*, 13 N.L.R. 134

Crammer v. *Giles* (1883) 1 Cab. and El. 151

Karflex v *Poole* (1933) 2 K.B. 257

Mercantile Union Guarantee Corp. v. *Wheatley* (1937) 4 All E.R. 713.

Benin suit No. B/23/1955.

Eboh for plaintiffs.

Fregene for defendant.

Thomas, J. : The plaintiffs claimed from the defendant the sum of £2,200 being the total sum of rentals now due from the defendant on account of two Dennis Centaur lorries which the plaintiffs delivered to the defendant on a hire purchase agreement dated 1st February, 1955.

The defendant counter-claimed for general damages for £1,500 and special damages for £537 4*s* 6*d* making a total sum of £2,037 4*s* 6*d* in that plaintiffs delivered only one lorry instead of two as had been agreed upon.

The parties completed the hire purchase agreement wherein it was stated *inter alia* that the plaintiffs "shall forthwith on the signing of this agreement let to the hirer (defendant) and the hirer shall take on hire (with an option) of purchase from the date hereof for the period of three months subject to prior determination as hereinafter provided the said motor vehicles described in the schedule".

It is not disputed that the deposit was duly made.

The plaintiffs' case is that the defendant accepted the two Dennis Centaur lorries referred to in the schedule, but failed to pay the rentals, punctually, referred to in the schedule as agreed by him in clause 6 (*f*) of the agreement and that in consequence they exercised their rights by seizing both lorries under clause 8 of the agreement and instituted this claim.

The defendant's case is that only one Dennis Centaur lorry was in truth and in fact delivered as agreed and that the other was never delivered to him at any time owing to the fact that it developed Gear Box trouble on its way from Lagos to be delivered to him at Benin.

That he had, on several occasions, demanded the delivery of this other vehicle, without success, and therefore withheld the rentals, as plaintiffs had agreed to deliver to him two vehicles and counter-claimed accordingly for General and Special Damages.

Both parties admitted that the registration numbers of the lorries were B1877 and B1878 and that the lorry in dispute was B1877.

Mr Fitton, the plaintiffs' Manager in Benin, testified that he was certain that both vehicles were delivered to the defendant, in Benin, as agreed.

So also did their Foreman, Essien, the only other witness called by the plaintiffs.

Plaintiffs, in support of their claim, tendered the Debit Note No. 8396 of the 7th February, 1955, signed by the defendant, as well as their Job Card No. 5557, Exhibit 5, showing that the defendant had on the 8th March, 1955 left lorry No. B1877 with them for repairs.

From the evidence tendered, I have now to decide whether lorry No. B1877 was ever delivered to the defendant as agreed. The defendant testified *inter alia* as follows :—

"I was able to take delivery of one only lorry B1878. This was on the 4th February. I did not get the second lorry after I had received vehicle B1878".

He then recounted all the hazards that befell B1878, the lorry, and that in consequence, he had proposed, to Mr Fitton, plaintiffs' Manager, that Mr Jones, plaintiffs Engineer in Lagos, who had assembled the vehicles there, should be requested to come to Benin and test the vehicles under actual working conditions, in the bush. This was agreed to and carried out. The defendant further testified as follows :—

"He came about 17th or 18th February, 1955. He proposed to go to the bush to test the lorry. I went with him. Because of the fault, the lorry was unable to climb the hill. It was then towed to Benin by my own lorry. He reported to Mr Fitton, the Manager, that despite all the repairs to the lorry it was still giving trouble. He tried and found other complaints developed, *viz*—the Flywheel, etc.....

I did not take delivery of the faulty lorry. Orally I requested them repeatedly to get the lorry repaired or change it with a good one. Because Mr Fitton the Manager ignored my request I sent them a Registered letter (Exhibit 2) of the 25th April (I will advert to this letter later). I received Exhibit 2A in reply. B1877 was always in possession of the plaintiffs".

The defendant then called his most important witness Mr Jones, a former Engineer of the plaintiffs and now Superintendent of Ports Authority in Lagos and who had come to Benin to put the faulty lorry right. He testified that both vehicles had left Lagos on the same day, but that one broke down at Ilesha, on the way to Benin, owing to Selector trouble in the Gear Box. It was then returned to Lagos where it was put right and sent again to Benin. In mid-February 1955 the witness came to Benin and made some necessary adjustments to the Gear Box of this lorry.

Defendant's Counsel then asked the witness the following questions :—

Q.—Before you left Lagos would you say whether the lorry was delivered ?

A.—"The facts as I know them are these. When the two lorries arrived in Benin, I was not present and therefore did not see them being handed over to Mr Economides. On arriving in Benin to carry out the tests, the lorries were registered and in a road worthy condition and I assumed that Mr Economides had taken delivery. Both lorries showed signs of use. The lorry which had Back Axle trouble was not the lorry which had Gear Box trouble and after the Back Axle repair, I assumed that it was satisfactory as I heard nothing further about it".

It appears from this piece of evidence that the lorry that had the Gear Box trouble, and on account of which Mr Jones had come to Benin, and had further adjustments made to the Gear Box, was the lorry registered as B1877.

Further, it appears that B1878 which the defendant admitted had been delivered to him was the vehicle that developed Back Axle trouble during the test in the bush.

It must be borne in mind that Mr Jones referring to the Job Card Exhibit 5, relating to B1877, testified as follows :—

"This Job Card does not refer to the repairs in question, *i.e.*, those that I effected".

Under cross examination by the Court, the witness testified as follows :—

"I have no recollection of the Registration Nos. of either lorry, but do remember this fact that on the day that both lorries were taken to the bush for testing, I drove the lorry which I had made the Gear Box adjustments to and that was the lorry that had broken down at Ilesha. I left M and K on the 31st March, 1955. One of Mr Economides' drivers drove the lorry that developed the Back axle trouble and I eventually ordered the unit to be changed. I actually saw the unit taken out from the M and K new lorry in readiness for it to be taken to the bush".

It is clear from this evidence that after the adjustments had been completed on the Gear Box of the faulty lorry, that had initially suffered a break down at Ilesha, it was driven by Mr Jones, defendant's witness without any mishap.

The defendant's story is patently in conflict with that of his witness. Mr Jones impressed me as a fair and straight forward individual and I was most impressed by his testimony. I accept his evidence on this point as against the defendant's, and I am satisfied that, in truth and in fact, lorry B1877, contrary to the testimony of the defendant, was delivered to him as agreed.

I am fortified in this conclusion from evidence from three other sources, antecedent in time in relation to this action.

(1) The Debit Note Exhibit 4 dated 7-2-55 signed by the defendant gives full particulars and registration of each vehicle as follows :—

Engine No. 181171 E 914 Chassis No. 170 N15	B1878
Engine No. 181176 E914 Chassis No. 171 N15	B1877

(2) Turning to defendant's registered letter to the plaintiff, dated 25th April, 1955, it is significant that it is headed as follows :—

Dennis Centaur—Chasis No. 171 N15

It is clear that its subject matter was in reference to Chasis No. 171 N15 and the Debit Note Exhibit 4 has furnished us with the link connecting Engine and Chasis Nos. with Registration Nos. That vehicle was none other than B1877.

Further, the penultimate paragraph of Exhibit 2, defendant's letter to the plaintiff, written on the 25th April, 1955 reads as follows :—

"This vehicle is being idle in your garage for over a period of forty days owing to lack of spare parts and experienced technical staff. I am sure you are unable to appreciate the tremendous loss I sustained in my business owing to my inability to execute many outstanding contracts due to lack of transport".

Would a business man who had not taken delivery of B1877, at any time whatsoever, have written in that strain ?

(3) The plaintiff's case is that the lorry B1877 had been brought to their garage for repairs on the 8th March, 1955 as shown on the Job Card Exhibit 5 and in my opinion, the defendant's letter of the 25th April appears to be in keeping with plaintiff's contention, *i.e.*, the forty days that the vehicle had been lying idle in the plaintiffs' garage as suggested in the defendant's letter. Finally, I am satisfied that the lorry B1877 was delivered to the defendant as agreed.

The defendant was not obliged to go on suffering as he has maintained in this court, if the lorry B1877 had not in fact been delivered to him as agreed. He could have treated the non-delivery as breach of the terms of the Agreement. This he did not do.

Furthermore he had a right to terminate the Agreement under Clause 10 by exercising his undoubted rights thereunder.

The Agreement was one of Hire Purchase and he had an option to buy.

Under Clause 8 the plaintiffs were well within their rights in seizing lorry B1878 for non-payment of rentals.

Volume 16 Halsbury's Laws of England 2nd Edition, page 527 ; article 778.

The authority for that proposition is *Brooks* v. *Beirnstein* (1909) 1 K.B. 98 : 78 L.J.K.B. 243 reported in 3 Digest, page 96 also *Daniel Olatunde Williams* v. *United Africa Co. Ltd.*, 13 N.L.R., page 134.

Further at page 520, Volume 16, 2nd Edition, Halsbury's Laws of England, article 766.

"Where there is a term in the Hire Purchase Agreement that the hirer shall pay 'punctually' equity will not relieve the hirer against a forfeiture occasioned by default in payment of the instalments on the due date as they accrue time being of the essence of the contract".

Crammer v. *Giles* (1883) 1 Cab. and El. 151 reported at 3 Digest 95.

Defendant's Counsel argued that the delivery of the lorries on a date subsequent to the 1st of February, 1955 as envisaged in the Agreement had no retrospective effect and that it was an indication that both parties intended to deviate from the Hire Purchase Agreement.

This proposition is not, in my opinion, well founded.

Dustan's Law relating to Hire Purchase, 4th Edition at page 45 states :—

"Obligations of the owner at Common Law. Apart from any express terms in the Agreement, there is an implied condition in Hire Purchase Agreements that the person who lets goods on hire is the owner of them at the time when he lets them".

Karflex v. *Poole* (1933) 2 K.B. 251.

"The implied condition is that he is or will be the owner of the goods when the bailment begins but not necessarily when the Agreement is signed".

Mercantile Union Guarantee Corp. v. *Wheatley* (1937) 4 A.E.R. 713.

"Goddard J. in *Karflex* v. *Poole* pointed out that the implied condition as to ownership in Hire Purchase Agreements was not the same as that contained in the Sale of Goods Act, 1893, S. 12".

I will find for the plaintiffs in terms of his writ and will dismiss the defendant's counter-claim against the plaintiffs.

Judgment for plaintiffs on claim. Defendant's counter-claim dismissed.

Z. A. ONWUDIWE... ... ... (*Petitioner*)

v.

C. D. ONWUDIWE ... ... (*Respondent*)

MICHAEL. O. NWABUZOR ... ... (*Party cited*)

[HIGH COURT OF JUSTICE : Onyeama, Ag. J., 30th March, 1957.]

Divorce—Petitioner's adultery—Discretion—No discretion statement filed—Matrimonial Causes Rules, 1947—Rule 4 (3) (g).

The respondent, who brought a cross petition, although admitting acts of adultery did not ask for the exercise of the Court's discretion nor did he file a discretion statement :

Held : that the Court in these circumstances had no alternative but to dismiss the respondent's cross petition.

Petition and cross petition dismissed.

(*NOTE.*—This case is reported on the above point only. The petition was dismissed on other grounds.)

Petition and Cross Petition for dissolution of Marriage : Warri Suit No. W/63/54.

Ogbobine for Petitioner.

Atake for Respondent.

Aghoghovbia for Party cited.

Onyeama, Ag. J. : I would have granted a dissolution of the marriage on the crossp-rayer of the respondent, but his own admitted acts of adultery constitute a discretionary bar to relief. He has not asked for the exercise of the discretion of the Court in his favour, nor has he filed a discretion statement.

According to the Matrimonial Causes Rules, 1947, Rule 4 (3) (*g*) :

"(3) The petition shall conclude with a prayer setting out particulars of the relief claimed including—

(*g*) In appropriate cases a prayer that the Court will exercise its discretion to grant a *decree nisi* notwithstanding the adultery of the petitioner during the marriage".

Rule 28 provides :

"(1) Every party to a Matrimonial Cause praying that the Court shall exercise its discretion to grant a *decree nisi* notwithstanding that party's adultery shall lodge in the Divorce Registry a statement (in these Rules called a "discretion statement") signed by him or his solicitor stating that the Court will be asked to exercise its discretion on his behalf notwithstanding his adultery, and setting forth particulars of the acts of adultery committed and of the facts which it is material for the Court to know for the purpose of the exercise of its discretion".

In view of the failure of the respondent to comply with the Rules I do not propose to exercise discretion in his favour. I consider the ultimate result of this case wholly unsatisfactory, as it is clear from the evidence that the marriage has completely broken down. I can see no good in keeping in being a relationship which must from now on exist in name only and which does not even present to the gaze a front of respectability seeing that the spouses are openly living apart in adultery. It appears to me that I have no alternative but to dismiss the petition and the cross-petition.

Petition dismissed.

Cross-prayer dismissed.

THE QUEEN

v.

1. THE CHIEF JUDGE (JUDICIAL NATIVE COURT OF APPEAL IBADAN)
2. IBARAPA NATIVE ADMINISTRATION
3. ADEAGBO AJANI

EX PARTE ABODUNRIN ALAO ... ... (*Applicant*)

[HIGH COURT OF JUSTICE : Taylor, J., 1st April, 1957.]

Certiorari—Jurisdiction of Native Court of first instance—Terms of Warrant—Jurisdiction of Native Court of Appeal—Western Region Appointment and Recognition of Chiefs Law, 1955.

In a suit brought in the Native Court of first instance the plaintiff claimed a declaration that he was qualified and entitled to be selected and appointed to a chieftaincy and the only person entitled to hold the post and enjoy the title and further claimed an injunction restraining the defendant from performing the duties of the office or receiving or enjoying the emoluments attaching thereto. On an appeal to the Native Court of Appeal the decision of the court of first instance was set aside on the ground that the Court had no jurisdiction to entertain the claim under its warrant.

Upon a preliminary objection that the High Court had no jurisdiction to entertain the application for an order absolute by reason of section 34 (1) of the Western Region Appointment and Recognition of Chiefs Law, 1955 it was ruled that the Court had such jurisdiction and upon argument.

Held : (1) that the Native Court of Appeal had jurisdiction to entertain the appeal from the Native Court of first instance on the question of the jurisdiction of that Court notwithstanding the provisions of section 34 (1) of the Western Region Appointment and Recognition of Chiefs Law, 1955 ; and

(2) that the Native Court of Appeal rightly held that the Native Court of first instance had no jurisdiction to entertain the claim which did not fall within the powers conferred upon it by its warrant.

Order nisi discharged.

Cases cited :

Ademola II v. *Thomas* 12 W.A.C.A. 81.

Timitimi v. *Amababe* 14 W.A.C.A. 374.

Odunuwe and others v. *Udeagu* 14 W.A.C.A. 187.

Ibadan Suit No. I/16/57.

Agbaje for applicant.

First respondent absent and not represented.

Akinloye for second and third respondent.

Taylor, J. : On the 25th February, 1957 I gave my ruling on a preliminary point taken by the respondents' Counsels that by virtue of section 34 (1) of the Western Region Appointment and Recognition of Chiefs Law, No. 1/1955 this Court had no jurisdiction to entertain this application for the order absolute for a *writ of certiorari* to remove into this Honourable Court the judgment and other proceedings of the Chief Judge of the Ibadan Judicial Native Court of Appeal for the purpose of being quashed. I ruled that this Court had jurisdiction to entertain the application.

The matter was then fully argued before me on Monday the 4th March, 1957. Counsels' contentions shortly summarized are these :—

Agbaje (Senior) for the applicant contends that this Court is bound by the terms of the *order nisi* and says that the *order nisi* only brings the judgment and other proceedings of the Judicial Native Court of Appeal before me for quashing and accordingly this Court cannot go further and enquire into the proceedings before the Native Court of first instance inspite of the fact that such proceedings would automatically be before me. He went further to say that had the matter been before me by way of appeal I would have had such power, but that I was now sitting in my original jurisdiction and not appellate. He dealt with paragraph 8 of his affidavit and stated that the Court of first instance was empowered to exercise jurisdiction over the matter by virtue of its warrant. This latter argument deals not and was not intended to cover the point whether the Court of first instance had jurisdiction by virtue of the Western Region Appointment and Recognition of Chiefs Law. It was advanced in answer to the *ratio decidendi* of the Judgment of the Judicial Native Court of Appeal.

Ademola for the first respondent contends that this Court is asked to interfere by way of *certiorari* on the point that the Judicial Native Court of Appeal had no jurisdiction and once I have found that it had no jurisdiction I must quash the proceedings and go no further. The learned Crown Counsel even went so far at one stage as to say that I cannot go so far as to enquire into the judgment and reasons for the judgment of the Appellate Court. Nothing would be more absurd than to say that a Court enquiring into whether a lower court had jurisdiction or not could not enquire into the *ratio decidendi* of the judgment of the lower Court based purely as it was on the lack of jurisdiction. He said that to enquire into such reasons was to assume that that Court had jurisdiction. I was not impressed by this line of thought. Surely any court sitting as an Appellate Court as was the Judicial Native Court of Appeal has jurisdiction to hear an appeal as to whether the lower Court had jurisdiction to try a case and this in spite of the Law No. 1/1955 for by doing so it was not doing anything which the law forbade provided it kept strictly to this preliminary point of jurisdiction. Now having heard this preliminary point, how can it be said that merely by my hearing an application as to whether the Judicial Native Court of Appeal had jurisdiction, I would be assuming that it had jurisdiction to entertain not the preliminary point as stated above, but the very issue that the statute had forbidden. Mr Ademola also in effect associated himself with the contention of Mr Agbaje that were this matter on appeal before me and not by way of *certiorari* I would have power to go into the proceedings and decision of the lower court of first instance.

Mr Akinloye's arguments were the most attractive of the lot and his contention was that it was the duty of the court to see that justice was done. That it was in the interest of public order for me to enquire now into the whole proceedings and further that it was in the interest of the state that there should be an end to litigation. He says that the judgment of the court of first instance was brought into prominence by paragraphs 7 and 8 of the affidavit of the applicant and that this Court therefore has power to enquire into it. In the alternative he suggested that where no benefit can be derived, *certiorari* should be refused for in the case before me no benefit would accrue to the applicant if I quashed the proceedings of the Judicial Native Court of Appeal and also that of the court of first instance ; for he said that the result in both alternatives would be the same.

The first point that falls for consideration is whether the Judicial Native Court of Appeal had jurisdiction to entertain the appeal before it ? There is no need for me to set out the claim before the Native Court of first instance because each and every part of the four claims set out therein is a claim which is undoubtedly caught by the provisions of section 34 (1) of the Western Region Appointment and Recognition of Chiefs Law, No. 1/1955 which provides that :—

> "Notwithstanding anything in any written law whereby or whereunder jurisdiction is conferred upon any court whether such jurisdiction is original, appellate or by way of transfer, no Court shall have jurisdiction to entertain any civil cause or matter instituted for the determination of any question relating to the selection, appointment, installation, deposition or abdication of a Chief."

I must not be understood at the moment as saying or in any way inferring that the Native Court too had no jurisdiction to entertain this matter in so far as the claim before the Native Court was instituted in 1954 and the Ordinance under reference came into force on the 30th January, 1955, though I am aware that it came into force before the delivery of judgment of that Court and in fact during the hearing of evidence. I do not in this judgment propose to go into the retroactive effect or not of this Law.

Now regardless for the time being as to when the decision in the Native Court of first instance was given, an appeal was lodged against this decision to the Judicial Native Court of Appeal. Having commenced on the 27th August, 1956 and continued on various other adjourned days so that this Ordinance was well in force before the hearing commenced in the Native Court of Appeal, judgment was delivered on the 24th September, 1956. I only intend to quote the relevant parts of the judgment which begins by referring to the claim before the court below and quoting the judgment of that court and then goes on to say as follows :—

"It is against the above judgment that the appellants have lodged this appeal, one of their gounds of appeal being that the trial court (*i.e.*, Ojaba II Native Court) has no jurisdiction to try the case. It is only on that one gound that I shall decide this appeal."

All that the Chief Judge was there doing was not to entertain the appeal on the merits even though he might have made the mistake of hearing the whole of the appeal, but on the point as to jurisdiction of the Court of first instance to hear the case for he went on to say that :—

"It is true Ojaba II Court is a Native Court, but it is not competent to try *all matters* involving Native Law and Custom ; *e.g.*, it is not competent to try matrimonial issues or land cases. It is only competent to try such cases as are listed on its warrant ; and matters relating to the selection, appointment, installation, deposition, *etc.*, of Native Chiefs are not among such cases. The fact that the case was transferred to Ojaba II Court does not authorise the Court to exceed its jurisdiction as stated in its warrant."

From this it is clear that the Chief Judge was not considering the Law No. 1/1955 and its effect on the matter before him. What he was considering was whether the court of first instance had exceeded its warrant by hearing a matter not included in the terms of such warrant. I am not at the moment concerned with the correctness or not of this judgment or whether such matters are or are not included in the warrant of the court of first instance. What I am at the moment concerned with is whether the Judicial Native Court of Appeal had jurisdiction to hear an appeal relating to the jurisdiction of such lower court on a point as to whether its warrant empowered it to hear a case dealing with the recognition and deposition of Chiefs instituted at a time when the Ordinance or Law No. 1/1955 was not in force. It would be straining the words of this Law and in particular of section 34 (1) to hold that it prevented the Court whether sitting in its original or appellate jurisdiction or by way of transfer from hearing a point as to jurisdiction. As I have said earlier I am aware that the Judicial Native Court of Appeal probably heard the whole appeal before becoming wise to the position with the result that it took only the argument as to jurisdiction and gave judgment only on that point. I do not think this fact would vitiate the judgment or ruling of the Appellate Court. I therefore hold that the Judicial Native Court of Appeal had jurisdiction, not to entertain the appeal on its merits, but to hear the appeal on the question as to the jurisdiction of the court of first instance, and if it finds that that court had exceeded its warrant, it must of course set aside the judgment of that court.

The second ground upon which this application is brought was not pursued by Mr Agbaje who rested his application mainly on the first ground. I therefore take it as having been abandoned. Ground 4 was not argued as such, but this was probably because it does not differ from Ground 1. As for Ground 3 the contention is that the Judicial Native Court of Appeal erred in holding that the Native Court of first instance had no jurisdiction to try the case. To do this one would have to look into the warrant of the Ojaba II Native Court and consequently into the proceedings before that Court. Paragraphs 7, 8 and 9 of the affidavit of the applicant deal with this point and paragraph 8 in particular states that :—

"That by the warrant of Ojaba II Native Court it is a Grade B Court with full jurisdiction in cases in which no claim is made for and which do not relate to, money or other property."

Let us now turn to the claims before the Native Court and in particular to the third and fourth claims which are as follows :—

"The plaintiff's claim against the defendants are as follows :—

3. That Abodunrin Alao is a person qualified and entitled by Native Law and Custom of Aiyete to be selected and appointed Oniwafin of Aiyete and having been duly elected and appointed in accordance with Native Law and Custom, he is the only person entitled by Native Law and Custom to hold the post and *enjoy* the title of Oniwafin of Aiyete.

4. An injunction restraining Adeagbo from performing the duties of the Oniwafin of Aiyete and from *receiving or enjoying any of the emoluments attaching to the office of Oniwafin of Aiyete.*"

The underlining is mine of the word "enjoy" in the third claim and the words "receiving or enjoying any of the emoluments attaching to the office of Oniwafin of Aiyete" in the fourth claim ; the object of which is to show that the claims are claims relating to money or other property and are therefore outside the warrant. The decision of the then West African Court of Appeal though on a matter of jurisdiction of the then Supreme Court is of some guidance on this particular point in the case of *Ademola II* v. *Thomas* 12 W.A.C.A. 81 at 85-86. The result is that the Native Court of first instance certainly had no jurisdiction over items 3 and 4 of the claim before it. In the case of *Timitimi* v. *Amababe* 14 W.A.C.A. 374 at 376 Coussey, J. A. states :—

"In the first place want of jurisdiction is not to be presumed as to a court of superior jurisdiction. Nothing is out of its jurisdiction but that which specially appears to be so. On the other hand an inferior court such as a Native Court, is not presumed to have any jurisdiction but that which is expressly provided."

The onus was on Mr Agbaje to show this. Looking at my notes of Counsel's argument very little help was given by Mr Agbaje on this point for as I said he rested his arguments on the point that the Judicial Native Court of Appeal had no jurisdiction and that was the end of it and the order must be made absolute.

I am aware of the decision of Reece J. which was confirmed by the then West African Court of Appeal in the case of *Odunuwe and others* v. *Udeagu of Isheagu* in 14 W.A.C.A. at page 187 where Reece J. made an order absolute on an application for *certiorari* in respect of the part of the claim which was outside the jurisdiction of the Native Court and refused it in respect of the part of the claim which was within the jurisdiction of the Native Court. In that case the application was direct to the High Court from the Native Court and not as in the case before me where it has gone through the process of an appeal before being brought here by the applicant who was the successful party in the Native Court of first instance.

Having held that the Judicial Native Court of Appeal had jurisdiction to hear the issue as to the extent of the Native Court warrant then on Mr Agbaje's contention, supported by the learned Crown Counsel that I must not go outside the order *nisi* which deals only with the proceedings of the Native Court of Appeal, the order *nisi* should be discharged. On the other hand however having found that the Native Court at least had no jurisdiction by its warrant as far as claims 3 and 4 are concerned, which to my mind are the major parts of the claim, for an order on the first two portions of the claim without an order on the third and fourth restraining the defendant from so acting and collecting the perquisites of that office would be an empty order which would have no useful purpose, again the order should be discharged as after full consideration I am not prepared as Reece J. did under different circumstances to divide the issues, make an order on some and refuse it on the others. I do therefore discharge the *order nisi* with costs to second and third respondents.

Order nisi discharged.

INSPECTOR-GENERAL OF POLICE ... ... (*Respondent*)

v.

KASUMU AKANO AND OTHERS ... ... (*Appellants*)

[HIGH COURT OF JUSTICE : Taylor, J., 8th April, 1957.]

Criminal Law and Procedure—Appeal against sentence—Absence from record of matters considered.

Magistrates owe it as a duty to the accused as well as to the Appellate Court to endeavour to make their records as full as possible. Where the record is silent on such essential matters in relation to sentence as whether account was taken of the accused being first offenders, what part each accused took in the offence or whether the Magistrate was moved by any knowledge or statement as to the prevalence of the offence, sentence may be reduced.

Sentence reduced.

(*Note.*—This appeal involved other questions but is reported as to sentence only.)

Cases cited :

R. v. *Gumbs* 19 Cr. App. R., page 74.

R. v. *Collier and other* 15 Cr. App. R., page 85.

Appeal from Magistrate's Court, Ibadan No. I/38CA/56.

Lloyd for Respondent.

Miss Osibolu for 1st to 16th Appellants.

Akerele (*Miss Osibolu* with him) for 17th to 19th Appellants.

Taylor, J. : On the question of sentence the principle on which an Appeal Court acts is well illustrated by the case of *Samuel Gumbs* 19 C.A.R. 74 at 75 where Lord Chief Justice Hewart said :—

"Two principles from time to time have been mentioned in this Court, and in some cases they may have to be considered together. One is that this Court never interferes with the discretion of the Court below merely on the ground that this Court might have passed a somewhat different sentence ; for this Court to revise a sentence there must be some error in principle."

What error in principle has been put before me ? None. It is true that the accused persons are first offenders and that they pleaded guilty even though before me they now seek to change this and challenge that plea. I am aware of the decision in *Collier and Epps* 15 C.A.R. 85 where the Court of Criminal Appeal took the appellant's confession into account in reducing a term of sentence of eighteen months I.H.L. to only six months. It cannot be too often emphasized that learned Magistrates owe it as a duty to the accused as well as to the Appellate Court to endeavour to make their records as full as is possible in order to enable the Court of Appeal to do substantial justice. In the case before me the record is silent and is nude of these essential matters such as :—

1. Whether the learned trial Magistrate was informed by the police that the accused were first offenders and whether he took that into account in his sentence.

2. What part did each of the accused take in the offence and whether there were any matters therein which would affect sentence.

3. Was the Magistrate moved by any knowledge or statement on the prevalence of this particular offence in the particular district ?

I was at first reluctant to review the sentence but in view of the above matters I do hereby reduce the sentence of twelve months imprisonment with hard labour to one of six months imprisonment with hard labour and confirm the conviction of the learned Magistrate and substitute the above for the sentence imposed by him.

In view of this reduction the sentence will date as from today.

Sentence reduced.

THE QUEEN

v.

THE GOVERNOR OF THE WESTERN REGION OF NIGERIA ... ...

IN *re* ALASAN BABATUNDE AJAGUNNA II OF IKARE, OWO DIVISION ... ... (*Applicant*)

[HIGH COURT OF JUSTICE : Taylor, J., 8th April, 1957.]

Writ of Certiorari—Appointment of chief—Deposition of predecessor—Section 22 of the Western Region Appointment and Recognition of Chiefs Law, 1954—Proof of order of deposition—Affidavit—Section 77 and 112 of the Evidence Ordinance—non-publication in Gazette—Jurisdiction of Court—Section 34 of the Western Region Appointment and Recognition of Chiefs Law, 1954.

On an application for a writ of certiorari for the removal into the High Court for the purpose of being quashed an order made by the Governor of approval and recognition of the appointment of a chief, the Court directed the Governor to file an affidavit in reply to the point in issue as to whether the applicant who previously held the office of chief had been deposed or not. An affidavit was sworn on behalf of the Governor affirming that the applicant had been deposed in exercise of powers conferred by section 22 (1) of the Western Region Appointment and Recognition of Chiefs Law, 1954. It has contended on behalf of the applicant that the affidavit was not satisfactory proof of the order and further that the order not having been published was invalid. On behalf of the respondent it was contended that the jurisdiction of the court was ousted by reason of section 34 of the Law.

Held : (1) that the affidavit was sufficient proof of the making of the order ;

(2) that publication in the Gazette is not a condition precedent to the validity of the order ; and

(3) that the jurisdiction of the court is ousted.

Application dismissed.

Case cited :

Engelke v. *Musmann* (1928) A.C. 433.

Ibadan Suit No. I/42/57.

Ayoola for Applicant.

Lloyd for Respondent.

Taylor, J. : This is an application for a rule *nisi* for a writ of *certiorari* to issue directed to His Excellency the Governor, Western Region of Nigeria to remove into this honourable Court for the purpose of being quashed the order of approval and recognition of the appointment of Amusa Momoh as the Olukare of Ikare.

After hearing Mr Ayoola on the 18th February, 1957 I ruled that an order should be made directing His Excellency the Governor to file an affidavit in reply to the point then in issue which was as to whether the applicant had been deposed or not. As a result His Excellency through the Secretary to the Premier and Executive Council of the Western Region of Nigeria swore to an affidavit dated the the 18th March, 1957 the important paragraph of which states that :—

2. "That on the said 6th day of October, 1956 Sir John Rankine, K.C.M.G., K.C.V.O., the Governor, Western Region after consultation with Executive Council made and signed the order of deposition of Alasan Babatunde, Ajagunna II, as the Olukare of Ikare as annexed hereto and marked with the letter 'A'".

The order of deposition was so attached and it reads as follows :—

"In exercise of the powers conferred upon me by section 22 (1) of the Western Region Appointment and Recognition of Chiefs Law, 1954 and on being advised by the Executive Council that the deposition of Alasan Babatunde, Ajagunna II, as the Olukare is necessary in the interests of peace, order and good government, I do hereby depose Alasan Babatunde, Ajagunna II as the Olukare of Ikare.

It was dated the 6th October, 1956 and signed by His Excellency the Governor. In addition to this it should be mentioned that Exhibit "A" in the present proceedings before me is the *Western Region of Nigeria Gazette* No. 2, Vol. 6 of 3rd January, 1957 tendered in relation to Notice No. 14 which is a notice of the approval and recognition of the appointment of Amusa Momoh as the Olukare of Ikare by His Excellency.

Mr Ayoola contends that the affidavit filed is not satisfactory proof of the order which has to be proved by one of the methods set out in section 112 of the Evidence Ordinance. Further he says that the order of deposition was not made public nor was it served on his client and since it was a general principle of law that any order of Government must be published before it can be valid, this order not having been published was invalid. Mr Ayoola then went on to contend that he should be given an opportunity of cross-examining the deponent for, subsequently to the 6th October, 1956 his client has been officially recognised as the Olukare of Ikare by the Minister of Local Government in a speech contained in Hansard. Finally Mr Ayoola says that he would be applying to have the original order of deposition shown to the court.

Mr Lloyd shortly agreed that the deposition was not published in the Gazette but contends that the applicant was well aware of it and this could be inferred from paragraph 15 of the applicant's affidavit. Finally he says that the jurisdiction of the court is now ousted and that the affidavit filed should be accepted as containing the true facts.

It is necessary to examine section 112 of the Evidence Ordinance referred to. It states that :—

112. "The following public documents may be proved as follows :—

"(*a*) all proclamations, acts of state, orders, notifications, nominations, appointments and other official communications of the government of Nigeria or of any local or native authority—

(*i*) which appear in the Gazette, by the proclamation of such Gazette and shall be prima facie proof of any fact of a public nature which they were intended to notify.

(*ii*) by a copy thereof certified by the officer who authorised or made such order or issued such official communication."

There are three other sub-sections in this section 112 (*a*) but there is no need for me to deal with them in so far as section 112 (*a*) (*ii*) covers the point now in issue and is against Mr Ayoola's contention for it allows proof by a certified copy by the officer who authorised or made such order. The copy of the order attached to the affidavit was signed by the Governor who was the officer making the order and the affidavit was sworn to by one Anthony Holden the Acting Secretary to the Premier and Executive Council of Western Region of Nigeria.

Further there is section 77 of the Evidence Ordinance which empowers the court in any civil proceeding to order proof by affidavit notwithstanding that a party desires the attendance of the deponent for cross-examination and that he can be produced for that purpose. I was referred by Mr Ayoola to the case of *Engelke* v. *Musmann* 1928 A.C. 433 which was a case dealing with diplomatic privilege and incidentally the right to cross-examine on an affidavit. It refers to the cases of *Seacomb* v. *Bowlney and Triquet* v. *Bath* at page 444 and states that in those two cases the dispute was tried upon affidavit and that the only questions determined were whether those affidavits showed that the status was adequate to secure the protection. In the judgment of Lord Phillimore however we have the following at page 449 :—

"But as the defendant is now content to rely solely upon the certificate of the Foreign Office delivered to the Court by the Attorney-General, it is unnecessary to consider the question of cross-examination."

This authority is therefore of little assistance. I do however accept the affidavit sworn to by Mr Holden and the facts therein contained as I do the copy of the order of deposition signed by His Excellency and attached to the affidavit. I continually asked Mr Ayoola to show me good cause why I should not accept the affidavit and its contents as representing the true state of things and though Counsel challenged the contents of the affidavit he was unable to advance any sound reason why I should not do so other than a statement that if I made the order *nisi*, then from his cross-examination of the deponent he would be able to show that in fact no such order of deposition could have been made on the day in question. I asked Mr Ayoola if he proposed to call one of the Executive Councillors to support his contention but he replied in the negative. His application is based on the publication in the Hansard of the speech already referred to and to some action which he said was taken by a government body in recognition of his client. What the action was and which government body he refers to was not disclosed to the court. I do not find enough substance in these contentions to make me hold that the affidavit is untrue with the serious repercussions it would have on the deponent.

Accepting the affidavit as I do there is no other alternative left for me but to hold that the jurisdiction of the court is now ousted from enquiring further by virtue of the Western Region Law No. 1/55. I was referred to a passage in Halsbury at page 193 of Vol. 10 of the 1st Edition which states that :—

> "The case is more difficult where the jurisdiction of the court below depends, not upon some preliminary proceeding, but upon the existence of some particular fact. If the fact be collateral to the actual matter which the lower court has to try, that court cannot, by a wrong decision with regard to it give itself jurisdiction which it would not otherwise possess."

Mr Ayoola's point here is that the jurisdiction depends on the existence of some particular fact, *i.e.*, the existence or not of a vacancy, and the Governor cannot by arriving at a wrong decision over it vest himself with jurisdiction. This passage is obviously not on all fours with this case for the question of vacancy or not depends here on whether the applicant was deposed or not. His deposition is within the discretion of His Excellency the Governor in Council. This court is asked to say that the deposition was wrong and invalid because it was not published, not because it was not done according to Native Law and Custom or necessary in the interests of peace, order or good government. Had that been the position then this passage would have been applicable.

The power of deposition is contained in section 22 (1) of the Law under review and it empowers the Governor to suspend or depose any chief if he is satisfied that it is required according to Native Law and Custom or is necessary in the interests of peace, or order or good government. I can see nothing in the Western Region Law No. 1/55 which makes publication in a gazette a condition precedent to the validity of an order for deposition of a chief. As I informed Mr Ayoola such absence of publication and knowledge would certainly be a defence to any steps taken or proposed to be taken against his client for example under section 26 of the Law which imposes a penalty on a person wrongfully holding out as a chief, but it certainly does not invalidate the order even more so in view of section 34 (*i*) (*c*) of the Law which precludes any step being taken in respect of, or calling in question anything done in the execution of any of the provisions of this Law or in respect of any neglect or default in the execution of any such provisions by the Governor, etc.

On all the above considerations I do dismiss this application for an order *nisi*.

Application dismissed.

SHUKRI DAVID ... ... (*Plaintiff*)

v.

MOHAMMED DEBS ... ... (*Defendant*)

[HIGH COURT OF JUSTICE : Taylor, J., 15th April, 1957.]

Lease—Assignment—Lessor's consent withheld—"Purposes of trading and residence"—proposed assignee a corporation—Inability to comply with conditions of residence.

Costs—Conduct of defendant before suit—plantiff's out-of-pocket expenses.

The plaintiff leased certain premises from the defendant and covenanted (*inter alia*) not to assign or underlet without the lessor's' consent and further to use the premises for the purposes of trading and residence only and to begin to use the premises for such purpose within six months from the date of the lease. The plaintiff being desirous of assigning the lease to a coporation sought the lessor's consent which was withheld, no reason for withholding being given. In an action seeking an order compelling the lessor to give assent or declaration that plaintiff is entitled to assign, the lessor's consent having been unreasonably withheld :

Held : (1) that consent was not unreasonably withheld in that the proposed assignee being a Corporation is incapable of complying with the conditions of residence ; and

(2) that in view of the conduct of the defendant in failing to reply to the plaintiff's letter or giving the reason for withholding consent, the plaintiff is entitled to his out-of-pocket expenses.

Claim dismissed. Plaintiff to have out-of-pocket expenses.

Cases Cited :

Jenkins v. *Price* (1908) 1 Ch. D., page 10.

Zard v. *Saliba* (1955-56) W.R.N.L.R., page 63.

Willmott v. *London Road Car Co. Ltd.* (1910) 2 Ch., page 525 (C.A.) ; (1910) 79 L.J. Ch., page 431.

Ibadan Suit No. 1/225/56.

Ayoola for Plaintiff.

Adekunle for Defendant.

Taylor, J. : This is a claim brought by a lessee against his lessor by assignment for an order compelling the latter to give his consent to the deed of assignment of the plaintiff's interest in the said property to the Ibadan Co-operative Marketing Union Limited or in the alternative a declaration that the plaintiff is entitled by reason of the defendant's unreasonable withholding of consent, to a right to assign his interest in the said property notwithstanding the defendant's withholding of consent.

It is common ground that the plaintiff is the lessee by virtue of a deed of the 22nd November, 1940 of the premises at Gbagi Street, Ibadan, and also that the defendant is the assignee of the lessor's interest by virtue of a deed of the 18th February, 1954. By virtue of clause 2 (3) of the deed of the 22nd November, 1940 we find the usual lessee covenant not to assign or underlet without the consent of the lessor and of the Olubadan in Council, but such consent is not to be unreasonably withheld.

The plaintiff's case is that he is desirous of assigning to the Ibadan Co-operative Produce Marketing Union Limited and that he has by several letters written to the defendant requested the latter's consent but that no reply was forthcoming to any of his letters by the defendant. Further the plaintiff says that the assignee-to-be is a reputable and financially stable firm. It should be noted that the consent of the Olubadan in Council is not here in issue the same having been obtained by the plaintiff.

The defence after amendment is a three-fold one that :—

1. The plaintiff has not sought the defendant's consent to assign.

2. That the defendant has not unreasonably withheld his consent.

3. By virtue of paragraph 2 (5) of the deed of the 22nd November, 1940 the lessee is not entitled to assign or sublet the demised premises to the Ibadan Co-operative Produce Marketing Union Limited.

I will dispose shortly of the first and second parts of the defence for the real struggle in respect of the third leg of the defence. In respect of the first point Mr Adekunle's contention is that the request as contained in the letters was not to an assignment but to a subletting. The highest that this argument could be put in Mr Adekunle's favour is that the request of the 6th September, 1956 as per Exhibit "C" and that of the 15th September, 1956 as per Exhibit "D" dealt with a request to sublet and this in spite of the fact that Mr Adekunle agrees with me that to talk of subletting the remainder of the unexpired period is nonsensical and is certainly not legal phraseology. However the requests contained in the letters of the 3rd November, 1956 and 9th November, 1956 Exhibits "E" and "F" respectively deal with assignment. There was no reply to these letters. There is no doubt that the defendant's action constitutes an unreasonable withholding of consent. The evidence of the defendant's agent, a person who on his own showing is empowered by the defendant to act for him by virtue of an unrestricted power of attorney, that he feels he should consult the defendant who was away from the country is puerile for not a single letter or copy was tendered by him to show that he had even communicated any of these requests to his principal. I do not believe him that he had any intention to consult the defendant. He simply had no intention to reply to those letters because he did not want to give his consent and at that time he did not want to commit himself to a reply. I accept the evidence of the plaintiff that the assignee-to-be, to use the plaintiff's own words, is strong financially and of good reputation.

Now to the real issue between the parties. Paragraph 2 (5) of the deed of the 25th November, 1940 states as follows :—

2. The lessee covenants with the lessors as follows :—

"(5) To use the premises for the purposes of trading and residence only, and to begin to use the premises for such purposes within six months from the date hereof."

Mr Adekunle contends that since a firm cannot comply with the covenant of residence, the premises cannot be assigned to such firm and referred me to the case of *Jenkins* v. *Price* (1908) 1 Ch. D. 10 at 12.

Mr Ayoola on the other hand differentiates *Jenkins* v. *Price* from the present case by saying that the words "she would at all times reside on the premises" as contained in the covenant were mandatory in that case. Further he referred me to the case of *Zard* v. *Saliba* 1955-56 W.R.N.L.R. 63-65 and contended that the word "and" in "trading and residence only" should be interpreted as meaning "or".

I propose to deal with the contention of Mr Adekunle as to whether the firm can carry out this clause 2 (5) of the deed of the 25th November, 1940 in relation to residence. That they can carry out the trading purpose is not subject to dispute between the parties. The learned Author if Halsbury, Vol. 18 the 1st Edition, page 580 S. IIII states that :—

"and unless the nature of the lease shows that it is to be held by an individual, a company may be such a person."

In the note, the learned Author refers to some cases of which *Jenkins* v. *Price* is one and *Willmott* v. *London Road Car Co. Ltd.* 1910 2 Ch. 525 (C.A.) is another. I have to ask myself firstly whether the nature of the lease is such that it is to be held by an individual ? The object of this clause 2 (5) is that the lessee covenants that he will use the premises not for the purpose of trading or residence but for the purposes of trading and residence only. The intention is to secure the lessee in use of the premises for residential and for trading purposes. The use of the words "purposes" twice in this clause 2 (5) in addition to the following words appearing in clause 3 sub-clauses 3 and 4 that :—

"(3) If the lessee shall not within six months from the date hereof use and continue to use the premises for such purposes as aforesaid....."and

"(4) If the lessee shall not use the premises hereby demised for the said purposes....."

All show quite clearly that the intention was that the lessee whoever he may he shall not only reside on the premises but shall also use the premises for trading and for those two purposes only. Now can the Ibadan Co-operative Produce Marketing Union Limited comply with the clause ? In *Jenkins* v. *Price* (1908) 77 L.J. Ch. 41 at 42 Cozens Hardy M.R. states that :—

"On looking at the lease it is, in my opinion too plain for argument that there is a covenant that the lease shall not be assigned to a limited Company. Those are not the actual words of the covenant, but the words which are used really involve that with perfect plainness, the lessee covenanting that she will not assign without the consent of the lessor unless such consent be unreasonably withheld, and also that she will reside on the premises and personally conduct the business. It is obvious that a limited Company cannot perform that covenant..."

The case of *Willmott* v. *London Road Car Co. Ltd.* (1910) 79 L.J. Ch. 431 and 432 is not really to the point for it merely establishes that a company could not be regarded as a "respectable person" and that therefore where a lease contains the following words :—

"but such consent shall not be withheld in respect of a respectable and responsible person."

A company is not contemplated.

The case of *Zard* v. *Saliba* referred to by Mr Ayoola is against him for there the learned Chief Justice Western Region of Nigeria says at page 64 that :—

"The deed of lease (Exhibit C) contains a clause (No. 6) that the land should be used for purpose of residence and trading only. The plaintiff a Lebanese trader, sublet portion of the land to the defendant, also a Lebanese trader."

Clause 6 of the deed of sublease (Exhibit "A") states as follows :—

"(6) To use the said land for purpose of residence, trading, garage, sawmill and machinery only."

The learned Chief Justice held not that the premises could be used for any one of these purposes but that it could be used for residence and trading and that the other words such as garage, sawmill and machinery are merely other business or occupation permissible by the agreement.

On the above I must hold that by the deed the lessee is required to reside on the premises and to trade there. Secondly the Ibadan Co-operative Produce Marketing Union Limited as such cannot comply with the condition of residence. The result is that the plaintiff's case must be dismissed and I do dismiss it. In doing so as I earlier informed Mr Adekunle I intend to mulct his client in the cost of issuing the summons for had he replied to the letters of the plaintiff and given this as his reason for refusing to consent to the assignment this action might never have been brought. The plaintiff is therefore entitled to his out-of-pocket expenses.

Claim dismissed but plaintiff to have out-of-pocket costs.

OLA FASAN ... ... (*Appellant*)

v.

J. A. FASEKOMI ... ... (*Respondent*)

[HIGH COURT OF JUSTICE : Thomas J., 3rd May, 1957.]

Appeal from judgments of Native Courts—Second suit between parties on same issue—res judicata—Validity of judgments in second suit.

Interest—Members of Native Court of Appeal interested in subject matter of appeal.

In 1951 the respondent brought an action in the Native Court against the appellant in respect of a certain piece of land. This action was dismissed and on appeal to the Native Court of Appeal his appeal also was dismissed. In 1954 the appellant brought an action against the respondent in respect of the same piece of land and in this action his claim was dismissed and on appeal to the Native Court of Appeal his appeal also was dismissed, thus in effect reversing the previous judgments of both Native Court and Native Court of Appeal in the ealier suit. On appeal to the Magistrate's Court the judgment of the Native Court of Appeal was upheld. On appeal to the High Court.

Held : (1) that in the second suit neither the Native Court nor the Native Court of Appeal had power to reverse the judgments in the earlier suit the matter being *res judicata.*

(2) Certain members of the Native Court of Appeal had interest in the subject matter of the claim but the Magistrate omitted to take this fact into consideration.

Appeal allowed.

Cases referred to :—

Nthah v. *Benniah* 2 W.A.C.A., page 1.

Akyin v. *Ejymah* 3 W.A.C.A., page 65.

Shoe Machinery Co. v. *Cutlan* (1896) 1 Ch. D., page 667.

Appeal from Magistrate's Court in its appellate jurisdiction. Appeal No. B/17A/1956.

Soetan for Appellant.

Fagbemi for Respondent.

Thomas, J. : The appellant represented the Oloka family as plaintiff against the defendant, now respondent, in respect of a piece of land. The suit was tried in the Ondo Native Court and subsequently went on appeal to the Ondo Native Court of Appeal.

The respondent who was sued in his personal capacity, succeeded in both Courts.

The appellant then appealed to the Senior Magistrate against the decision of the Native Court of Appeal who held as follows :—

"After examining the records of proceedings in both Courts and hearing arguments of Counsel on this appeal, I am of the opinion that the Ondo Native Court went carefully into the subject matter of the plaintiff—appellant's claim—a matter which is within their competence and in my view, peculiarly within their knowledge. Issues of Native Law and Custom raised in the matter were carefully examined and stated in both Courts. I am not satisfied, after hearing arguments in support of the grounds of appeal, that I ought to interfere with the decision of the Native Court."

He then cited in support of his contention *Abakah Nthah* v. *Anguah Benniah* 2 W.A.C.A. at page 1 also *Kwamin Akyin* v. *Essie Ejymah* 3 W.A.C.A., page 65. He then dismissed the appeal.

The principle of law enunciated by the learned Senior Magistrate was undoubtedly correct, but it was in my opinion misapplied by him in the present case.

The suit was commenced in the Ondo Native Court on the 8th July, 1954 and decided there on the 18th September, 1954 and in the Ondo Court of Appeal on the 15th October, 1954. The learned Senior Magistrate's decision was on the 31st July, 1956.

Throughout the proceedings from the Native Court of first instance to that of the Senior Magistrate's, the appellant exhibited the proceedings in *J. A. Fasekomi* v. *Olaniyan* 197/50.

The present respondent was then the plaintiff and his claim was as follows :—

"The plaintiff claims the defendant to come and show cause why claiming his late father's land (Fasekomi) situated at Oke Aresun to Ajagbale on the right hand side when going from Ondo to Agbabu.

The plaintiff is also seeking for an injunction to restrain the defendant or his agent from interfering with the said land.

Plea—I never claim the land in dispute for myself because is belonging to the Oloka family. The present plaintiff—appellant was then the defendant."

This Native Court decided *inter alia*.

"The President and the sitting Chiefs and the N.C.C. have gone to view the land in dispute 25-10-50. When we got there we could see that the both parties and all the Oloka family were farming together on the Oloka land. Their forefathers did not divide the land during their lifetime and they use it till they die and their forefathers did not divide the land and therefore their descendants have no power to divide it and they should be using it together as their forefathers did. The plaintiff stated that he sold four plots and the defendant said that they sold four plots. The relatives of the Oloka should sit down and make account of what they have sold together and reasoned together and then they should deduct their expenses from the sales and if there is any surplus they should use it for the benefit of their family. The plaintiff was their representative or clerk for about five years and he should be asked to continue his work among his relatives and that another clerk should be chosen in addition, from today nobody out of Oloka family should sell any land out of the Oloka family land without the confirmation of the whole Oloka family. The Court must not hear that they separate themselves again, they must do together as their forefathers did. The Court has no power to divide any family's land to the owners."

Against this judgment the present respondent appealed to the Ondo Native Court of Appeal which decided as follows :—

"The Lower Court had investigated this case carefully before passing decision on it. The appeal by the defendant-appellant is dismissed and the judgment of the Lower Court is confirmed. 26*s* 6*d* cost of appeal to be deducted by the defendant-appellant out of the families account, dissatisfied party is given leave to appeal to the Magistrate, Grade I within thirty days."

It is to be noted that this judgment was dated 21st July, 1951.

The present defendant-respondent did not appeal any further and the net result is that this judgment still binds him.

That was why in my opinion, the present plaintiff-appellant on the 8th July, 1954 sued the present respondent in the Ondo Native Court as follows :—

"(*a*) The defendant to come and explain why putting Sobos on the Oloka family land without the information of the family contrary to the family's Natural Constitution signed by the defendant in 1945.

(*b*) The defendant also to explain why refusing or dissociating himself from the Ondo District Native Appeal Courts judgment in suit No. 197/50 of 28-10-50 and Appeal suit No. 74/50 of 22-6-51, respectively, where the defendant himself was then the plaintiff.

(*c*) Defendant also to stop his agents' activities on the said land until this case will be heard. Area in question starts from Oke Aresun to Ajegbale and Okegun road....."

It is clear that the land in dispute in Suit 197/50 and that in the present Suit 104/54 are identical and that the parties are the same.

It was during the hearing of the present Suit 104/54 that the Ondo Native Court reversed its former decision which had been upheld on appeal. They clearly had no power to do so, as it was *res judicata*. On appeal the Native Court of Appeal reversed its former judgment ; they clearly had no power to do so as it was already *res judicata*. Some of the judges were members of the panel of judges who had given the earlier decision which was still subsisting at the date of the second and present trial.

On perusing the record of appeal it is significant that the President of the Native Court of Appeal the High Chief Lisa Fawehimi and the High Chief Sashere Akinkugbe, an associate judge of the Court of Appeal, were interested in the appeal before them in that they had each purchased portions of this Oloka family land and were still in possession of them.

The learned Senior Magistrate omitted in his judgment to deal with the question of *res judicata* and also the fact that the President of the Court of Appeal and another associate Judge of Appeal were interested parties.

The Ondo Native Court of Appeal were not in a position to rectify the issues as they did, in Suit 104/54, which is the subject matter of the present appeal, however unsatisfactory the final result may be.

The authority for that is to be found in the words of Romer J. in *Shoe Machinery Company* v. *Cutlan* (1896) 1 Ch. P. 667 at page 672 where the defendant sought to adduce new evidence in a second action.

> "If he were to be so entitled, I do not see how there could be any finality of the question in an action. According to this contention the defendant might try his case piecemeal. He might raise such objections as he thought convenient and, when he was defeated, he might then raise other points at his leisure, and might, in that way try the case piecemeal, and, so far as I can see, extend it over as long a period as he pleased. In my opinion the defendant is not entitled to do that, he is bound to put his whole case before the Court ; and if he does not do so, then it is his own fault or misfortune. He cannot be allowed to put part of his case, or to put his case in an incomplete manner."

For the above reasons the plaintiff-appellant is, in my opinion entitled to the judgment of the court. I will therefore allow the appeal, set aside the judgment appealed from and enter judgment for the plaintiff-appellant.

Appeal allowed. Judgment entered for the plaintiff on the claim.

JOSEPH NAHMAN ... ... (*Plaintiff*)

v.

IBADAN (PROVISIONAL) DISTRICT COUNCIL ... (*Defendant*)

[HIGH COURT OF JUSTICE : Taylor, J., 6th May, 1957.]

Local government council—Action against for default in payment—Defaulting Council dissolved—Liability of successor—Time within which action to be brought—Section 205 (b) of the Western Region Local Government Law, 1952.

Practice—discontinuance on date of hearing—Leave of Court—Rules of Supreme Court Order 44, rules 1 and 2.

The plaintiff sought to recover from the defendant Council a sum of money in respect of which the defendant Council's predeccessor had made default in payment, such payment having fallen due to be made after assessment. Assessment was made on 22nd August, 1955. On 5th March, 1956 the previous Council was dissolved and the defendant Council established. Demand for payment was made on 29th October, 1956 and the defendant Council failed to make payment. The plaintiff brought this action on 23rd January, 1957. The action was set down for hearing on 16th April, 1957 and the hearing adjourned to 25th April on which date the plaintiff filed notice of discontinuance. On application by defendant Council that leave to withdraw be refused and action be dismissed :

Held : that the action should have been brought at least within six months from the date upon which the defendant Council was established and that it not having been so brought leave to withdraw should be refused and the action be dismissed.

Action dismissed.

Cases cited :

Yaw Biei v. *Kwame Assah* 14 W.A.C.A. 303.
Fox v. *Star Newspaper Co.* 1898 L.J.Q.B. 454.
Fasoro v. *Milbourne and another* 4 N.L.R. 83.
Ademola II v. *Thomas* 12 W.A.C.A. 81.
Griffiths and another v. *Smith and others* (1914) 1 All E.R. 66.
Bradford Corp. v. *Myers* (1916) 1 A.C. 242.
Western India Match Co. v. *Lock* (1946) 2 All E.R. 227.
Rex v. *Marshland Smeeth and Fen District Commissioners* (1920) 89 L.J.K.B. 116.
Nahman v. *Ibadan District Council*, F.S.C. 167/56 (unreported).

Ibadan Suit No. I/17/57.

Agbaje Williams (holding *Rosiji's* brief) for Plaintiff.

Somolu (*Soremekun* with him) for Defendant.

Taylor, J. : This is a claim for the sum of £31,000 as per an agreement dated the 27th day of June, 1955 entered into between the plaintiff and the Ibadan District Council, a Council which was dissolved under section 10 (2) of the Western Region Local Government Law, 1952 and in consequence the present defendant was established. This is contained in paragraph 2 of the Statement of Claim which is admitted by virtue of paragraph 2 of the Statement of Defence. Other important admissions for the purpose of this ruling and judgment are the paragraphs relating to the agreement which is the basis of this action and the fact that the condition which gives rise to the payment of the sum due and payable to the plaintiff have since taken place as contained in paragraphs 4 and 5 of the Statement of Claim. Finally by virtue of paragraph 7 of the Statement of Claim the present defendant has succeeded to the property of the Ibadan District Council which fact is admitted in the Defence.

The claim in its present form between these parties was set down for hearing on the 16th April, 1957. It came up in Court No. 1 on the 1st day of April, 1957 when pleadings were ordered giving 7/7 days to each side hearing was fixed for the 16th April, 1957.

On that day I was unable to hear the matter and adjourned it till the 25th and 26th April, for hearing.

Perhaps a little digression for the sake of clarity is pardonable in so far as the original suit against the Ibadan District Council and the subsequent interpleader came up before me for hearing. In the original suit judgment was entered in favour of the present plaintiff in ignorance of the fact that the then defendant had ceased to exist before the day on which the case was actually heard. The present defendant body which was created by the same instrument dissolving the old body was not a party to the old proceedings, no steps having been taken to have them substituted, with the result that the judgment did not affect them and in fact was a nullity. The present plaintiff realising the position, at first sought to issue process against the property of the present defendant. The result was a successful interpleading by the present defendant. Again an application was later made by the plaintiff to substitute the present defendant for the old defendant in the appeal lodged against my judgment in the former suit. This application failed. This new suit is the outcome of those failures and the realisation that the original judgment against the defunct Ibadan District Council was of no value, in short it was a nullity.

Having gone so far I would have thought it was in the plaintiff's interest that there should be an end to the unfortunate position in which he has found himself. He applied for the present summons on the 23rd January, 1957 which was issued on the 31st January, 1957. The subsequent dates are as already stated. The shortness of the period for pleadings and the fact that the case was ready for hearing and came up for hearing within three months of the application for summons all point to the fact that an early hearing was desired. Now on the 25th day of April, 1957, the present plaintiff filed a notice of discontinuance through his Counsel. I shall comment on this notice a little later. The day before this second hearing, dated, *i.e.*, on the 24th April, the plaintiff filed in court a notice to produce and served the defendant with same, so that it is reasonable to presume that up to the 24th April the plaintiff was prepared to proceed with the case. Now on the 25th April we have this notice of discontinuance. Mr Rosiji informed me that the notice was filed "yesterday" and served "yesterday" but looking through the court's file the notice to produce is shown as having been filed as stated by Counsel whereas the notice of discontinuance was filed on the actual day on which I heard the legal arguments the subject matter of this ruling and judgment. I was unaware of this at that time as the notice of discontinuance was not on my file. I sincerely hope that this was a genuine error on Counsel's part and not an endeavour to mislead the court. This application to withdraw was opposed by Mr Somolu, Counsel for the defendant who in his able and well prepared address argued that I should refuse leave to withdraw or in the alternative that should I be inclined to grant it then that it should be on the terms that the plaintiff be barred from bringing a similar action. He referred me to Order 44, Rule 1 of our Rules of Court and compared it with the relevant Order 38 applying to the Gold Coast, now Ghana, as interpreted in *Yaw Biei* v. *Kwame Assah* (14. W.A.C.A. 303). Finally he referred me to Order 26, Rule 1 of the rules prevailing in the United Kingdom.

Mr Rosiji in replying stated that his reason for wishing to withdraw was that his client wished to consult legal opinion in the United Kingdom and he did not wish to stand in his way. That if the opinion was favourable, he would bring another suit provided this one was struck out according to his wish and not dismissed. With the greatest respect to Mr Rosiji I do not think his client is paying him the fitting tribute or compliment he deserves.

Considering Order 44, Rule 1, Cap. 211, Volume 10, Laws of Nigeria, a person is entitled to withdraw his claim before the date fixed for hearing without leave, but after that date he may do so with leave of the court and the court may on granting such leave impose such conditions as to costs or as to the bringing of any subsequent suit as the Court may see fit to do. That is the difference between Order 44, Rule (1) and Rule (2). This is well illustrated by the case of *Fox* v. *Star Newspaper Co.* 1898 L.J.Q.B. 454 at 456 where Chitty L. J. said that :—

> "The principle of the rule is that, after a plaintiff has proceeded with his action to a certain point and brought the defendant face to face with him, he is not entitled to escape the determination of the issue before them by a side door."

In view of the fact that this case was set down before me for hearing on the 16th April and was again set down for hearing on the 25th April on which day this notice of discontinuance was filed I am of the view that, also taking into account the reason for wishing to withdraw and all the other circumstances of the case enumerated by me above, leave to withdraw should be refused ; and that would have been my ruling in ordinary circumstance. But in view of the defence raised by virtue of paragraphs 8 and 9 and part of 7 I asked Counsel to address me on the legal issue for it would have been pointless my granting leave to withdraw with a view to the plaintiff's coming again if this action was caught by the provisions of section 205 (*b*) of the Western Region Local Government Law, 1952. If on the other hand it was not so caught and would not be caught in the future I was, as I informed Counsel, prepared to consider favourably the application to withdraw.

There is no need for me to set out paragraphs 8, 9 and part of 7 of the Statement of Defence in so far as the point raised by them is sufficiently set out with clarity in paragraph 9 which states that :—

> "The defendants will seek to contend at the trial that the Court has no jurisdiction to entertain plaintiff's present claim against them, and hereby rely specifically on the provisions of section 205 (*b*) of the Western Region Local Government Law, 1952, as the action was *not* commenced within the time limited by the said law for him to do so."

Now section 205 (*b*) of that Law states that :—

> "When any suit is commenced against any Council for any act done in pursuance or execution or intended execution of any law or ordinance or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Law or Ordinance, duty or authority such suit shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in the case of the continuance of damage or injury, within six months after the ceasing thereof."

The first point that falls for consideration is whether this suit was in respect of any act done in pursuance or execution or intended execution of any Law or Ordinance or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Law or Ordinance duty or authority ? Mr Somolu referred me to the Public Officers Protection Ordinance, Volume 5, Laws of Nigeria, Cap. 186, section 2 and says that it is word for word the same, at least as far as relevant portions are concerned as with the Law under consideration. He also referred me to the case of *J. D. Fasoro* v. *E. K. Milbourne and another* 4 N.L.R. 83. I did not however find this authority of much assistance, for though it dealt with the Public Officers Protection Ordinance it was a case of an assault by a police constable, the second defendant, on the plaintiff in that case, on the authority of the first defendant a District Officer. The Court there held that the assault was not justified but that the claim against the second defendant was barred by section 2 (*a*) of the Public Officials Protection Ordinance because notice of the claim was not given until more than three months after the occurrence. I am doubtful whether the authority will stand the test today on similar facts for I find it hard to believe that it can be said that a police officer who is requested by a District Officer to deliver a slap to a person who is not proved to have used force on any one or under the circumstances of that case can be said to have acted in pursuance or execution or intended execution of any Law or Ordinance or of any public duty or authority for the learned Author of Halsbury's Statutes of England the 18th Edition at page 752 dealing with the English equivalent to the Public Officer's Protection Ordinance which is the Public Authorities Protection Act, 1893 states that :

> "If illegal acts are done from some motive other than an honest desire to executive a statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority for example if they are done from a desire to injure a person or to assist some person or cause, without any honest belief that they are covered by, or are necessary in the execution of, statutory authority, the Act is no defence for the acts complained of were not done in intended execution of statutory duty, but only in pretended execution thereof."

The relevant words in this Act are word for word the same as our Public Officers Protection Ordinance and section 205 (*b*) of the law under review. Be that as it may the other authority cited by Mr Somolu is relevant and it is that of *Ademola II* v. *Thomas* 12 W.A.C.A. 81 at 83.

In that case undoubtedly the Alake of Abeokuta, as was held by the court, was acting in pursuance of authority vested in him in giving his consent to the installation of the native Chief concerned. In the present case I have to ask myself whether the Ibadan District Council, and consequently its successor the defendant, was acting under the provisions of this Law in entering into the arrangement into which it did by virtue of paragraphs 3, 4 and 5 of the Statement of Claim ? In whatever way one looks at these paragraphs the arrangement between the parties was no more or less than an arrangement to settle Suit No. I/63/54 out of court on the payment of a figure to be later assessed provided the present defendant's predecessor failed in Suit No. I/45/54. The Ibadan District Council as is the present defendant are empowered under the law to enter into contracts by virtue of section 63 (1-3), and, by virtue of section 205 (*d*) provision is made for the Council to sue and be sued as well as for its appearance in legal proceedings. As I held in the suit between the plaintiff and the Ibadan District Council, if a Council is empowered to sue and defend an action and given power to carry on its business it must by inference have power to settle cases out of court. Mr Rosiji has endeavoured to define some of the words appearing in the law under review such as "Acts", "Authority", "Law", "Duty" and "power". I do not propose to enter into this battle of words or definition for two cases to which I shall now make reference adequately deal with the present case. The first case is that of *Griffiths and another* v. *Smith and others* (1941) 1 All E.R. 66 at 70. There the appellant's son was at the material time a pupil of a non-provided school. The female appellant was invited to attend an exhibition of the pupils' work. The invitation was issued by the Headmaster with the authority of the respondents, the manager of the school. The female appellant attended and was injured through the collapse of a floor due to want of repair and she sued for damages. It was contended that the respondents in holding the gathering in question, were not acting in pursuance of any public duty or in execution of any Act of Parliament, but were performing a purely voluntary act. Viscount Simon L.C. held that :—

> "There is however, a second question connected with the construction of the Act on which it is difficult to reach precision. Assuming that the 'person' is a public authority in the sense required, what kind of action by the public authority is to be regarded as satisfying the conditions of the section that the act must be 'done in pursuance, or execution, or intended execution of any Act of Parliament or any public duty or authority', or that the neglect or default must be 'in the execution of any such Act, duty, or authority in one sense anything which is done by a public authority within the limits of their statutory powers' might be regarded as done in the execution of the statute. Even if a public corporation exist independently of a statute, all their actions within their powers might perhaps be regarded as done in the execution of their public authority."

It was however held that the case of *Bradford Corp.* v. *Myers* (1916) 1 A.C. 242 had decided that that construction was too wide a construction and Viscount Maugham at page 77 of the same report said :—

> "When the invitations were issued to a number of persons, including the appellant, were the managers doing an act in execution, or purported execution, of a public duty or authority in relation to the school ? For the reasons I have given, it is, I think, immaterial that the managers were not bound to invite persons to what was called an 'open meeting' to see exhibits of work done by the boys.....
>
> If as I think we must assume, the managers thought that the open meeting was in the interest and for the benefit of this voluntary school, the act of inviting people to attend was a thing done in direct discharge of a public duty—namely, that of carrying on the school to the best advantage. I am using the adjective 'direct' simply as indicating that the duty was cast upon the managers by the mere fact that they were bound to carry on the school as efficiently as possible."

A little earlier the same learned Lord said at page 76 :—

> "The words in the section are 'public duty or authority', and the latter word must be taken to have its ordinary meaning of legal power or right and *does not imply a positive obligation.*"

I have underlined the words "does not imply a positive obligation" for Mr Rosiji's argument is destroyed by those words and interpretation of the word "authority". There is no need to quote from the other case of *Western India Match Co.* v. *Lock* (1946) 2 All E.R. 227 for suffice it to say that Lord Goddard C. J. applied the principle enunciated in the earlier House of Lords case just referred to.

I have no doubt that the Ibadan District Council by entering into this agreement of compromise were acting within the meaning of section 205 (*b*) and that they were therefore entitled to the benefit of the law.

One must now turn to the calculation of the period of six months next after the act, neglect or default or in the case of a continuance of damage or injury then within six months after the ceasing thereof. It has not been argued and it could not be argued that this was a case of a continuing damage or injury. The principle to be considered in the latter case is illustrated by the case of *Rex* v. *Marshland Smeeth and Fen District Commissioners* (1920) 89 L.J.K.B. 116 at 126 where McCardie J. said :—

> "The quesion, therefore is whether or not Counsel for the plaintiff are right in arguing that there was here 'a continuance of injury or damage'. These words are curiously vague. The net result of the authorities appears to be that, in order to come within these words the plaintiff must prove a continuing breach of duty, together with a continuing damage."

The act or default in this case before me is the default of the Ibadan District Council in making payment after a reasonable assessment "shall have been made by the Town Engineer, Ibadan" as per paragraph 3 of the Statement of Claim. The Assessment took place on the 22nd August, 1955 as per paragraph 6 of the Statement of Claim. The question is when was there a default in payment ? On the pleadings as they stand, and no evidence having been led on this preliminary point the plaintiff by paragraph 8 stated that a demand was made to the present defendant on the 29th October, 1956 and the present defendant failed to pay. Now this demand and alleged default is exactly one year and two months after the assessment was made. Mr Rosiji contends that the period of time began to run as from then. The result if this contention were correct would be that a would-be-litigant could bye-pass or postpone the running of time by not taking steps to obtain a direct refusal from the other party, until it pleases him to do so. We in fact know that the original action against the Ibadan District Council was commenced within this period of six months. Now the Ibadan District Council having become defunct on the 5th March, 1956 the present defendant was created in its stead. The next step for the plaintiff was to move for the present defendant to be substituted for the old Council in so far as from the 5th March, 1956, to use the words of the Federal Supreme Court in *Nahman* v. *Ibadan District Council* F.S.C. 167/56, (unreported) "the action against it abated". If this was the case then surely time must begin to run against the new Council as from the time when it would have run against the old Council. Now I have no evidence as to when the old Council defaulted in payment. But that they did so before they became defunct in March 1956 is not open to doubt for the action was in Court long before that date. Giving the plaintiff the latest possible period or day for time to start running against him and calculating as from the 5th March, 1956 time would still have run against him. Mr Rosiji in a last effort "threw" in section 11 of the Western Region Local Government Law, 1952 which states that :—

> "An instrument issued under the provisions of sections 7, 8, 9 or 10 shall not unless the contrary intention appears affect the validity of any decision taken or act done by the Council existing at the time of the issue of such instrument and shall not affect any right, privilege, obligation or liability accrued or incurred or existing at the time of the issue of such instrument."

On the pleadings the instrument dissolving the old and establishing the new Council was issued under section 10 (2). It is therefore covered by section 11. But the object of section 11 was to provide in effect that notwithstanding the creation of the new Council all acts done by the old Council and all rights and liabilities created or then existing shall continue to exist

unless a contrary intention appears. Applying it to this particular case, and bearing in mind the wording of section 228 (*b*) and (*c*) to which I was referred by Counsel, it means no more than that the right of action against the old Council which was brought within time and which existed at the time of the issue of such instrument of revocation, shall not be affected so that with the creation of the new Council all the plaintiff had to do was to substitute. But if the plaintiff does not avail himself of this opportunity and permits the old action to die a natural or in this case an unnatural death with the result that he has to start again he takes the risk of being out of time, for in this case the action was not commenced until the 23rd January, 1957.

The result is that the defendant must succeed in the defence raised as to limitation of time and this being so there is no point in my giving leave to withdraw and the action must be and is hereby dismissed with costs to the defendant.

Action dismissed with costs to the Defendant.

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